

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

GARY M. BLAIR, as Jury Commissioner,  
etc.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA  
BARBARA COUNTY,

Respondent;

THE PEOPLE et al.,

Real Parties in Interest.

2d Civil No. B171673  
(Super. Ct. No. 1074699)  
(Santa Barbara County)

Benjamin Ballesteros is Hispanic and on trial for murder. He challenged the jury venire on the ground that he is denied his Sixth Amendment right to trial by a fair cross-section of the community. He alleges Hispanics are significantly underrepresented and systematically excluded from jury venires.

The trial court granted the motion and ordered the county Jury Commissioner Gary Blair<sup>1</sup> to "develop venires representing a fair and reasonable cross-section of the community." In response, Blair filed a petition for writ of mandate. We

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<sup>1</sup> Although not a party to the trial court proceeding, Blair has standing to file a petition because he is directly affected by the trial court's order. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796-797.)

issued a stay of the trial court's order pending resolution of the petition. We now grant the petition because the county's procedures to obtain a pool of citizens for jury duty is race neutral, and Ballesteros failed to establish a prima facie case of significant underrepresentation or systematic exclusion of Hispanics from the county's jury venires.

#### Terms of Art

To ease the reader's task, we offer a glossary of terms.

*Source list*--"The list of registered voters and the Department of Motor Vehicles' list of licensed drivers and identification cardholders resident within the area served by the court, are appropriate source lists for selection of jurors. These two source lists, when substantially purged of duplicate names, shall be considered inclusive of a representative cross section of the population . . . ." (Code Civ. Proc., § 197, subd. (b)<sup>2</sup>; see *People v. Burgener* (2003) 29 Cal.4th 833; *People v. Ochoa* (2001) 26 Cal.4th 398, 427.)

*Master list or jury pool*--names randomly selected from a source list. From this list or pool, persons will be summoned for possible jury duty for a period of time. (§ 194, subds. (g) & (m); *People v. Bell* (1989) 49 Cal.3d 502, 520, fn. 3.)

*Venire*--group of prospective jurors summoned from a master list and made available, after excuses and deferrals have been granted, for assignment to a panel. (*People v. Bell, supra*, 49 Cal.3d at p. 520, fn. 3.)

*Panel*--group of jurors taken from the venire who are assigned to a particular courtroom and then selected to try a case. (*People v. Bell, supra*, 49 Cal.3d at p. 520, fn. 3.)

*Absolute disparity*--measures the difference between the proportion of the population of a group in the community and the proportion of people in that group in the master list or pool. (*People v. Bell, supra*, 49 Cal.3d at p. 527, fn. 14; Kairys, *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) 65 Cal. L.Rev. 776, 789-790 (hereafter Kairys).) It is obtained by subtracting the jury representation

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<sup>2</sup> All statutory references are to the Code of Civil Procedure.

percentage from the community percentage. (*People v. Morales* (1989) 48 Cal.3d 527, 543-544.)

*Comparative disparity*--"measures the *percentage* by which the number of group members in the actual venire falls short of the number of group members one would expect from the overall 'eligible population' figures. Thus, if 32 of every 1,000 members of the presumptively eligible population are Black, but only 21 of every 1,000 persons who actually make up the venire are Black, the comparative disparity is the percentage by which 21 falls short of 32, or approximately 34.4 percent." (*People v. Anderson* (2001) 25 Cal.4th 543, 564, fn. 6; Kairys, *supra*, 65 Cal. L.Rev. at p. 790.)

#### *FACTS*

At the hearing on Ballesteros' motion, Blair explained how jury venires are formed. Names of potential jurors are obtained from two source lists--a list of registered voters and a Department of Motor Vehicles' list of licensed drivers and identification cardholders residing in the county. (§ 197, subd. (b).) Duplicate names are merged from the source lists to form a master list from which prospective jurors are selected. (§ 194, subds. (g) & (i).) Neither the source lists nor the master list identifies the race or ethnicity of the potential jurors. Every three months, approximately 35,000 names are randomly selected by computer from the master list to receive juror questionnaires. Before questionnaires are mailed, the addresses on the list are updated using the most current information available from the United States Postal Service.

Questionnaires returned to the jury commissioner are separated into four categories and coded by computer as: (1) qualified; (2) excused; (3) disqualified; or (4) undeliverable. The names of the persons whose questionnaires are returned by the post office marked "addressee unknown" or "undeliverable" remain on the master list. If a new address is provided by the postal service, the person again becomes eligible to receive a questionnaire at the new address. If no new address is found, the name retains the undeliverable code until a new address is provided.

Individuals who are qualified at the questionnaire stage are eligible to be selected by random computer draw to receive a jury summons. The number of

summons sent out depends on the needs of the court. Individuals who are summoned and who fail to appear for jury duty are sent a "failure-to-appear letter" and have 10 days to respond and explain the reasons for failing to appear. These individuals are reassigned for jury service with a new reporting date. Blair testified that, due to budget constraints, the county takes no enforcement action against persons who fail to return questionnaires or summons.

Ballesteros submitted the declarations of John R. Weeks, Ph.D., Professor of Geography and Director of the International Population Center at San Diego State University. Weeks conducted a Spanish surname analysis from information in the 2000 census. He concluded that Hispanics who are 18 years and older constitute about 24 percent of the general population in the Southern Judicial District of Santa Barbara County and that about 14.6 percent of the Hispanic population meet the eligibility criteria for serving on a jury. From information provided by the county, Weeks concluded that persons with Hispanic surnames presently constitute approximately 8.8 percent of jury venires in the Southern Judicial District of Santa Barbara County.

Representation of Hispanics in county venires from which juries are selected is measured in terms of "absolute disparity" and "comparative disparity." Weeks concluded that, where as here, Hispanics constitute 14.6 percent of the jury-eligible population and 8.8 percent of jury venires, the absolute disparity is approximately 6 percent and the comparative disparity is about 40 percent.<sup>3</sup>

Based on Weeks' declarations, the trial court found that the disparity between the number of Hispanics qualified to serve as jurors and the number of Hispanics actually serving on juries in the county ("comparative disparity") demonstrates that Hispanics are significantly underrepresented in jury venires and that this underrepresentation is due to systematic exclusion of Hispanics in the jury selection process.

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<sup>3</sup> The statistics presented by the county's expert were not substantially different from those presented by Weeks. The petitioner has accepted Weeks' numbers for purposes of this petition. We will do likewise.

In this petition, Blair contends that the disparity in the number of jury-eligible Hispanics in the community and the number of Hispanics on the master list ("absolute disparity") is not constitutionally significant and that the county's jury selection procedures do not systematically exclude Hispanics.

#### *DISCUSSION*

Our review of the trial court's order involves mixed questions of law and fact. We apply de novo review to all legal issues and accept any factual findings by the trial court if supported by substantial evidence. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

The Sixth Amendment right to a jury trial encompasses the right to trial by an impartial jury drawn from a representative cross-section of the community. The right to an impartial jury applies at every step of the juror selection process, including compiling the master list of jurors and the selection of venires from that list. (*People v. Bell, supra*, 49 Cal.3d at p. 525.) A similar and coextensive right exists under the California Constitution. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *Duren v. Missouri* (1979) 439 U.S. 357, 358-359 (*Duren*); *People v. Howard* (1992) 1 Cal.4th 1132, 1154.)

To establish a prima facie violation of the fair cross-section requirement, a defendant must show (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 underrepresentation is due to systematic exclusion of the group in the jury selection process. (*Duren, supra*, 439 U.S. at p. 364; *People v. Howard, supra*, 1 Cal.4th at p. 1159.) The relevant "community" is the community of qualified jurors in the judicial district in which the case is to be tried. (*People v. Mattson* (1990) 50 Cal.3d 826, 842; *Williams v. Superior Court* (1989) 49 Cal.3d 736, 744-745.)

If a defendant makes a prima facie showing that the fair cross-section requirement is violated, "the burden shifts to the prosecution to provide either a more precise statistical showing that no constitutionally significant disparity exists or a

compelling justification for the procedure that has resulted in the disparity in the jury venire." (*People v. Horton* (1995) 11 Cal.4th 1068, 1088; *People v. Sanders* (1990) 51 Cal.3d 471, 491.)

The parties agree that Hispanics are a distinctive group within the meaning of *Duren*. (*People v. Breaux* (1991) 1 Cal.4th 281, 298.) Their dispute concerns the adequacy of Ballesteros' showing as to the second and third prongs of *Duren's* three-prong test.

### Fair Representation

Under *Duren's* second prong, a defendant must demonstrate that the number of Hispanics on jury venires is "not fair and reasonable in relation to the number of such persons in the community." (*Duren, supra*, 439 U.S. at p. 364; see also *People v. Ramos, supra*, 15 Cal.4th at p. 1155 [defendant must show "a constitutionally significant difference between the number of members of the cognizable group appearing for jury duty and the number in the relevant community"].)

Two methods have been used in this analysis. To reiterate, absolute disparity measures the difference between the proportion in the population of a cognizable class and the proportion of the cognizable class in the master list or pool. Comparative disparity "measures representativeness by the percentage by which the probability of serving is reduced for people in a particular category or cognizable class." (*Kairys, supra*, 65 Cal. L.Rev. at p. 790.) In short, comparative disparity is no more than an expectation.

In its opinion, the trial court acknowledged that our Supreme Court consistently relies on the absolute disparity test and "no case has found a significant disparity utilizing that test with a less [than] 10% absolute disparity." The trial court believed, however, that absolute disparity is not a fair test here because "[t]he present case does not involve a small group in the overall population" and "there could be 0% representation of Hispanics on local juries and a finding of no significant under representation." But criticism of the absolute disparity test is apt, if at all, only when the class in question is small. "[A]pplication of the absolute disparity standard where the

cognizable class is small means that almost all underrepresentations of small and medium-sized minorities—even total exclusions—are validated, for by definition, a small minority can never have a large absolute disparity. If the maximum allowable absolute disparity is 10%, total exclusion of a 9% minority is permissible." (Kairys, *supra*, 65 Cal. L.Rev. at p. 796, fn. omitted.) "Use of the absolute disparity standard for small minorities means that total exclusion of any minority that is smaller than the maximum allowable absolute disparity would be permissible." (*Id.* at p. 796, fn. 110.) The trial court recognized that Hispanics are not a small group, constituting 24 percent of the county's population.

Although neither the United States Supreme Court nor our Supreme Court has determined whether absolute or comparative disparity provides the most accurate measure, in its numerous opinions involving fair cross-section challenges, our Supreme Court consistently has used the absolute disparity test to determine the constitutionality of venire composition. For example, in *People v. Bell*, *supra*, 49 Cal.3d 502, the statistical evidence showed that African-Americans constituted about 8 percent of the adult population and comprised approximately 3 percent of prospective jurors, an absolute disparity of 5 percent and a comparative disparity of over 50 percent. While the ultimate ruling in *Bell* did not turn on the question whether defendant made a prima facie case under *Duren's* second prong, the court stated: "It does not appear that a disparity of this degree [5 percent] renders the representation of Blacks on jury venires less than fair and reasonable in relation to their numbers in the general population of Contra Costa County." (*Bell*, at p. 527.)

Similarly, in *People v. Sanders*, *supra*, 51 Cal.3d 471, our Supreme Court refused to find that a juror selection process resulting in a comparative disparity of almost 50 percent and an absolute disparity of 8 percent was unconstitutional. And, in *People v. Ochoa*, *supra*, 26 Cal.4th 398, a comparative disparity of 40.8 percent and an absolute disparity of 5.3 percent passed constitutional muster. The Ninth Circuit has "consistently held that absolute disparities below 7.7% are insubstantial and constitutionally permissible." (*United States v. Cannady* (9th Cir. 1995) 54 F.3d 544, 548; *United States*

*v. Sanchez-Lopez* (9th Cir. 1989) 879 F.2d 541, 548; *United States v. Suttiswad* (9th Cir. 1982) 696 F.2d 645, 648-649.)

We have found no case in which a California court relied on the comparative disparity test to find a jury venire unconstitutional nor a case from any jurisdiction where a court has held a comparative disparity of 40 percent unconstitutional.

The trial court also concluded that, because Hispanics fail to respond to juror questionnaires in significantly greater numbers than the non-Hispanic population and the number of Hispanics on the master list continues to diminish over time, "[i]t would be fundamentally unfair to let the process play out until the absolute disparity reaches [a number deemed constitutionally significant by the courts]."

The trial court projects a worst-case scenario where Hispanic representation on county jury venires eventually will be reduced to zero. Just as we cannot ignore clear precedent, we cannot base a decision on unsupported assumptions. (See *People v. Horton, supra*, 11 Cal.4th at pp. 1089-1090 [expert's speculation about cause of underrepresentation insufficient to establish constitutional defect].) The trial court's pessimistic prognostication assumes unchanging demographics. There is no evidence that the percentage of Hispanics in Santa Barbara County will remain static. Nor can we assume their rate of nonresponse to jury questionnaires will remain constant.

### Systematic Exclusion

A prima facie showing of systematic exclusion under the third prong of *Duren* requires evidence that the county selected the jury pool in a constitutionally impermissible manner that was the probable cause of the disparity. (*People v. Ochoa, supra*, 26 Cal.4th at p. 427; *People v. Bell, supra*, 49 Cal.3d at p. 524.) That is not the case here. "A defendant does not discharge the burden of demonstrating that the underrepresentation was due to systematic exclusion merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of an improper feature of the jury selection process." (*People v. Burgener, supra*, 29 Cal.4th at p. 857.) "Were statistical evidence of recurring disparity alone adequate to



establish a prima facie violation of the cross-section guaranty, the third prong of the [analysis] would be surplusage." (*Bell*, at p. 529.)

The trial court acknowledged the county's jury selection process is race neutral but found a constitutional violation nonetheless because the county does not resend juror questionnaires to nonresponders unless a new address is provided. The court would impose this burden on the county because Hispanics have a nonresponse rate substantially higher than the non-Hispanic community. The court believed that resending the questionnaires would be "an affirmative step to remove from the otherwise statutorily approved source list non-responders with the clear knowledge that Hispanics are disproportionately impacted."

We appreciate the trial court's concerns, but our Supreme Court has repeatedly said that the effect of race neutral procedures may not be the basis for a finding of systematic exclusion. (See e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 546 ["a prima facie case of systematic exclusion or underrepresentation of a distinctive class is not made merely by demonstrating that the county's race/class *neutral* jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw"]; see also *People v. Sanders*, *supra*, 51 Cal.3d at p. 492 ["When, as here, 'a county's jury selection criteria are neutral with respect to race, ethnicity, sex, and religion, more is required to shift the burden to the People. The defendant must identify some aspect of the manner in which those criteria are being applied that is: (1) the probable cause of the disparity, and (2) constitutionally impermissible"]; and see *People v. Bell*, *supra*, 49 Cal.3d at p. 530 ["No case holds . . . that disparity that results notwithstanding application of neutral and presumptively constitutionally permissible juror selection criteria is a product of 'systematic exclusion'"].)

We are not permitted to disregard the numerous decisions of our Supreme Court holding that "[e]vidence that 'race/class *neutral* jury selection processes may . . . operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw' is insufficient to make out a prima facie

case." ( *People v. Currie* (2001) 87 Cal.App.4th 225, 236, quoting *People v. Morales, supra*, 48 Cal.3d at p. 546.)

Nor may a finding of systematic exclusion be based on historic underrepresentation of Hispanics on county jury venires. (See *People v. Bell, supra*, 49 Cal.3d at p. 524 ["[W]e do not understand the United States Supreme Court to have created such a minimal burden that a defendant need demonstrate only that underrepresentation has occurred over a period of time, upon which the court must presume that a constitutional defect is inherent in the system unless the People rebut the presumption"].)

Similarly, a finding of systematic exclusion cannot be based on the county's failure to locate nonresponders. Budget constraints may preclude more thorough search procedures. "So long as the state uses criteria that are neutral with respect to the underrepresented group, the state's failure to adopt other measures to increase the group's representation cannot satisfy *Duren's* third prong." (*People v. Burgener, supra*, 29 Cal.4th at p. 858; *People v. Horton, supra*, 11 Cal.4th at pp. 427-428; see also *People v. Ochoa, supra*, 26 Cal.4th at p. 428 [state's inability to provide a remedy, without more, does not support fair cross-section claim].) Moreover, nothing suggests that resending questionnaires a second or even a third time will be a charm.

Very recently, our colleagues on the First District Court of Appeal rejected an identical claim. In *People v. Currie, supra*, 87 Cal.App.4th at page 235, the court said: "A prima facie case of systematic exclusion, under *Duren's* third prong, cannot be established through appellant's claim that the county has failed to adopt other measures, which . . . might increase the racial representation of African-Americans on jury venires in Contra Costa County. Our high court has repeatedly admonished that such reference to measures not taken by the county is insufficient to establish a prima facie case of systematic exclusion." (See also *People v. Morales, supra*, 48 Cal.3d at p. 547 ["[W]ithout more factual information, accurate conclusions regarding the cause of the disparity cannot be drawn and any attribution of the cause is wholly speculative"].)

Neither can a finding of systematic exclusion be based on evidence that Hispanics fail to respond to juror questionnaires in greater numbers than do other groups. (See *People v. Ochoa*, *supra*, 26 Cal.4th at p. 427 ["the failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state"].) Disproportion due to economic, cultural and social mores is not within the court's province. (*People v. Morales*, *supra*, 48 Cal.3d at p. 547.)

We grant the writ petition and dissolve the temporary stay.

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GILBERT, P. J.

We concur:

COFFEE, J.

PERREN, J.

Frank J. Ochoa, Jr., Judge  
Superior Court County of Santa Barbara

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Hatch & Parent, Diane M. Matsinger, Kelly M. Knight; Nye, Peabody & Stirling, David L. Nye for Petitioner.

Thomas W. Sneddon, Jr., District Attorney, Gerald McC. Franklin, Senior Deputy District Attorney, for Real Party in Interest the People.

Sanger & Swysen, Robert M. Sanger for Real Party in Interest Benjamin Ballesteros.

James S. Egar, Public Defender, Raimundo Montes de Oca, Deputy Public Defender, as Amicus Curiae on behalf of Real Party in Interest Benjamin Ballesteros.

No appearance for Respondent.