SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. BENJAMIN BALLESTEROS Defendant.	Case No.: 1074699 **ORDER AFTER HEARING**

The Defendant's Motion to Challenge the Jury Venire in the above-entitled matter came on regularly for hearing on November 12, 2003, in Department One of the above-entitled Court. Gordon Auchincloss, Esq., appeared as counsel for plaintiff, Robert M. Sanger, Esq., appeared as counsel for defendant, and David L. Nye, Esq., appeared as counsel for the jury commissioner.

The Court has reviewed the entire file and considered the testimony and evidence presented and the legal argument of counsel.

Defendant moves the court challenging the jury venire by alleging that he is denied his 6th Amendment right to trial by a fair cross section of the community. He asserts that this is caused by the manner in which jury pools are drawn in the Santa Barbara Superior Court. The 6th Amendment to the Constitution of the United States of America provides a right to trial "by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law..." and guarantees the accused the right to be tried by a jury drawn from "a representative cross section of the community." (*Taylor v. Louisiana* (1975) 419 U.S. 357, 368, fn.26.)

Pursuant to *Duren v. Missouri* (1979) 439 U.S. 357, 364 and *People v. Stansbury* (1993) 4 Cal. 4th 1017, 1061 a prima facie case for denial of the right to a jury drawn from a cross section of the community is made out if the following elements are established. First, that a distinctive group in the community is allegedly excluded from the jury pool. Second, that the distinctive group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the community. And third, that the under representation in venires from which juries are drawn is due to systematic exclusion of the group in the jury selection process. If a prima facie case is established, the only remaining question is whether there is adequate justification for the infringement. (*Duren v. Missouri* (1979) 439 U.S. 357, 368, fn. 26.)

1. Distinctive Group.

Defendant alleges that Hispanics are under represented in jury venires such that he is denied his right to a trial by a cross section of the community. All parties agree that Hispanics are a "distinctive group" for purposes of cross section analysis. (See *People v. Sanders* (1990) 51 Cal. 3d 471, 491.) For purposes of analysis, the parties have utilized data for Spanish surnamed persons as a measuring tool for Hispanics as a distinctive group.

2. Fair and Reasonable Representation.

"To satisfy the second prong, (a defendant) must show that the number of (members of the distinctive group) *on venires* from which juries are selected...was 'not fair and reasonable in

relation to the number of such persons in the community.'" (*People v. Currie* (2001) 87 Cal. App. 4th 225, 233, italics omitted.) "The relevant 'community' for cross-section purposes is the community of *qualified jurors in the judicial district* in which the case is to be tried." (*Ibid.*)

The parties point to various numbers in an effort to demonstrate that there either is, or is not, fair and reasonable representation of Hispanics in the jury pool. The defense expert notes that Hispanics constitute 24% of the local population based on census data. His more particularized review of census data led him to conclude that 14.6% of the population is Hispanic and, in addition, meet the criteria for jury service.

The jury commissioner asserts that the number of Hispanics drawn from the merged and purged source list derived from the Registrar of Voters and Department of Motor Vehicles lists reveals a pool of potential Hispanic jurors in the range of 18%. He states that the total number of potential Hispanic jurors who are sent questionnaires is within a few percentage points of that range. He further contends that there is no statistically significant under representation of Hispanics in the jury venire on that basis.

The jury commissioner's position misses the point entirely. The glaring problem in the jury pool development process relates to how the juror questionnaires are treated in that process, as will be discussed later. Utilizing the percentage of Hispanics sent questionnaires as a benchmark does nothing to explain why the percentage of qualified jurors with Hispanic surnames on the source list as of June 6, 2003 was only 8.784%.

Based on *Currie* the relevant numbers to compare are the number of eligible persons in the community within the distinctive group and the number of qualified jurors from within that group. Evidence supports the conclusion that the percentage of persons with Hispanic surnames within the community eligible for jury service is 14.6%. As of the last time jury pools were

formed, the percentage of persons with Hispanic surnames in the qualified jury pool was approximately 8.8%. The court finds that the absolute disparity is thus around 6 percentage points, with a 40% comparative under representation of Hispanics, based on the declaration of Dr. Weeks. The question is whether this disparity is sufficient to meet the second prong of the *Duren* criteria.

Appellate courts have been reluctant to express any precise, or even any generally recognized formulation for trial courts to utilize in making determinations as to whether an under representation of a distinctive group is sufficient to constitute a numerical denial of fair and reasonable representation in the jury venire. Reviewing courts have, for the most part, passed over this issue and moved on to the third *Duren* factor--systematic exclusion. Finding no systematic exclusion, those reviewing courts have found it unnecessary to rule upon, and therefore provide guidance to trial courts, on the issue of significant statistical disparity. The court will adopt that analytical method in the present case and defer discussion of this issue (fair and reasonable representation) until a later point.

3. Systematic Exclusion

Duren makes it clear that purposeful or intentional discrimination is not at issue in cross section challenges as it is in equal protection challenges to jury selection. "In arguing that the reduction in the number of women available as jurors from approximately 54% of the community to 14.5% of jury venires is prima facie proof of "unconstitutional underrepresentation," petitioner and the United States, as *amicus curiae*, cite *Casteneda v. Partida* 430 U.S. 482, 496 (1977); *Alexander v. Louisiana, supra, at 629; Turner v. Fouche*, 396 U.S. 346, 359 (1970); and *Whitus v. Georgia*, 385 U.S. 545, 552 (1967). Those *equal protection*

challenges to jury selection and composition are not entirely analogous to the case at hand. In the cited cases, the significant discrepancy shown by the statistics not only indicated *discriminatory effect* but also was one form of evidence of another essential element of the constitutional challenge—*discriminatory purpose.* Such evidence is subject to rebuttal evidence either that *discriminatory purpose* was not involved or that such purpose did not have a determinative effect. See *Castenada, supra* at 493-495; *Mt. Healthy City Bd.of Ed. V. Doyle* 429 U.S. 274, 287 (1977). In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement." (*Duren v. Missouri, supra,* 439 U.S. 357, 368, fn. 26.)

As to the third element of the *Duren* test, a defendant does not meet the burden of demonstrating that the under representation was due to systematic exclusion by establishing only statistical evidence of a disparity. "When ...'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." (*People v. Bell* (1989) 49 Cal. 3d 502, 524.) "Evidence that 'race/class *neutral* jury selection processes may nonetheless operate to permit 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. [Citation]." (*People v. Sanders, supra,* 51 Cal.3d 471, 492-493, italics in original.)

The list of registered voters and the Department of Motor Vehicles' list of licensed drivers and identification cardholders residing within the area served by the court are utilized to create a source list for the selection of jurors in Santa Barbara County. Use of those lists to

create a source list is authorized by statute, and is deemed to create a source list "inclusive of a representative cross section of the population." (Code of Civil Procedure section 197, subdivision (b).) There are a number of steps to the process of developing the list of qualified jurors from that source list.

The steps at issue in this case relate to the jury commissioner's practice of disqualifying from further consideration as potential jurors those persons who are sent juror questionnaires and who, for whatever reason, fail to respond. Non-responders are excluded from the list of potential recipients of juror questionnaires who might then be considered for qualification in the newly formed qualified juror list. If a person on the source list appears on an updated DMV or Registrar of Voters list with a new address, that person is restored to the status of one who might receive a juror questionnaire and potentially be included in the newly formed qualified juror list. The individual who fails, for whatever reason, to respond to the juror questionnaire and who does not thereafter change addresses is permanently excluded from consideration for jury duty.

Excluded from consideration as potential jurors are those who have previously been disqualified, those whose juror questionnaires were returned as undeliverable, those exempted from jury service, and those who have failed to respond to prior jury questionnaires. The largest number, by far, of persons excluded from consideration as potential jurors are those who failed to respond to prior juror questionnaires. (See Exhibits attached to Declaration of Stephen T. Andrews, filed October 15, 2003).

"Non-responder exclusion" factors into the qualified juror pool creation process at two levels. When determining which persons from the source list are eligible to receive juror questionnaires, non-responders are excluded. From those who are sent questionnaires, non-responders are again excluded from consideration as potentially qualified jurors, and are

additionally deemed "unavailable" as potential jurors when future lists are formed. Between June 2001 and November 2002, the percentage of persons on the source list with Spanish surnames averaged 19.1% of the total list. After elimination of non-responders, the percentage of persons with Spanish surnames to whom questionnaires were sent during that time period averaged 16%. After elimination of non-responders to the questionnaire sent, the percentage of persons with Spanish surnames who qualified for jury service averaged about 9%. (See Table 4 attached to Supplemental Declaration of John R. Weeks, filed September 17, 2003.)

The case at bench is unlike those involving race neutral features relied upon by the jury commissioner. (*People v. Morales, supra,* 48 Cal.3d 527; *People v. Bell, supra,* 49 Cal.3d 502; *People v. Sanders, supra,* 51 Cal.3d 471.) In *Morales*, the defendant, "offering no specific evidence on the subject," speculated that a large number of persons excused were Hispanic and that a disparity "may well be the result of the county's failure to enforce more vigorously its jury selection program." (*Morales, supra,* 48 Cal.3d 527, 543.) Such speculation did not meet the Defendant's burden to demonstrate systematic exclusion. "[T]he evidence here did not indicate that Hispanics were granted a disproportionate number of exemptions or excuses." (*Id.* at 546.) By contrast, in the case at bench the jury commissioner concedes that "it is apparent that the south Santa Barbara county Hispanic community has a non-response to questionnaire rate that is substantially higher than the non-Hispanic community. The result of this is an increased percentage of Hispanics in the source list that are coded as being ineligible to receive a questionnaire." (Declaration of Andrews, para. 22, filed October 15, 2003). Also unlike *Morales*, the feature in question is not one "over which courts have no control" (*Id.* at p. 548) and it does not appear that the county is "already doing all it reasonably can to assure a representative jury." (*Id.* at p. 549.) In the case at hand, the jury commissioner takes an

affirmative step to remove from the otherwise statutorily approved source list non-responders with the clear knowledge that Hispanics are disproportionately impacted.

In *People v. Sanders, supra,* 51 Cal.3d 471, the facially neutral selection procedure was not constitutionally impermissible. Defendant failed to demonstrate that the county's procedure of relying on voter registration lists alone to assemble the county's master jury list was constitutionally impermissible. Sole reliance on voter registration lists was at that time statutorily permitted (Code of Civil Procedure section 204.7) and the court presumed the constitutionality of the statute. *Id.* at p. 495. Section 204.7 has since been supplanted by section 197 (combined voter registration and DMV lists.)

In *People v. Bell, supra,* 49 Cal 3d. 502, the defendant "offered no evidence identifying the probable cause of the disparity." (*Id.* at p. 528.) He speculated that the manner in which hardship deferrals were granted was a factor, but "did not offer any evidence to suggest that these deferrals were constitutionally suspect," (*Id.* p. 524.) offering "no evidence that Blacks sought or were granted deferral on grounds of hardship in greater relative numbers than members of other groups." (*Id.* p. 528.) The *Bell* court acknowledged that a race neutral feature may constitute systematic exclusion where probable cause and constitutional impermissibility are demonstrated. "Had defendant demonstrated that a disproportionate number of Blacks were deferred on grounds of hardship, and identified the aspect of the hardship criteria used to defer them, we would be called upon to determine whether the state has sufficiently compelling interest in permitting prospective jurors to obtain deferrals on that basis to justify the impact on the composition of the venire." (*Id.* at pp. 530-531.)

In the case at bench, defendant has done just this, demonstrating that a disproportionate number of Hispanics are excluded from the source list and determined ineligible to receive

questionnaires or to be further considered as potential jurors after failing to respond to questionnaires. Although he testified that he was unaware of the statistical information discussed below until these proceedings commenced, the jury commissioner is now clearly aware that persons with Spanish surnames fail to respond to jury questionnaires at a significantly higher rate than non-Hispanics. (See Jury Commissioner's Points and Authorities in Opposition to Motion to Challenge Jury Venire, filed October 15, 2003 at page 27.)

As of June 28, 2001, Hispanics constituted 18.9% of the source list. Hispanics were excluded from further consideration as a possible juror for failure to respond to a juror questionnaire at a 49.8% rate, while non-Hispanics were excluded for this reason at a 36.1% rate. Hispanics were available to be sent questionnaires at a rate of 16.9%.

As of October 29, 2001, Hispanics constituted 19% of the source list. Hispanics were excluded from further consideration as a possible juror for failure to respond to a juror questionnaire at a rate of 54.1%, while non-Hispanics were excluded for this reason at a 39.1% rate. Hispanics were available to be sent questionnaires at a rate of 15.2%.

As of May 14, 2002, Hispanics constituted 18.6% of the source list. Hispanics were excluded from further consideration as a possible juror for failure to respond to a juror questionnaire at a rate of 46.9%, while non-Hispanics were excluded for this reason at a 30.8% rate. Hispanics were available to be sent questionnaires at a rate of 15.8%.

As of November 14, 2002, Hispanics constituted 18.5% of the source list. Hispanics were excluded from further consideration as a possible juror for failure to a respond to juror questionnaire at a rate of 54.3%, while non-Hispanics were excluded for this reason at a 37.0% rate. Hispanics were available to be sent questionnaires at a rate of 13.7%.

As of May 13, 2003, Hispanics constituted 18.2% of the source list. Hispanics were excluded from further consideration as a possible juror for failure to respond to a juror questionnaire as a rate of 58.2%, while non-Hispanics were excluded for this reason at a 40.1% rate. Hispanics were available to be sent questionnaires at a rate of 13%.

As of June 6, 2003, Hispanics constituted 18.2% of the source list. Hispanics were excluded from further consideration as a possible juror for failure to respond to a juror questionnaire at a rate of 63.9%, while non-Hispanics were excluded for this reason at a 48.1% rate. Hispanics were available to be sent questionnaires at a rate of 9.4%. This statistical data demonstrates that while the overall numbers of Hispanics in the source list remains fairly constant, Hispanics consistently fail to respond to questionnaires at a higher rate than non-Hispanics. As a result of the exclusion of non-responders, the data shows that the percentage of Hispanics available as prospective jurors diminishes consistently over time. When one considers the diminishing percentage of Hispanics who are available to be sent questionnaires, and adds on the percentages of Hispanics who fail to respond to the new juror qualification questionnaire, and are thereby disqualified from being part of the new jury pool, it is clear that the increasing smaller number of Hispanics in the jury pool is directly caused by exclusion of non-responders. In total, exclusion of non-responders eliminated from consideration as a potential juror 38.7% of all names on the source list as of June 28, 2001; 41.9% of the total source list as of October 29, 2001; 33.8% of the total source list as of May 14, 2002; 40.1% of the total source list as of November 14, 2002; 43.7% of the total source list as of May 13, 2003; and 50.9% of the total source list as of June 6, 2003.

When one adds in those dropped from consideration for disqualification, undeliverability, and exemption reasons, the potential pool of persons to whom juror questionnaires may be sent

represents a greatly reduced number of persons as compared to the source list. On June 28, 2001, 27.3% of the total source list (all names on the source list—Hispanic and non-Hispanic) was available to receive a questionnaire which might qualify him or her for jury service on a new panel. As of October 29, 2001, 29.8% was available; as of May 14, 2002, 28.6% was available; as of November 14, 2002, 18.5% was available; as of May 13, 2003, 12.3% was available; and as of June 6, 2003, 6.5% of the total source list was available to receive a questionnaire which might qualify him or her for jury service on a new panel. (*As of June 6, of the 231,880 names on the source list, only 15,008 were available for juror questionnaires—216,872 were unavailable.*) A very small number of good citizen responders appear to be filling the jury venire in southern Santa Barbara County.

The number of persons who are "available" for jury service in southern Santa Barbara County has been distorted by exclusion to the point where it bears no relationship to the source list which is sanctioned by statute as a method for insuring a cross section of the community in jury pools. In addition, the elimination of non-responders clearly has a significantly disproportionate impact on Hispanics in the community of potential jurors.

This case is clearly distinguishable from *People v. Anderson* (2001) 25 Cal. 4th 543. In that case, the defense expert testified that 3.2% of the population was Black in the trial jurisdiction, and only 2.1% of the persons actually appearing for jury duty were Black. The jury services supervisor testified that "[j]urors were summoned at random from the master list, derived from voter registration and DMV registration records. Only about 10 percent of the persons summoned appeared. If a person failed to respond to the initial summons, another summons was sent in the same manner. If the person still failed to respond, a notice was sent by certified mail. By September 1990, work had begun on implementing a bench warrant system

for those who did not respond to the certified notice, but the system was not yet operational." (*Id.* at p. 565.) The trial court found that there was not a significant under representation of Blacks in the jury pool. It also found that "defendant had failed to show, beyond [the expert witness's] speculation unsupported by any study of the subject, that the cause of the disparity was the failure of jury officials to conduct greater follow-up of persons who failed to respond to the random jury summons." (*Id.* at p. 565.) Here, there has been a clear showing as to the cause of the disparity.

The California Supreme Court in *Anderson* determined that the statistical disparity issue need not be decided since the defense failed to establish a prima facie case under *Duren's* third prong. (*People v. Anderson, supra,* 25 Cal.4th 543, 567.) As to that third prong, the court noted that the defense expert "could only speculate that the large number of nonresponders might tip disproportionately toward minority populations, and that the conceded lack of follow-up on non responders might account for the underrepresentation on the venires." (*Id.* at p. 567.) It concluded that "there was an insufficient showing that any discrepancy in the jury pool was attributable to 'systematic exclusion'—because the procedures employed by the jury commissioner were, on their face, race-neutral, and the opinion of (the defense expert) as to the cause amounted to no more than speculation." (*Id.* at p. 568.)

In the instant case, the jury commissioner's own experts have done an exhaustive analysis which clearly shows that a given internal mechanism utilized by the jury commissioner has the effect of excluding a significantly higher percentage of Hispanics from jury service than non-Hispanics. The local process fails to utilize any of the statutory mechanisms established by the legislature to preserve the cross section of the community provided by the statutorily approved source list. In *Anderson,* the local jurisdiction sent an initial summons, a subsequent summons,

and a certified notice to jurors before abandoning the effort. It was working on a bench warrant system for non-responders at the time of the litigation.

California Code of Civil Procedure section 196, subdivision (c) provides that a non-responding potential juror "may be summoned to appear before the jury commissioner or the court to answer such inquiry, or may be deemed to be qualified for jury service in the absence of a response to the inquiry." Instead of using available tools to preserve the cross section established presumptively by state statute, the local process has an unnecessary feature which affirmatively eliminates a large percentage of the pool, and which is known to eliminate Hispanics in a heavily disproportionate fashion.

The jury commissioner testified that some 20 years ago an effort was made to summon non-responders in for jury service. Of the panels of non-responders summoned into court, only a few jurors from each panel would appear in court. From this experience alone, the jury commissioner assumed that there were a high number of "bad addresses" for prospective jurors. He did not testify that any percentage of the jury summons were returned as "undeliverable" or "addressee unknown". If one were to speculate from these circumstances, and that is all that one can do with this meager evidentiary-presentation, it is far more likely that those who ignored and discarded their juror questionnaires did the same thing with their juror summons.

The evidence supports the conclusion that an identifiable feature of the process for qualifying and drawing persons into the jury venire, the exclusion of non-responders, is the probable cause of the disparity existing as to Hispanics in southern Santa Barbara County jury pools. This feature causes a reduction in the number of Hispanics in the jury venire such that it results in a denial of a cross section of the community in jury panels, and is therefore constitutionally impermissible. (*People v. Bell, supra,* 49 Cal.3d 502, 524.) "The statistical

evidence tend(s) to show the causal relationship between the disparity and the impermissible feature. The defendant thus made out a prima facie case as to the third prong..." *Id.* at p. 529, discussing *Duren.*

Thus, even though the identifiable feature is race neutral (all non-responders are eliminated from further consideration as jurors), it's effect on the process of drawing jurors from the community violates the 6th Amendment. There is no evidence that any compelling interest justifies inclusion of this feature in the process. It would appear as though the convenience of working with those citizens most inclined to be responsive to governmental needs and duties of citizenship drives inclusion of this feature.

It is further the case that the offending feature is not one "over which courts have no control". (*People v. Morales, supra,* 48 Cal.3d 527, 548.) The jury commissioner has direct control over whether this feature is part of the process. Neither is it true that the court is "already doing all it reasonable can do to assure a representative jury". (*Id.* at p. 549.) As has been discussed, the jury commissioner takes none of the steps authorized by statute to deal with non responders. Neither does he utilize any other measure such as sending follow up or certified letters to remedy the non-responder problem.

Having so found, the court is required to deal with the second *Duren* prong—whether the distinctive group's representation is fair and reasonable in the jury pool.

2A. Fair and Reasonable Representation

As was noted in *People v. Bell,* "the Supreme Court has not yet spoken on either the means by which disparity may be measured or the constitutional limit of permissible disparity." (*People v. Bell, supra,* 49 Cal.3d 502, 527-528.) "It is difficult to discern from the case law any one threshold of disparity substantial enough to be deemed constitutionally significant under the

second prong of the *Duren* test. In *Alexander v. Louisiana, supra,* 405 U.S. 625, a case decided prior to *Duren* and differing in that it involved an equal protection challenge to allegedly discriminatory jury selection procedures, the high court indicated it had never 'announced mathematical standards for the demonstration of 'systematic' exclusion of blacks' from jury pools." (cite omitted) (*People v. Bell, supra,* 49 Cal.3d 502, 528, fn. 15.)

"Several statistical tests have been acknowledged by the Supreme Court, utilized by the lower federal courts and the courts of our sister states, and suggested by legal scholars. (See Kairys et al., *Jury Representativeness: A Mandate for Multiple Source Lists,* (1977) 65 Cal.L.Rev. 776, 789-790.) [¶] The 'absolute disparity' test measures representativeness by the difference between the proportion of the population in the underrepresented category, and the proportion of those persons in the source pool in the underrepresented category. In this case the source is the merged list drawn from voter registration and Department of Motor Vehicles driver's license/identification card holders. In a hypothetical example of absolute disparity suggested in Kairys, supra, if 30 percent of the 18-and-over population is Black, but only 20 percent of the source list is Black, the absolute disparity for Blacks is 30 percent minus 20 percent, or 10 percent. (Id., 65 Cal.L.Rev. at pp. 789-790)" (*People v. Bell, supra,* 49 Cal.3d 502, 527, fn. 14.) Justice Eagleson, in the same footnote, goes on to note that the use of "more complex tests than the absolute disparity method—e.g., the 'statistical significance' test or the 'comparative disparity' test—has been criticized as distorting the proportional representation when the group allegedly excluded is very small." (*Ibid.*, citations omitted.)

Justice Broussard, in his dissent, takes issue with Justice Eagleson regarding the validity of the absolute disparity test in determining the significance of statistical disparity. "Of the various tests, absolute disparity is the least satisfactory. Its likely effect in California would be to

make it extremely difficult or impossible for most minority groups in most counties to establish a prima facie Duren violation. If we ever have to choose one test to the exclusion of others, absolute disparity is not the test we should adopt. I trust that California courts will recognize that this court does not herein adopt the absolute disparity test, nor any fixed threshold necessary to establish a prima facie case under that test." (*People v. Bell, supra,* 49 Cal.3d 502, 565, fn. 3.)

Another well-regarded legal treatise points out how absolute disparity distorts statistical analysis in cross section cases. "In absolute disparity cases the lower federal courts and the state court have generally concluded that a disparity of 10 percent or less is not sufficient to establish a prima facie case in either equal protection or fair cross section cases. We have discovered no case in which a court applying only the absolute disparity analysis found a disparity of less than 10 percent to be significant. The origin of the 10 percent figure is the Supreme Court's statement in *Swain v. Alabama* that, 'We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in the community is underrepresented by as much as 10 percent.' Although disparities between 10 percent and 15 percent have been found significant in a few cases, several courts have held disparities in this range insufficient to establish a prima facie case of either an equal protection or a fair cross section violation. Absolute disparities between 15 percent and 20 percent have generally been deemed significant, and disparities of more that 20 percent have almost universally been deemed sufficient to establish a prima facie case.

"*An inflexible application of the 10 percent cutoff--or any other rule of thumb in absolute disparity cases--is difficult to justify in either equal protection or fair cross section cases. The significance of a 10 percent disparity varies depending upon both the percentage of the minority group in the population and the size of the relevant sample. For example, assume that in a*

jurisdiction with a discretionary selection process, a group making up 8 percent of a very large population has been totally excluded from jury service for a period of years. In that context the 8 percent absolute disparity is strong circumstantial evidence of intentional discrimination." (*Beale, Grand Jury law and Practice* (2nd ed.), Section 3:19, p. 3-90-3-92, footnotes omitted, emphasis supplied.)

"[A] mathematical calculation of the absolute disparity between the proportion of the population and source or pool that is in the underrepresented category provides, however, only a rough tool for evaluation, particularly in the case of groups which comprise only a small percentage of the population. (See Kairys. *Jury Representativeness: A Mandate for Multiple Source Lists (1977) 65 Cal.L.Rev.776, 790.)*" (*People v. Buford* (1982) 132 Cal. App. 3d 288, 296.) In *Buford,* the distinctive group was only 7.3% of the population, so the court used a "statistical significance" test to determine that a significant statistical underrepresentation existed. The *Buford* court noted, "[t]he Supreme Court in *Wheeler* advises that the constitutional goal is to obtain a jury 'that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.'" (*Ibid.*, citing *People v. Wheeler,* (1978) 22 Cal. 3d 258, 277.)

The California Supreme Court's most recent discussion of absolute vs. comparative disparity harkens back to the *Bell* majority's criticism of comparative disparity. The court pointed to cases where the absolute disparity was in the range of 1-4% and comparative disparities were as high as 72%. (*People v. Burgerner* (2003) 29 Cal.4th 833, 859-860.) It does appear as though use of comparative disparity can distort under representation in cases where the distinctive group is a very small percentage of the total population. But that concern does not attend here. The present case does not involve a small group in the overall population.

Hispanics are 24% of the local population and at least 14.6% of the juror eligible population. The comparative disparity in this case appears to accurately reflect the under representation of Hispanics locally. Despite it's expression of concern, the Supreme Court ultimately noted, "we have [] repeatedly declined to adopt any one statistical methodology to the exclusion of others" in determining the significance of statistical disparity. (*People v. Burgener, supra,* 29 Cal. 4th 833, 859-860.)

Some courts and commentators have expressed the opinion that the comparative disparity approach is superior to the absolute disparity standard. The comparative disparity standard is obtained by the following formula:

$$\frac{A - B}{A} \times 100 = \text{the comparative disparity, where:}$$

A = the percentage of the community that makes up the cognizable group in question, and
B = the percentage of the jury venire which is composed of the cognizable group in question. *People v. Sanders, supra,* 51 Cal.3d 471, 492, fns. 5 and 6.

"[C]ourts have recognized the inadequacy of measuring underrepresentation based merely on absolute disparity. (see, e.g., *Bradley v. Judges of Super. Ct. for Los Angeles Cty. (9th Cir. 1976) 531 F.2d 413, 416, fn. 8.)* Experts who have studied the question conclude that the comparative disparity method is preferable: The theory of the comparative disparity method is simply stated. '(In) a fair, cross-sectional system, the probability of any eligible person being included in the source (or in the final pool) would be the same for every eligible person, regardless of race, ethnic background, sex, age, or socio-economic status. The comparative disparity standard 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.)*" (*People v. Harris* (1984) 36 Cal. 3d 36, 56-57.)

Bell is among many cases, as has been mentioned before, where the reviewing court bypassed the second prong of statistical disparity and hinged it's decision on the failure to show the third prong, or systematic exclusion. As to the statistical disparity issue, Justice Eagleson, writing for the majority, noted that an absolute disparity of 5% "does not appear" to render the representation of Blacks on jury venires less than fair and reasonable. (*People v. Bell, supra,* 49 Cal.3d 502, 527.) Justice Broussard, in dissent, found this same figure to be a substantial under representation, utilizing a statistical probability test. (*Id.* at pp. 565-566.) Many cases have made only passing references to prong two, without determining whether a statistical disparity is significant, because of a failure on the movants part to make a showing as to the third *Duren* prong. "[H]ere, as in *Bell.* (Blacks constituted 8 percent of Contra Costa County population, but only 3 percent of prospective jurors, yielding absolute disparity of 5 percent and comparative disparity of 62.5 percent) and *Sanders* (adult Hispanic citizens constituted 16.3 percent of Kern County population, but only 8.3 percent of those appearing for jury duty, yielding absolute disparity of 8 percent and comparative disparity of 49 percent), *we need not resolve the issue, because, as the trial court ruled, defendant failed to establish a prima facie case under Duren's third prong by showing that the disparity was caused by the systematic exclusion* of Blacks from Indio/Palm Springs juries." (*People v. Anderson* (2001) 25 Cal. 4th 543, 567, emphasis supplied.)

If one were to utilize the absolute disparity test there would be no significant disparity in the instant case. There is an absolute disparity of 6% in the instant case, and no case has found a significant disparity utilizing that test with a less that 10% absolute disparity. If one were to utilize absolute disparity, with Hispanics providing 14.6% of the jury eligible population in southern Santa Barbara County, there would be no significant under representation of Hispanics

unless they comprised less that 4.6% of local jury pools. If one were to follow the authorities mentioned in *Beale* where no significant disparity was found where the absolute disparity was closer to 15%, there could be 0% representation of Hispanics on local juries and a finding of no significant under representation. Relying upon absolute disparity in this case would be fundamentally unfair.

In terms of statistical probability, Dr. Weeks opines in his declaration that "there is virtually no chance that this [under representation of Hispanics] could have occurred just by chance." (Declaration of John R. Weeks, Ph.D., filed November 5, 2003) Dr. Weeks found a comparative or relative disparity of at least 40 % in terms of the under-representation of Hispanics in southern Santa Barbara County. Utilizing these testing methodologies in the instant case. the evidence supports the conclusion that the disparity between Hispanics in the jury pool and Hispanics eligible to serve in the community is significant.

In addition, it is the case that this disparity can only grow with present jury pool selection procedures. As has been noted previously, the jury commissioner's statistics show that the percentage of Hispanics failing to respond to juror questionnaires is significantly greater than the non-Hispanic population. Those non-responders are excluded from the process thereafter. Each and every snapshot of the source list presented in Mr. Andrews' declaration shows a diminution over time in the percentage of Hispanics on the source list "available" for jury duty. With each mailing of juror questionnaires followed by the subsequent deletion of non-responders. the percentage of Hispanics in the jury pool will continue to diminish. It would be fundamentally unfair to let the process play out until the absolute disparity reaches 10%. which it undoubtedly will over time, before legal justification or administrative resolve leads to the scrapping of a

flawed system, when already the group's representation in the jury pool is not fair and reasonable in relation to the number of Hispanics in the community.

The injury from jury selection practices which systematically exclude a cognizable class of prospective jurors "is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." (*People v. Bell, supra*, 49 Cal.3d 502, 520, fn. 3, citing *Ballard v. United States (1946)* 329 U.S. 187, 195 and *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 225.)

IT IS THEREFORE ORDERED that the jury commissioner quash the juror panels for defendant's trial proceeding and develop jury panels representative of a fair and reasonable cross section of the community.

Dated: NOV 21 2003

FRANK J. OCHOA

Frank J. Ochoa
Judge of the Superior Court

PROOF OF SERVICE

1013A(1)(3), 1013(c) CCP

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA:

I am a citizen of the United States of America and a resident of the county aforesaid. I am employed by the Santa Barbara Superior Court, State of California. I am over the age of 18 and not a party to the within action. My business address is 118 E. Figueroa Street, Santa Barbara, California, 93101.

On **November 21, 2003,** I served a copy of the attached **ORDER AFTER HEARING** addressed as follows:

David Nye
Carrington & Nye
33 @. Mission St., #201
Santa Barbara, CA 93101

Robert Sanger
Sanger & Swysen
233 E. Carrillo St., #C
Santa Barbara, CA 93101

Gordon Auchincloss
Deputy District Attorney
1105 Santa Barbara St.
Santa Barbara, CA 93101

_____ MAIL

By placing true copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States Postal Service mail box in the City of Santa Barbara, County of Santa Barbara, addressed as above. That there is delivery service by the United States Postal Service at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

✓ PERSONAL SERVICE

By leaving a true copy thereof at their office with their clerk therein or the person having charge thereof.

✓ WILL CALL BOX

By leaving a true copy thereof at their "will call" box, located in the Superior Court Clerk's Office, 1100 Anacapa St., Santa Barbara, California.

_____ EXPRESS MAIL

By depositing such envelope in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail, in a sealed envelope, with express mail postage paid.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 21 day of November 2003, at Santa Barbara, California.

Josefina R. Martinez DEPUTY CLERK