SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, Vs. VINCENT HENRY SANCHEZ DEFENDANT.	Case No.: CR 2001900034 (Ventura Case No.) **DECISION AND ORDER**

The Motion to Dismiss Grand Jury Indictment of Defendant Vincent Henry Sanchez in the above-entitled matter came on regularly for hearing on December 13, 2001, and for further hearing on December 21, 2001, in Department One of the above-entitled court. The matter was heard together with a Motion to Dismiss brought by the defendant in the case of People v. Michael Joseph Schultz. Michael D. Schwartz, Esq., and Michael Frawley, Esq. appeared as counsel for plaintiff. Neil B. Quinn, Esq. appeared as counsel for defendant Sanchez. The court has previously issued its decision in the Schultz case. A decision in the Sanchez matter is issued herein.

Defendant is a thirty-year old Hispanic male. He was indicted by Ventura's 2001-2002 Grand Jury on seventy-five counts including a first degree murder charge, as well as felony kidnapping, burglary, rape and other sex offense charges against numerous victims. He contends

the indictment was unlawful in that the procedures used to impanel the Grand Jury routinely excluded certain constitutionally cognizable groups in violation of the 14th Amendment of the United States Constitution. He asserts that the grand jury pool was not drawn from a fair cross section of the community as required by the 6th Amendment of the United States Constitution and California statutory law applicable to grand jury selection. He avers that the criteria used to qualify prospective grand jurors results in automatic exclusion of certain individuals in violation of his right to equal protection and to due process.

The only issue before this court is process: the formation and composition of the grand jury. Upon reciprocal agreement between Ventura County Superior Court and Santa Barbara County Superior Court and through the Judicial Council, this matter was assigned to this court. The assignment was "for purposes of the motion to dismiss (grand jury formation and composition) only." (Order on Assignment, November 28, 2001.) This court has not been asked to consider the facts underlying the charged offenses, the evidence against Defendant, or any other matter concerning the merits, and has not done so.

Defendant's Motion to Dismiss is directed solely to the still pending charges and allegations of the Indictment. Before filing this motion, Defendant Sanchez pled guilty to 61 felony counts in the Indictment, not including the homicide allegations at issue here. The defendant has expressly waived any challenge as to the counts which have been the subject of guilty or no contest plea. The parties are in agreement that the guilty plea to those 61 counts waived the issue of the composition of the grand jury, as to those counts. Thus, the defense agrees that the 61 guilty pleas already entered are valid and will remain unaffected, regardless of the Court's ruling with respect to the remaining charges contained in the Indictment.

The Court has considered Plaintiff's Supplemental Opposition to his Motion to Dismiss dated February 11, 2002 pursuant to Rule 11.03[1] of the Local Rules of the Ventura County

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[1] Rule 11.03, *General Rules for Pretrial Motions in Criminal Cases*, requires that pretrial motions in criminal cases be noticed in writing and briefed, and states, "Where pertinent legal authority comes to counsel's attention after the filing of his or her brief, a supplemental brief should be served and filed where time allows. Where supplemental briefing is not possible,

Superior Court, and over the objection of the Defendant. The defense objected to the plaintiff's Supplemental Briefing, and argued that the People waived any challenge to the right to a fair cross section by failing to contest it in their initial briefing and oral argument, and waived any issue of need to demonstrate prejudice in the same manner. Plaintiff points out that neither party briefed the issue of Legislative Intent in its initial papers, and refers to Rule 11.03 and to an appellate rule, *Government Code* §68081, regarding supplemental briefing of issues that are neither proposed nor briefed.

The applicability of *Penal Code* section 904.6 was not only proposed by the defense, but was the cornerstone of the Defendant's motion to dismiss. The parties were given full opportunity to respond to the Court's inquiries concerning whether there exists a right to a state grand jury drawn from a fair cross section at the December 21, 2001 hearing. Citations contained in Plaintiff's supplemental brief were not supplied to the court and opposing counsel as far in advance of the hearing as possible as is required by Rule 11.03. The parties left to the Court the initial task of surveying and analyzing the Legislative History behind section 904.6. However, the Court has exercised its discretion to consider the supplemental authorities, due to the significance of the legal issues presented.

Background

Grand juries serve three basic functions: "to weigh criminal charges and determine whether indictments should be returned (*Penal Code* §917); to weigh allegations of misconduct against public officials and determine whether to present formal accusations requesting their removal from office (*Penal Code* § 922; see *Gov. Code*, § 3060 et seq.); and to act as the public's 'watchdog' by investigating and reporting upon the affairs of local government (e.g., §§ 919, 925 et seq.)." *McClatchy Newspapers v. Superior Court* (1988) 44 Cal.3d 1162, 1170.

All counties are required to impanel at least one grand jury every year. (*Penal Code* §905). A regular grand jury is impaneled each year as provided in *Penal Code* section 896, et

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citations should be supplied to the court and opposing counsel as far in advance of the hearing as

seq. (Referred to herein as an "896" or "regular" grand jury.) In addition, section 904.6 authorizes an additional criminal grand jury, which may serve for a shorter term. (A "904.6" or "additional" grand jury.) Section 904.6 was amended in 1991 to be applicable to all counties. Ventura County continues to have only a regular 896 grand jury, performing all three basic functions and serving for a full year.

A 904.6 additional grand jury is impaneled much like a trial jury. The presiding judge selects persons at random from the list of trial jurors in civil and criminal cases and determines if they are competent to serve as grand jurors. (§904, subd. (c)) The presiding judge impanels the additional criminal grand jury from time to time, as needed, and discharges them when no longer needed. (§904.6(c)) Section 904.6 criminal grand jurors are therefore not required to commit to a full year of service. Service on the additional grand jury is obligatory, not voluntary. All persons "have an obligation to serve, when summoned for that purpose." (§904.6(e)) The result of compulsory service and random selection ensures that the pool will represent a fair cross section of the community. If impaneled, the additional grand jury has exclusive jurisdiction to return indictments, except for matters that the regular grand jury had been inquiring into at the time of empanelment.

A regular grand jury constituted under section 896, which is the only grand jury utilized in Ventura, is selected in a sharply different manner. The superior court judges select the grand jury after interview from a list that is composed by the jury commissioner. (§§896, and 903.1) The jury commissioner creates this list by diligently inquiring and informing herself in respect to the qualifications of residents of the county. (§903.2) This is done pursuant to rules or instructions adopted by a majority of the superior court judges for the county. In Ventura, residents are included on the list only if they apply and volunteer to serve for a full year, five days a week. This results in a greatly restricted and non-representative pool.

The grand jury list in Ventura represents only a small segment of the county's jury eligible population. Ventura Grand Jury Commissioner Peggy Yost testified that she has been

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possible."

responsible for compiling the grand jury lists for the last two years, 2000-2001 and 2001-2002 (in which defendant Sanchez was indicted). She has done so using procedures approved by the presiding judge and also in effect prior to 2000. The system requires voluntary application. (RT 12:10-13) A person may be nominated by a judge, but will still be required to fill out an application which requires a waiver of confidential information and a notice that they will be investigated. (She testified that the investigations are background checks, and are no longer performed by the district attorney's office. This information is not explained on the application, however.)

In the year 2000, Ventura had a population of 538,953 over the age of 18. (Table 1 to Declaration of Dr. Weeks, most recent Census data.) Ms. Yost testified that in typical years only 100 of Ventura's residents apply to serve as grand jurors. Even this number is down sharply in recent years. Last year she had fewer than 40 residents apply to serve, (RT 14:2-6), and believed only 10 were female. (RT 23:9-10)

Ms. Yost testified that for the last two years, Ventura was unable to comply with the requirement of Penal Code section 899 to have a proportionate representation on the master grand jury list from each supervisorial district. (RT (1-6, 18-23) Ms. Yost and Defendant's expert, Dr. Weeks, both offered evidence that, based on the population within the five supervisorial districts in Ventura County, the Court had determined that each group of 30 nominees should include 6 persons from each district. The court maintained that pattern through 1999-2000, but was unable to do so in 2000-2001 and 2001-2002. (*Testimony of Ms. Yost,* RT 12/13/01, *Supplemental Dec. of Dr. Weeks*, ¶¶7 and 8, Table 2.) From Supervisorial District 5, which includes the City of Oxnard and which has the largest concentration of Hispanics, there were only two applicants in each of those years. (*Id.*) (RT 9:25-26). Ventura did not use summons to correct the deficiency or to compose the master list.

Based on this volunteer system, there were only 40 members of the grand jury pool for 2001-2002, the year in which defendant Sanchez was indicted. Comparing this to the most recent Census data for 2000, the pool represented only .0000742 of the population over age 18.

Although the District Attorney's office has asked the Ventura Superior Court to adopt a 904.6 grand jury system, it has apparently refused to do so. The prosecutor stated at oral argument, "We requested several years ago that the Court do it [impanel a 904.6 additional grand jury], and the Court has declined to do so. I think we can – it seems that a system like that would have certain advantages." (RT 56:12-16)

Constitutional Framework

The 5th Amendment to the United States Constitution guarantees in criminal prosecutions a right to due process. (No person shall "*be deprived of life, liberty, or property, without due process of law.*") The due process clause of the 5th Amendment is applicable to the State courts through the 14th Amendment, which provides at Section 1, "*nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*."

The 6th Amendment to the United States Constitution guarantees "In all (federal) criminal prosecutions, the accused shall enjoy the *right to a speedy and public trial, by an impartial jury.*" This clause has been interpreted to require a trial jury drawn from a fair cross section of the community. The 6th Amendment right to trial by impartial jury is applicable to the States through the due process clause of the 14th Amendment. *Duncan v. Louisiana* (1968) 391 U.S. 145. Therefore, state court trial ("petit") juries must be drawn from a fair cross section of the community in order to satisfy the Sixth Amendment constitutional requirements.

State court *grand* juries, on the other hand, are not bound by federal cross section requirements, but only by equal protection guarantees embodied in the 14th Amendment, *United States ex rel Barksdale v. Blackburn* (1980) 610 F.2d 253, and any guarantee that may be provided by state law. The 5th Amendment to the United States Constitution also guarantees, in the case of a capital offense, presentment or indictment by Grand Jury. ("No person shall be held to *answer for a capital*, or otherwise infamous crime, *unless on a presentment or indictment*

of a Grand Jury.") However, the grand jury clause of the 5th Amendment is not applicable to the states. *People v. Hurtado* (1883) 63 Cal. 288.[2]

Article I, Section 16, of the *California Constitution* secures the right to jury trial, but does not speak to grand juries.[3] Article I, Section 23, ("Grand Jury") of the *California Constitution*, provides simply that "Sec. 23. One or more grand juries shall be drawn and summoned at least once a year in each county."

Defendant's purposeful discrimination and fair cross section challenges are independent of each other and will be considered in turn.

I. Purposeful Discrimination

Source of Protection: 14th Amendment

The 14th Amendment to the *United States Constitution* provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It has been interpreted to prohibit purposeful exclusion of any recognizable distinct class from serving as trial ("petit") jurors or grand jurors. *Pierre v. Louisiana* (1939) 306 U.S. 354. Hispanics are a distinct class, protected by the 14th Amendment from discriminatory jury exclusion. *People v. Ramos* (1997)

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[2] "Unlike the jury trial clause of the Sixth Amendment, the grand jury clause of the Fifth Amendment has not been incorporated into the Fourteenth Amendment." *1 Beale, Grand Jury Law & Practice*, §3.12, citing *People v. Hurtado* (1883) 63 Cal. 288 (overruled by statute on other grounds concerning non-statutory voluntary manslaughter as discussed in *People v Spurlin* (1984) 156 Cal.App.3d 119.

[3] It provides in full: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict. A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel. In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute. In civil causes the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court. In civil causes other than causes within the appellate jurisdiction of the court of appeal the Legislature may provide that the jury shall consist of eight persons or a lesser number agreed on by the parties in open court. In criminal actions in which a felony is charged, the jury shall consist of 12 persons. In criminal actions in which a misdemeanor is charged, the jury shall consist of 12 persons or a lesser number agreed on by the parties in open court." *Cal.*

15 Cal.4th 1134, 1154. Women are also a protected, distinct class. *Taylor v. Louisiana* (1975) 419 U.S. 522, 531-532. Young people have not been recognized as a distinct class, although the question has been left open by the California Supreme Court. *People v Stansbury* (1993) 4 Cal.4th 1017, 1061.

Legal Standard – 14th Amendment Guarantee

A defendant raising a 14th Amendment challenge to a jury on the grounds of purposeful discrimination against a distinct class must make a prima facie showing that (1) "over a significant period of time"; (2) there has been a "substantial underrepresentation"; (3) of a "recognizable distinct class, singled out for different treatment under the laws." *Castaneda v. Partida* (1977) 430 U.S. 482.

The government may rebut this showing by proving either that (1) No discriminatory purpose was involved, or (2) Even if such purpose was involved, it did not have a determinative effect. *Duren v. Missouri* (1979) 439 U.S. 357, 368 n. 26. The government's rebuttal burden has also been described as follows: To establish the use of objective, racially neutral selection procedures, or, to show that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Castaneda v. Partida* (1977) 430 U.S. 482, 494-495.

Discriminatory purpose is an essential element of violation of the 14th Amendment's equal protection clause. *Arlington Heights vs Metropolitan House. Dev. Corp*. (1977) 429 U.S. 252, 264-265. Discriminatory purpose may be established by statistical evidence, rather than direct proof. Procedures that are "not racially neutral," or "susceptible to abuse," support a finding of discriminatory purpose. *Castaneda v. Partida* 430 U.S. 482, 494-495.

Evidence Regarding Purposeful Discrimination

Defendant Sanchez based his challenge on underrepresentation of women, young people, or Hispanics. Defendant did not make a prima facie showing of discrimination in violation of the 14th Amendment with respect to young people or Hispanics for the reasons discussed herein. He did make a prima facie showing of a 14th Amendment violation with respect to women.

Const. Article I, §16.

Evidence adduced at hearing demonstrated that over a significant period of time, there has been substantial underrepresentation of women on the Ventura grand jury.

Distinct Group

An equal protection claim, like a fair cross section claim, may only be based on exclusion of a "distinct group." A “distinct” or “cognizable” group is established by showing: (1) The group is definite and ascertainable, readily defined; (2) Members of the group must share a common perspective rising from their life experience in the group, i.e., a common social or psychological outlook or perspective on human events gained precisely because they are members of that group, and (3) The party seeking to demonstrate a violation of the rule also must show that no other members of the community are capable of adequately representing the perspective of the excluded group. *Rubio v. Superior Court* (1979) 24 Cal.3d 93. The party seeking to demonstrate a violation of the rule must also show that no other members of the community are capable of adequately representing the perspective of the excluded group. *Rubio v. Superior Court*.

Women are a distinct group. *Taylor v. Louisiana* (1975) 419 U.S. 522, 531-53. Youth, on the other hand, has not been recognized as a distinct group and defendant has not presented evidence herein that would support its recognition as "distinct." “Young people are not a cognizable class” *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1153. California Courts of Appeal have consistently found a failure to establish that young adults are a cognizable group. *People v. Estrada* (1979) 93 Cal.App.3d 76; *People v. Hoiland* (1971) 22 Cal.App.3d 530.

The California Supreme Court has left the question open: “We have not spoken on the question whether the young are a distinctive group; the Court of Appeal has rejected the claim a number of times.… We need not determine whether the exclusion of the young falls under the first prong of Duren,…because defendant has failed to establish a prima facie case under Duren's third prong by showing that the disparity he complains of was caused by systematic exclusion.” *People v Stansbury* (1993) 4 Cal.4th 1017, 1061.

To constitute a distinct group, the group must be readily ascertainable, share a common perspective arising from their life experience in the group, and it must be true that no other members of the community are capable of adequately representing the perspective. *Willis v Zant* (1983) 720 F.2d 1212. The testimony of Defendant's expert fell short. Dr. Weeks testified that older people tend to be socially and politically more conservative than younger people, and that it is the younger population, ages 15-30, that commits most of the crimes. He testified that the group aged 18-44 have similarities in attitude, ideas or experience. He explained that people in that age range are involving themselves in education, family formation and family building, job acquisition, labor force participation, and career building. He stated they have very different behavior and accompanying attitudes as compared to older groups. He noted that a majority of parents of minor children are in this group, as are a majority of wage earners.

He concluded that, "One would expect a more common perspective among people in that [young] group than they would share with people of different age groups." He could not testify that they were a readily ascertainable distinct group sharing a common perspective arising from membership in the group. His opinion was, "only that younger people are more likely to share attitudes [and there is] less variability". He acknowledged major differences within the group. When asked directly whether he would consider the group from 18 to 44 to be a distinctive group he was unable to provide a direct answer in the affirmative. (RT 55:10-11).

In *People v. Hoiland* (1971) 22 Cal.App.3d 530, defendants were convicted in the Santa Barbara Superior Court of participating in the 1970 Isla Vista riot that resulted in the destruction of the Bank of America building. They appealed, contending that the grand jury that indicted them was selected by a process that systematically excluded young people under the age of 30, and that persons between the ages of 18 and 20 were improperly excluded from the trial jury. "Defendants suggest[ed] that young people 'sympathetic to lawful student demonstrations' would experience 'different emotional responses' than those of their elders." Id.at 533. The Second District rejected their claims, finding that there was no evidence that individuals between 21 and 30 were a segment of the population that was a legally cognizable class requiring separate constitutional recognition, because people in that age group lacked the quality of distinctiveness

required for creation of a legally cognizable class. *Id.* at 540. The fact that there is a sub-group of society that shares a common factor and which was excluded from service is not enough to make out a challenge. "The number of such sub-groupings which any criminal defendant might be able to describe is limited only by the number of factors which can be enumerated in describing the personal profile of the individual." *Id.* At 534.

Women - Substantial Period of Time and Substantial Underrepresentation

Defendant's evidence spanned a significant period of time, from 1995 to 2001, and demonstrates substantial underrepresentation of women. Defendant Sanchez was indicted by the 2001-2002 grand jury. Dr. John R. Weeks, a professor of Geography and the Director of the International Population Center in San Diego, offered statistical evidence in support of Defendant's claim. Because 2000 was the most current Census data available, Dr. Weeks used that information for purposes of comparing the Ventura population aged 18 or over with the actual pools from which Ventura's grand jury was drawn.

In the year 2000, women constituted 51.1% of Ventura County's jury-eligible population, and in 2001 they constituted 51.2%. (Table 4) By comparison, women constituted only 30% of the 2001-2002 grand jury pool.[4] Of 40 pool members, only 12 were women. This represents an absolute disparity of 21.1, and a relative disparity of 41%. In terms of statistical significance, Dr. Weeks assigned this disparity a Z-score of –2.64. " A probability value below 0.05 is "generally considered to be statistically significant, i.e., when there is less than a 5% probability that the disparity was due to chance." *Coates v. Johnson & Johnson* (7th Cir. 1985) 765 F.2d 524, 537.

As Dr. Weeks explained in his affidavit, at pp. 8-9, "Disparity is measured first by absolute disparity, then by relative disparity, and finally by statistical significance of the disparity. All three are required for a statistically appropriate measurement of the size of under-representation. Absolute disparity measures the simple absolute difference between the

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[4] This figure was 26.5% for the 2000-2001 pool from which Defendant Schultz' grand jury was drawn, representing an absolute disparity of 24.6, to which Dr. Weeks assigned a Z-score of -3.41. (Table 7)

percentage of people in the community who are in the cognizable group and the percentage of that group as represented in the jury array."

Plaintiff points out that the statistics are slightly less disparate when one considers the membership of the eventual grand jury panels (which were manipulated to improve representation), rather than the membership up of the venire pools from which the juries were drawn. But the fair cross section right has been consistently found to guarantee a grand jury *drawn from* a fair cross section of the community. "The fair-cross-section requirement involves a comparison of the makeup of jury venires or other sources from which jurors are drawn with the makeup of the community…" *Duren* 439 U.S. at 364, n. 23.

The disparate representation of women in Ventura's grand jury pool was consistent throughout a five-year period. From 1995 through 2000, there were a total of 333 grand jury pool members in Ventura. Only 99 of the 333 were women, or 29.7% of the combined pool from which grand juries were drawn. (Table 5). By contrast, during this same period women generally constituted half of the jury eligible population. However, their representation in the jury pool ranged from a low of 22.2% (1999) to a high of 33.7% (1996).

There is no categorical answer to the question of how great a disparity must be shown to establish a prima facie case. "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 fair cross section violation. Absolute disparities between 15 percent and 20 percent have generally been deemed significant, and disparities of more than 20 percent have almost universally been deemed sufficient to establish a prima facie case." 1 *Beale* 3:19, p. 3-92, Citations omitted.

In *Ballard v. United States*, (1946) 329 U.S. 187, intentional exclusion of women was established where all women were excluded. In *Duren v. Missouri* (1979) 439 U.S. 357, the court held that systematic exclusion of women that resulted in jury venires that averaged less than 15 % women violated the fair cross section requirement. The discrepancy appeared in nearly every weekly venire for over a year.

In *Taylor v. Louisiana* (1975) 419 U.S. 522, 524, the court invalidated a system in which a woman was required to declare her willingness to serve before she could do so. As a result of the declaration requirement, only 1% of the persons whose names were drawn from the jury wheel were women, whereas women constituted 53% of the jury eligible population. In *Ford v. Seabold* (1987) 841 F2d 677, the court described a system in Kentucky in which "Census figures for 1970 indicate that women constituted nearly 53% of the population over eighteen years old in Scott County. According to Ford's analysis, however, women constituted only 31.3% of the 1980 pool and only 34.3% of the 1981 pool." *Id.* At 683. The court stated that where the disparity is not extreme, it is necessary to compare the absolute disparity.[5] It noted in dicta that an absolute disparity of "only" 21.7% was below that found unreasonable in *Duren*.[6]

Plaintiff argued that the disparity here is less than a 21% disparity that was found not to be disproportionate in *Williams v. Dalsheim*, (1979) 480 F.Supp.1049. While it is true that the petitioner's particular panel in *Williams v. Dalsheim* was composed of 26% percent women, the court based its finding of adequate representation on an average representation over time of 33%. *Id.* At 1055. The court stated, " it is this court's opinion that jury venires averaging 33% is not a result that yields unconstitutional representation within the meaning of Duren." *Id.* at 1056. Here, 33% represents the all time high for representation over a six-year period, not the average,

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[5] "The crucial question in determining whether the second prong of the *Duren* test is met is whether jury pools consisting of 31.3% and 34.3% women are fair and reasonable in relation to the actual percentage of women over eighteen in Scott County (53%). In *Duren*, the relevant community was comprised of 54% women. The Court found that jury venires containing approximately 15% women were not representative of the community. *Duren*, 439 U.S. at 365-66. The lack of women in the jury pools in this case, however, is not nearly as severe as in *Duren*. Because the percentage of women in the community differs slightly from the percentage of women in the community in *Duren*, it is necessary to compare the absolute disparity of the two cases." *Ford v. Seabold* at 683-684.

[6] "In Duren, the disparity between the percentage of women in the community and the percentage present in the jury venires was 39%. Here, on the other hand, the disparity is only 21.7% for 1980 and 18.7% for 1981, far below that found unreasonable in *Duren*. We need not decide whether a disparity of 18.7% or 21.7% is unreasonable, however, since we conclude that women were not systematically excluded during the selection process." *Id.* At 681.

and representation has dropped as low as 22%. The prosecutor conceded at oral argument herein that the numbers for women "come close" the "ballpark of underrepresentation." (RT 67:2-13)

In Ventura, the absolute disparity for women ranged from 17.1 (1996) to 28.8 (1999) over the years leading up to Defendant's indictment. The 1995-1996 pool had 27.4% women, while Ventura's jury eligible population was 50.8% female. This was an absolute disparity of 23.3, and a relative disparity of 77%, to which Dr. Weeks assigned a Z-score of -5.03 (Of 117 pool members, 32 were female.) (Table 12.)

The 1996-1997 pool had 33.7% women, while the jury eligible population was again 50.8% female. This was an absolute disparity of 17.1, and a relative disparity of 34%, to which Dr. Weeks assigned a Z-score of -3.43 (Of 101 pool members, 34 were female.) (Table 11)

The 1997-1998 pool had 29.9% women, while the jury eligible population was 50.9%. This was an absolute disparity of 21.0, and a relative disparity of 41%, to which Dr. Weeks assigned a Z-score of -3.90 (Of 87 pool members, 26 were female.) (Table 10)

The 1998-1999 pool had 24% women, while the jury eligible population was 51% female. This was an absolute disparity of 27.0, and a relative disparity of 53%, to which Dr. Weeks assigned a Z-score of -4.65. (Of 75 pool members, 18 were female.) (Table 9)

The 1999-2000 pool had 22.2% women, while the jury eligible population was again 51% female. This was an absolute disparity of 28.8, and a relative disparity of 56%, to which Dr. Weeks assigned a Z-score of -4.19. (Of 54 pool members, 12 were female.) (Table 8)

The 2000-2001 pool was 26.5% female, while the jury eligible population was 51.1% female. This was an absolute disparity of 24.6, and a relative disparity of 48%, to which Dr. Weeks assigned a Z-score of -3.41. As previously noted, the Z-score for the 2001-2002 grand jury pool was –2.64.

As Dr. Weeks explained, "statistical significance means that the difference between what we expected and what we observed is so large that it's unlikely that it would have happened by chance alone, that something is going on." (RT 69:19-23). "The Z score tells us how far away this relative disparity is from what we might expect by chance alone…" (RT 67:23-26) As noted above, the Z score for women ranged from –2.64 to -5.03 leading up to Defendant's indictment.

Dr. Weeks testified that any (negative) number that is over 1.96 is statistically significant at the 95 percent level, (RT 69:2-4), indicating that "95 times out of a hundred, when we looked at data from the community, we would not expect to see a disparity this large. Only five times out of a hundred could we have gotten that. So it's a very low chance that we could get a disparity that large just by chance alone from the community." (RT 69:13-18.)

The prosecutor candidly stated at oral argument, “I’m really at a loss to explain why there is not a better representation of women…” (RT 64:23-24) “I’m at a loss to understand why they are underrepresented, but there is nothing about the use of volunteers or the use of press releases or anything about the procedures that are being used here that would show a systematic exclusion of women.” (RT 67:18-22) The defendant suggested childcare considerations would likely deter women from voluntarily making a year long commitment to serve five days a week. Ventura's Jury Commissioner testified that she did not think Ventura has any problem getting close to 50 percent women in the master jury wheel for petit jurors, who are summoned. (RT 23:22-24.)

Hispanics - Representation

Evidence adduced at hearing did not demonstrate substantial underrepresentation of Hispanics on the Ventura grand jury over a significant period of time. In the year 2000, Hispanics constituted 17.7% of the 386,510 jury eligible population of Ventura County, adjusted for age of majority, citizenship, English language ability, felony convictions, and residency. (*Declaration of Weeks*, ¶16, Table 3, *Testimony of Weeks* RT 12/13/01, 48:7-20-49:1) In 2001 they constituted 18.2%. (Dr. Weeks arrived at this number by extrapolation, based on a continuation of trends for the 1990 to 2000 Census periods. *Weeks*, ¶17, Table 4). With respect to the 2001-2002 grand jury pool, Hispanics constituted 7.5%. Of 40 pool members, 3 were Hispanic. (*Supplemental Declaration of Dr. Weeks*, ¶4[7], Table 1.) Using the 2000 Census data, he found that this represented an absolute disparity of 10.2, and a relative disparity of 58%, to

[7] Dr. Weeks notes that more than half of the people had been in the pool in one or more previous years. (¶4)

which Dr. Weeks assigns a Z-score that is not statistically significant, –1.67. (*Id.*) He testified that a (negative) number that is over 1.96 is statistically significant. (RT 69:2-4)

From 1995 through 2001, there were a total of 516 applicants for the grand jury pool in Ventura, only 352 of which were unduplicated (non-holdover) applicants. At the time he prepared his evidence, Dr. Weeks had not received information about who among the 2001-2002 applicant pool had been nominees previously, so he excluded 2001-2002 from his initial analysis. (*Weeks* at ¶21).[8] From 1995 through 2000, 333 persons were in the pool. Dr. Weeks declares that there were only 26 Hispanics in the pool during this six-year period, representing 7.8% of the pool, when 17.7% would be expected. (¶23, Table 5) This represents an absolute disparity of 9.9, to which he assigned a Z-score of –4.72. As previously noted, "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 fair cross section violation." 1 *Beale* supra, 3:19, p. 3-92.

Viewing the pool statistics for each of the years from 1995-2001, there are insufficient disparities to demonstrate significant underrepresentation of Hispanics over time. The 1995-1996 pool was 7.7% Hispanic, while Ventura's jury eligible population was 15.5% Hispanic. This was an absolute disparity of 7.8, and a relative disparity of 50%, to which Dr. Weeks assigned a Z-score of –2.32 (Of 117 pool members, 9 were Hispanic.) (Table 12.)

The 1996-1997 pool was 8.9% Hispanics, while the jury eligible population was 16.0% Hispanic. This was an absolute disparity of 7.1, and a relative disparity of 44%, to which Dr. Weeks assigned a Z-score of –1.93 (Of 101 pool members, 9 were Hispanic.) (Table 11).

The 1997-1998 pool was 8% Hispanic, while the jury eligible population was 16.4% Hispanic. This was an absolute disparity of 8.4, and a relative disparity of 51%, to which Dr. Weeks assigned a Z-score of –2.09 (Of 87 pool members, 7 were Hispanic.) (Table 10).

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[8] Subsequently, he obtained additional information and submitted a Supplemental Declaration, addressing the 2001-2002 pool at Table 1.

The 1998-1999 pool was 8.0% Hispanic, while the jury eligible population was 16.9% Hispanic. This was an absolute disparity of 8.9, and a relative disparity of 53%, to which Dr. Weeks assigned a Z-score of –2.04. (Of 75 pool members, 6 were Hispanic.) (Table 9).

The 1999-2000 pool was 13% Hispanic, while the jury eligible population was 17.3% Hispanic. This was an absolute disparity of 4.3, and a relative disparity of 25%, to which Dr. Weeks assigned a Z-score of –0.83. (Of 54 pool members, 7 were Hispanic.) (Table 8)

The 2000-2001 pool was 14.3% Hispanic, while the jury eligible population was 17.7% Hispanic. This was an absolute disparity of 3.4, and a relative disparity of 19%, to which Dr. Weeks assigned a Z-score of –0.62. (Of 49 pool members, 7 were Hispanic.)

The 2001-2002 pool, from which Defendant Sanchez' grand jury was drawn, was 7.5% Hispanic, while the jury eligible population was 17.7% Hispanic (based on 2000 data). This was an absolute disparity of 10.2, and a relative disparity of 58%, to which Dr. Weeks assigned a Z-score of –1.67.

Thus, as Dr. Weeks concedes, in each of the years from 1996 to 2000, under-representation of Hispanics was not statistically significant. Dr. Weeks states with respect to each of these years, "…the pattern persists of too few Hispanics, women and younger people, with *only the latter two* representing differences that are large enough to be statistically significant for this one year." *Weeks Dec.*, ¶30 (1999-2000, Table 8), ¶31 (1998-1999, Table 9), ¶32 (1997-1998, Table 10), and ¶33 (1996-1997, Table 11). Emphasis supplied.

In sum, Defendant made a prima facie showing of a 14th Amendment violation with respect to women only. Defendant failed to make such a showing with respect to Hispanics. Defendant's challenge based on exclusion of youth fails because he did not demonstrate that youth is a distinct and cognizable group.

Rebuttal Evidence

The government successfully rebutted Defendant's showing with respect to under-representation of women by demonstrating that no discriminatory purpose was involved. Ms. Yost testified to outreach efforts made in an earnest attempt to obtain a more representative pool of applicants. She testified that she extended the application deadline, contacted female judges

and asked for names of women's organizations, and sent applications to them. (16:23-17:7) She made similar efforts to reach out to the Mexican-American Bar Association and the Oxnard Neighborhood Councils. (17:9-16). The government has negated the element of purposeful discrimination, and the 14th Amendment claim must fail.

II. Fair Cross Section

Defendant contends alternatively that his Grand Jury was not drawn from a "fair cross section" of the Ventura Community. A successful "fair cross section" challenge does not require purposeful discrimination.

Standing

A male defendant has standing to object to the exclusion of women from his jury on fair cross section grounds. *Taylor v. Louisiana* (1975) 419 U.S. 522. "If the exclusion of any group deprives the jury pool of its representative character, the fair cross section requirement is violated, and every defendant should have standing to raise the issue." 1 *Beale* 3:11, p 3-47. Thus, the Court of Appeal of California, First District, held in *People v. Navarette* (1976) 54 Cal. App. 3d 1064 that "the trial court erred in determining that, because he was a male, Peraza was precluded from challenging the grand jury on the ground that women were underrepresented thereon." *People v. Navarette* at 1076.

Source of Protection

The first issue to be resolved is whether there is a constitutional or statutory guarantee that a California grand jury be drawn from a fair cross section. Both sides cite California authorities that for the most part arose in the petit jury context.[9] From this they assumed a right

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[9] In *People v. Harris*, (1984) 36 Cal.3d 36, it was held that use of only voter registration lists violates the fair cross section requirement, but it is in the context of a petit jury. *People v. Henderson* (1990) 225 Cal.App.3d 1129, 1153, concerned a 6th Amendment petit jury challenge. ["Young people do not constitute a cognizable class for purposes of the cross-section rule."] *People v. McCoy* (1995) 40 Cal.App.4th 778, 783, was a petit jury challenge. The court stated, "Under the Sixth Amendment of the United States Constitution and article I, section 16 of the California Constitution, a defendant is entitled to a jury venire drawn from a representative cross-section of the community," "…it is settled as a matter of law that both Blacks and

to fair cross section in a California grand jury. Defendant relied primarily for this extension on *Pierre v. Louisiana* (1939) 306 U.S. 354, "Principles which forbid discrimination in the selection of Petit Juries also govern the selection of Grand Juries," and *People v. Newton* (1970) 8 Cal.App.3d 359, 388.

Pierre v. Louisiana considered a 14th Amendment equal protection challenge to a grand jury, not a 6th Amendment Fair Cross Section challenge. The defendant "did prove at the trial of said motion to Quash that Negroes as persons of color had been purposely excluded from the Grand Jury Venire and Panel which returned said indictment against … (petitioner) on account of their color and race." Id. at 362.

People v. Newton was a California case in which the Defendant challenged both the grand jury and the petit jury. The grand jury claim was only discussed in terms of the 14th Amendment's equal protection provision, not 6th Amendment cross-section: "The constitutional standards controlling the selection of grand jurors are the same as for petit jurors. [Citation] They must be selected in a manner which does not systematically exclude, or substantially underrepresent, the members of any identifiable group in the community." The *Newton* court did go on to consider a 6th Amendment Fair Cross Section claim to the petit jury that tried the defendant, but did not consider a cross-section challenge to the grand jury.

<u>6th Amendment Guarantee – Fair Cross Section</u>

There is no question that the 6th Amendment to the United States Constitution provides a right to a fair cross section for a trial ("petit") jury. The 6th Amendment is silent as to grand juries. It guarantees *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

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Hispanics are distinctive or cognizable groups" and "persons 70 and older do not constitute a cognizable group." *People v. McGhee* (1987) 193 Cal.App.3d 1333, concerned a claim that the prosecutor demonstrated group bias in excluding trial jurors. ["Youth is not recognized as a cognizable class for purposes of a Wheeler motion." Id. at 1351-1352.]

of the community." *Taylor v. Louisiana* (1975) 419 U.S. 357, 368 n.26. A grand jury proceeding is not a trial.

The purpose of guaranteeing trial by a jury drawn from a fair cross section jury is to assure diffused impartiality, and also to share the civic responsibility of administration of justice:

> "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [Citation omitted.] This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 'Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . (T)he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227, 66 S. Ct. 984, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting*)."*

Taylor v. Louisiana (1975) 419 U.S. 522, 530-531.

The 6th Amendment applies, however, only to trial juries and makes no provision for grand juries, which serve a different function. "A grand jury determines only if there is sufficient evidence to warrant a trial. The petit jury decides ultimate guilt." *People v. Hoiland* (1971) 22 Cal.App.3d 530, 538.

A right to a fair cross section does apply to *federal* grand juries by federal statute. 28 USC §1861. "The Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 et seq., establishes a detailed procedure to assure that grand and petit juries are randomly selected from a fair cross section of the community. Although the statute attempts to implement constitutional requirements, the right to a jury 'selected at random' is a statutory creation, 28 U.S.C. § 1866(f)

(emphasis added), not a constitutional command." *United States v Hawkins* (1978) 566 F.2d 1006, 1012.[10]

It appears that in state prosecutions, there is no right to a grand jury drawn from a fair cross section of the community unless there is a state statute or constitutional provision that so provides. "In state prosecutions in contrast, unless there is a state statute or constitutional provision on point, there is no right to a grand jury drawn from a cross section of the community." 1 *Beale, Grand Jury Law & Practice* (2nd ed. 1997) §3.12, pp.3-58 to 3-59. Based upon the clear language of the 6th Amendment, and a review of federal and state reported decisions, this court is persuaded that Beale is correct. Absent state law guarantee, there is no right to a state grand jury drawn from a fair cross section.

The court is aware that the Fifth Circuit has stated otherwise in dicta. In *Murphy v. Johnson* (5th Cir. 2000) 205 F.3d 809, it suggested that the Sixth Amendment right to a fair cross-section applies to state grand juries, as well as petit juries, regardless of any state law guarantee. The authorities relied upon by the Fifth Circuit do not support its conclusion. It relied upon *Curry v. Estelle* (5th Cir. 1975) 524 F.2d 981, *Taylor v. Louisiana* (1975) 419 U.S. 522, and *Peters v. Kiff* (1972) 407 U.S. 493.

In *Curry v. Estelle*, the court recognized a fair cross section guarantee, but did not identify its source. As authority, the *Curry* court cited *Taylor v. Louisiana*. *Taylor v. Louisiana*, involved a challenge to a petit, not grand, jury. *Pieters v. Kiff*, was a 14th Amendment case in which there was evidence of purposeful exclusion of Afro-Americans from both petit and grand juries; the jury lists for both petit and grand jurors were made up from tax digests that were by law segregated by race. There was no discussion of whether the 6th Amendment fair cross section guarantee applies to grand, as well as petit, juries.

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[10] "Unlike the jury trial clause of the Sixth Amendment, the grand jury clause of the Fifth Amendment has not been incorporated into the Fourteenth Amendment." 1 *Beale, Grand Jury Law & Practice*, §3.12, citing *People v. Hurtado* (1883) 63 Cal. 288.

California State Law Guarantee – Fair Cross Section

The question then becomes whether California law provides a fair cross section guarantee, rendering Defendant's fair cross section challenge cognizable. The California Legislature has expressed a general intent that all qualified persons have an obligation to serve on criminal grand juries, and that they are to be drawn from a fair cross section. Section 904.6(e) of the *Penal Code* provides, "It is the intent of the Legislature that all persons qualified for jury service shall have an equal opportunity to be considered for service as criminal grand jurors in the county in which they reside, and that they have an obligation to serve, when summoned for that purpose. All persons selected for the additional criminal grand jury shall be selected at random from a source or sources reasonably representative of a cross section of the population which is eligible for jury service in the county."

Thus, the Legislature expressed in the first sentence of 904.6(e) its intent that the fair cross section requirement, along with compulsory service and random selection, apply generally to all "criminal grand jurors." However, it did not include express "fair cross section" language in the provisions regarding a regular grand jury.

Prior to enactment of 904.6(e) in 1991, there was assumed to be a right to a grand jury drawn from a fair cross section, but the source of the right was unclear. *People v. Dean* (1974) 38 Cal.App.3d 966, cited by Defendant, did recognize a right to a "fair cross section" in a California grand jury, but this was based on the rule that "systematical and purposeful exclusion from a grand jury of a class of persons in the community denies due process and equal protection of the law," which are 14th Amendment considerations.

The court is aware of several other California cases in which a cross section challenge to a grand jury was considered. *People v. Estrada* (1979) 93 Cal.App.3d 76, *People v. Johnson* (1973) 33 Cal.App.3d 9, and *People v. Corona* (1989) 211 Cal.App.3d 529. The cases were decided prior to the 1991 enactment of 904.6(e) by amendment. In each case the court rejected the claims and did not clearly identify the source of a right to a fair cross section in a state grand jury.

In *People v. Estrada* the First District considered a fair cross section challenge to a grand jury on the merits. The Court held that the groups the defendant claimed were excluded ("less-educated," "young adults," "blue collar workers," and "households with family incomes less than $15,000") were not constitutionally "cognizable," and so the court did not address the remaining two *Duren* cross section factors. As authority for entertaining the fair cross section challenge, the *Estrada* court simply stated "A defendant's right to a representative cross-section has long been recognized by the United States Supreme Court and our state Supreme Court." Citing *Thiel v. Southern Pacific Co*. (1946) 328 U.S. 217 (a personal injury case, where no grand jury questions could be entertained), and *People v. Carter* 56 Cal.2d 549, 569 (a challenge to a petit jury). The *Estrada* court did not discuss the question of raising a fair cross section claim in a California state court; neither did it indicate whether it was relying on the *United States Constitution*, the *California Constitution*, or upon statute.

A California court also considered, briefly, a fair cross section claim to a state grand jury in *People v. Johnson* (1973) 33 Cal.App.3d 9. The claim was rejected out of hand with reference only to a federal case[11] and a state case based on the equal protection clause of the 14th Amendment.[12] Again, no constitutional basis for a fair cross section claim to a state grand jury was identified.

In 1990, Proposition 115 affected a dramatic change in felony criminal case processing in California. It enacted Article I, Section 14.1 of the *California Constitution* which reads as follows: "If a felony is prosecuted by indictment, there shall be no post indictment preliminary hearing." AB 607 in the 1991 legislative term was enacted to clarify the procedures to be utilized for commencing felony prosecutions.

The Senate Committee on Judiciary Analysis report for the hearing of July 16, 1991 in regard to this enactment is quoted in 76 *Op. Atty. Gen. Cal*. 181 (1993). It states the historical

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[11] *Zelechower v. Younger* (9th Cir. 1970) 424 F.2d 1256, in which a similar challenge was rejected.

context for the legislation under consideration. It notes that grand juries were utilized for indictment purposes prior to 1978. Then, "[t]he long-standing right of grand juries to issue indictments was qualified by *Hawkins v. Superior Court* 22 Cal.3d 572 in 1978, wherein the court opined that 'due process requires that an indicted defendant is entitled on his timely motion to a post-indictment preliminary hearing.' Thus, as a preliminary hearing was required to follow a grand jury proceeding, the indictment was generally abandoned in favor of a preliminary hearing on the charges in municipal court, and the function of the grand jury was limited to governmental oversight and the occasional criminal action in cases of official malfeasance.

"Last year the voters adopted Prop. 115, the 'Crime Victims Justice Initiative,' which overruled *Hawkins* by permitting an indictment as the initiation of criminal proceedings without a requirement of a subsequent preliminary hearing. District attorneys were free to choose indictment, rather than hearing, as the course of action in pursuing a case. Some have chosen to exercise this option freely, therefore imposing a significant criminal workload on grand juries still responsible for their civil obligations.

"This bill would bifurcate the institution of the grand jury into two forms, civil and criminal, authorizing counties to combine both functions in a single grand jury, or to establish independent criminal grand juries upon the decision of the presiding judge of the superior court or at the request of the District Attorney or the Attorney General. The civil grand jury would be authorized to inquire into county matters or return accusations of misconduct by public officials in the manner such juries functioned prior to Proposition 115 and pursuant to Hawkins; the criminal grand jury would be authorized to return indictments for public offenses pursuant to Proposition 115. *Individuals serving in the capacity of criminal grand jurors, whether on an independent panel or a unified body bringing an indictment in a criminal case, would be required to meet standards specified for criminal grand jury service."* 76 *Op. Atty Gen. Cal.* 181 (1993). Emphasis supplied.

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[12] *Montez v. Superior Court* (1970) 10 Cal.App.3d 343, in which a challenge of systematic exclusion of Hispanics (a class of which defendant was a member) was based on the Equal Protection Clause of the 14th Amendment.

The question is whether, in enacting 904.6, the Legislature intended the fair cross section guarantee to apply only to persons accused in counties that utilize a second 904.6 criminal grand jury, or whether it intended that guarantee to also apply to persons accused in counties such as Ventura, where the court constitutes a single grand jury for all purposes under section 896. The latter construction comports with the Attorney General's opinion.

The fundamental rules of statutory construction require "First, the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations omitted] Secondly, the provision must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citations] Significance, if possible, should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose, as 'the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.' [Citation] 'The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.' [Citations]…" *DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 17.

Legislative history discloses an intent that any grand jury with the power over criminal indictments would be drawn from a panel meeting specific standards for criminal service, including a fair cross section and compulsory service. The Senate Committee was of the opinion that section 904.6 would confer a fair cross section requirement on any criminal grand jury, whether constituted under either section 904.6 or section 896. The Senate Committee on Judiciary's report for the committee hearing on July 16, 1991, provided the following analysis: "…Individuals serving in the capacity of criminal grand jurors, whether on an independent panel or a unified body bringing an indictment in a criminal case, would be required to meet standards specified for criminal grand jury service.

"The purpose of this measure is to permit counties to establish additional grand juries to handle criminal indictments as authorized by Proposition 115, composed in a manner to preclude challenge for the 'technicality' of an unrepresentative panel."

The Assembly Committee, was of the opinion that criminal indictments would be issued solely by 904.6 grand juries. The Assembly Committee on Public Safety for the committee hearing on April 9, 1991, stated in part: "This bill will leave the selection process and powers of the civil grand jury intact with the exception of the power to issue criminal indictments. That function will reside exclusively with the criminal grand jury."[13]

Under either analysis, it was intended that criminal grand jurors would be drawn from a fair cross section. By enacting 904.6(e), the Legislature has created a process right. Contrary interpretation would lead to the conclusion that a defendant indicted by a grand jury in a county with a 904.6 grand jury would have the statutory right to a fair cross section. The defendant charged with the same crime in an adjoining county, with only an 896 jury, would not. Such a construction would run afoul of the 14th Amendment's equal protection provisions.

"[A] statute which is reasonably susceptible of two constructions should be interpreted so as to render it constitutional." *San Francisco Unified School District v. Johnson* (1971) 3 Cal.3d 937, 942. "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

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[13] These policy declarations of the California legislature are similar to those made by Congress in enacting the federal statutory grand jury cross section guarantee. 28 USC §1861, of the Policy of Jury Selection and Service Act of 1968, provides:

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

[Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." *Miller v. Municipal Court* (1943) 22 Cal.2d 818, 828.

If not construed together, to guarantee a right to a fair cross section in both 896 and 904.6 counties, the statutory scheme would have an inherent constitutional defect in that it would violate the equal protection clause of the 14th Amendment. In Supplemental Briefing, Plaintiff argued that differences in treatment from county to county do not necessarily violate equal protection, citing *People v. Superior Court (Skoblov)* (1988) 195 Cal.App.3d 1209, 1214 and *Bowens v. Superior Court* (1991) 1 Cal.4th 36. As a broad proposition, this statement is true, but it has no application in the instant case.

In *Bowens v. Superior Court*, the California Supreme Court held that an indicted defendant is no longer deemed denied the equal protection of the laws under article I, section 7 of the California Constitution, by virtue of the defendant's failure to receive a post indictment hearing. Its holding was based upon the enactment of article I, section 14.1 of the California Constitution, abrogating the Court's prior holding to the contrary. The Court emphasized that equal protection remains a viable right of a criminal defendant in California. "We reiterate, however, that the California Constitution continues to afford criminal defendants an independent source of protection from infringement of certain rights, including the right to equal protection and due process of the law. [Citations] These general rights of criminal defendants, however, are necessarily limited to the extent they are inconsistent with the express prohibition of post indictment preliminary hearings contained in article I, section 14.1." (*Id.* at 45, fn 4.) No such express constitutional limitation applies in the case at hand.

In *People v. Superior Court (Skoblov)* (1988) 195 Cal.App.3d 1209, also relied on by plaintiff, the court approved territorial distinctions within a state where they are rationally related to legitimate local factors, in the case of a non-fundamental right – diversion. The county in which Defendant Skoblov was charged with a misdemeanor petty theft did not have a diversion program, while other counties did. Section 1001.50 of the *Penal Code* left to the county board of supervisors the choice whether or not to adopt diversion programs. Equal protection did not

require territorial uniformity because territorial distinctions were rationally related to legitimate local factors, including "socioeconomic and demographic data, local law enforcement conditions, health factors, existing social services, and availability of resources." Here, on the other hand, the right to a grand jury drawn from a fair cross section is of uniform concern statewide, as expressed in the Legislative History set forth above, and any territorial distinction would be palpably arbitrary and discriminatory.

This court concludes that the provision of Title IV, Grand Jury Proceedings, of Part 2 of the *Penal Code*, read together, confer a right to a criminal grand jury drawn from a fair cross section, to be accomplished through compulsory service and random selection, as described in 904.6(e). Construing California's grand jury statutes together, and keeping in mind the statutory purpose, this court finds that California statutory law does provide Defendant with a right to a grand jury drawn from a fair cross section. Ventura is not required to empanel a 904.6 grand jury. However, if it opts to have a regular grand jury issue criminal indictments, it must provide a grand jury drawn from a fair cross section. Impossibility of obtaining a fair cross section willing to serve for a full year term does not excuse compliance, because the option of a short-term criminal grand jury is available under section 904.6.

Legal Standard – Fair Cross Section Guarantee

"The elements of a prima facie violation of a fair-cross section statute are generally the same as the elements of a Sixth Amendment violation." 1 *Beale, Grand Jury Law and Practice*, 3:11, p 3-45. A defendant raising a fair cross section challenge must make a prima facie showing that (1) the group alleged to be excluded is a 'distinctive group in the community'; (2) it's representation 'is not fair and reasonable in relation to the number of such persons in the community,' and (3) the underrepresentation in venires from which juries are drawn is 'due to systematic exclusion of the group in the jury selection process.'" *Duren v. Missouri* (1979) 439 U.S. 357, 364 and *People v Stansbury* (1993) 4 Cal.4th 1017, 1061.

There must be an "improper feature" to the process to satisfy the third prong: systematic exclusion. "Defendant cannot establish a prima facie case of systematic exclusion of Hispanics merely by presenting statistical evidence of underrepresentation in the jury pool, venire, or panel.

He must show that any underrepresentation "is the result of an improper feature of the jury-selection process." *People v. Howard* (1992) 1 Cal.4th 1132, 1160; *People v. Ayala* (2000) 23 Cal.4th 225, 256 (in which challenge to San Diego petit jury was unsuccessful where commissioner randomly summoned prospective jurors from voter registration and license/identification lists).

Once Defendant makes this prima facie showing, lack of discriminatory intent is irrelevant and will not rebut the prima facie showing of a fair cross section violation. “[I]n 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* (1979) 439 U.S. 357, 368 fn. 26.

Evidence Regarding Fair Cross Section Challenge

Systematic exclusion of women from jury panels violates the fair cross section requirement. In *Taylor v. Louisiana* (1975) 419 U.S. 522, 531, the court stated, “We are also persuaded that the fair-cross-section requirement is violated by the systematic exclusion of women, who in the judicial district involved here amounted to 53% of the citizens eligible for jury service. This conclusion necessarily entails the judgment that women are sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment's fair-cross-section requirement cannot be satisfied.”

As discussed above, Defendant has demonstrated that women are substantially under-represented in Ventura's grand jury pools as a result of systematic exclusion. (See Evidence Regarding Purposeful Discrimination.) The court is persuaded that the failure to employ compulsory service and random selection for criminal grand jurors as described in 904.6(e) is an improper feature. Defendant has therefore demonstrated a violation of his statutory right to a grand jury drawn from a fair cross section.

III. Remedy

As noted above, the fair cross section violation here was statutory, not constitutional. If there is a remedy, it is to be found in section 995 of the *Penal Code* and this motion will be construed as a Motion to Set Aside indictment pursuant to Penal Code section 995.

The Plaintiff, in its supplemental brief, states that it appears the correct method to attack the composition of a grand jury before trial is a motion to quash the indictment, rather than a motion to dismiss pursuant to section 995, citing *Vasquez v. Hillery* (1986) 474 U.S. 254 and *People v. Navarette* (1976) 54 Cal.App.3d 1064. It is apparent from these authorities that a motion to quash has been employed as a proper vehicle. It is not apparent that it is the exclusive procedural means available. In *Vasquez,* the Court held that Defendant's motion to quash indictment should have been granted by a California Superior Court because Defendant demonstrated intentional discrimination. Accordingly, the Court affirmed an order granting his federal petition for a writ of habeas corpus. The *Vasquez* Court did not disapprove or discuss alternative procedural vehicles that might be employed pretrial.

In *People v. Navarette, supra,* one male and one female defendant challenged their indictments by way of motion to quash on the ground that the 1973 Santa Clara grand jury was under-representative of women. The trial court found an absence of discriminatory purpose, but did find significant underrepresentation. On that basis, it granted the female's motion to quash but denied that of the male. On review, the First District vacated the order quashing the female's indictment, and also denied the male's petition for writ of prohibition, finding that "at the time of the selection of the grand jury at bench, the case law uniformly held that the grand jury selection process was subject to constitutional challenge only if the defendant sustained the burden of proving that there was a purposeful and intentional discrimination which resulted in a systematic exclusion…" (*Id.* at 1074.) The *Navarette* Court interpreted authorities decided after 1973 as imposing an affirmative duty to achieve a fair-cross section, irrespective of discriminatory intent, (*People v. Superior Court (Dean)* (1974) 38 Cal.App.3d 966, 971-972 and *Taylor v. Louisiana* (1975) 419 U.S. 522) but declined to apply these retroactively. It did not discuss the procedural

vehicle to be employed for a fair cross section attack, whether a motion to quash, a motion to dismiss under 995, or some combination thereof.

The superior court does have jurisdiction on a motion to set aside an indictment, pursuant to section 995, to determine whether the grand jury was properly selected, drawn, and impaneled. *Fitts v. Superior Court* (1935) 4 Cal.2d 514. In *Fitts*, a Defendant brought, “certain motions by which it was sought to quash and set aside the indictments” which were properly heard pretrial pursuant to 995. The Court noted that, “no challenge is made to the panel or to the individual members of the grand jury. Indeed, such a challenge is not permitted since the 1911 amendment of section 995 of the Penal Code,” but with regard to the method of selection and empanelment of the grand jury, “[t]here can be no dissent from the proposition that the respondent Superior Court, acting upon the motions presented to it by the petitioners in the causes therein pending against petitioners, had jurisdiction to determine, correctly or erroneously, on the evidence before it, whether the grand jury had been properly selected, drawn and impaneled.” *Fitts* at 519.

Section 995 of the *California Penal Code* provides that an indictment may be set aside, "Where it is not found, endorsed, and presented as prescribed in this code" or where the defendant has been indicted without probable cause. Section 997 provides that such an indictment may be set aside by the superior court, in an order that "directs that the case be resubmitted to the same or another grand jury, or that an information be filed by the district attorney…"

As noted, the superior court has jurisdiction on a motion to set aside an indictment to determine whether the grand jury was properly selected, drawn and impaneled. *Fitts v. Superior Court* (1935) 4 Cal.2d 514. However, "Mere irregularities, as distinguished from jurisdictional defects, occurring in the formation of a grand jury will not justify a court declaring an indictment a nullity. [Citations omitted.] The true distinction lies between the acts of a body having no semblance of authority to act, and of a body which, though not strictly regular in its organization, is, nevertheless, acting under a color of authority." *Fitts* at 521.

The question then arises whether a statutory fair cross section violation constitutes a mere irregularity, or whether it may support a motion to set aside. Cases interpreting the federal

statutory grand jury scheme (28 U.S.C. section 1861) have held that the indictment may be nullified where an irregularity in selection or empanelment interferes with the randomness or objectivity of the selection process. "[T]he selection of volunteers from the jury pool has been held to constitute a substantial violation because it introduces a nonrandom basis for selection and a subjective criterion: willingness to serve. State courts similarly focus on whether the deviation from the statutory procedures interfered with the randomness and objectivity of the selection process, or produced a biased or prejudiced grand jury." 1 *Beale, Grand Jury Law and Practice*, 3:10, p 3-41, citing *United States v. Kennedy* (5th Cir. 1977) 548 F.2d 1608.

Here we have a violation of California law, and the remedy should be found in California law. In California, statutory irregularity in impaneling a grand jury will only justify setting aside of the indictment if it results in an absence of "an essential jurisdictional fact." *Fitts v. Superior Court* (1935) 4 Cal.2d 514; *Bruner v. Superior Court* (1891) 92 Cal. 239.

In *Bruner*, the California Supreme Court issued a writ of prohibition to prohibit the San Francisco Superior Court from proceeding to trial on an indictment, because the grand jury was composed in the absence of an essential jurisdictional fact. The presiding judge appointed an "elisor" to gather a number of prospective jurors. There was no authority for such an appointment absent incapacity of the sheriff. The methodology utilized for gathering potential grand jurors was outside the then existing statutory framework for obtaining prospective grand jurors. The Supreme Court found this error to be jurisdictional in nature, depriving the grand jury of authority to act.

In *Fitts v. Superior Court*, the Court declined to issue a writ of prohibition where the grand jury *was lawfully drawn*, and the irregularities did not rise to the level of jurisdictional defects. As was explained in Justice Curtis' concurring opinion, "the members thereof were regularly summoned into court, after their names had been drawn from the grand jury box, where they had been deposited in pursuance of the law governing the selection and returning of grand jurors. The jury, therefore, was lawfully drawn and all members thereof were eligible to act, provided they met the qualifications fixed by law." *Id.* At 525 (citation omitted). The irregularities complained of involved the manner in which the judges interviewed the summoned

jurors, in private, asking about matters unrelated to their qualifications, including their business and fraternal connections and financial status. Assuming the claims that this was done in a biased manner and in violation of statute to be true, there was no jurisdictional defect. The grand jury was a de facto grand jury, and there was jurisdiction to proceed on the indictment.

In *People v. Byrd* (1954) 42 Cal.3d 200, a statutory violation was also insufficient to support nullification of the indictment where one of the grand jurors on the panel had previously served within a year and been discharged, rendering him incompetent to serve under section 199 of the *Code of Civil Procedure*. The irregularity did not amount to a jurisdictional defect depriving the respondent court of power to proceed with a trial on the indictment. *Id.* At 206.

Under California statutory law after 1991, a criminal grand jury that is not drawn from a fair cross section is jurisdictionally defective. The Legislature contemplated that an indictment issued by a jury not composed from a cross section pool would undermine a conviction thereon. The Senate Committee on Judiciary's report on AB 607, pursuant to which 904.6(e) was enacted, is instructive. "This bill would bifurcate the institution of the grand jury into two forms, civil and criminal…The civil grand jury would be authorized to inquire into county matters or return accusations of misconduct by public officials in the manner such juries functioned prior to Proposition 115 and pursuant to Hawkins; the criminal grand jury would be authorized to return indictments for public offenses pursuant to Proposition 115. Individuals serving in the capacity of criminal grand jurors, whether on an independent panel or a unified body bringing an indictment in a criminal case, would be required to meet standards specified for criminal grand jury service.… As noted supra, the existing selection process, involving judicial interview of volunteers for competence and subsequent selection by drawing from the 'grand jury box', tends to result in the empanelment of individuals who may not be especially representation [sic] of the composition of the community at large. Thus, the composition of the grand jury bringing an indictment may be challengeable upon appeal as to due process, failing to constitute a panel of 'peers.' To permit the creation of 'criminal' grand juries may afford the court an opportunity to fashion a panel more representative of the general population, immunizing it from future challenge and reducing the risk of successful appeal on a 'technicality.' "

The California Legislature has expressed its intent that random selection and compulsory service be the principal means to achieve selection from a fair cross section, as manifested in the first sentence of section 904.6(e). "It is the intent of the Legislature that all persons qualified for jury service shall have an equal opportunity to be considered for service as criminal grand jurors in the county in which they reside, and that they have an obligation to serve, when summoned for that purpose." This court finds that the use of volunteer jurors, rather than compulsory service, resulting in a grand jury pool that does not represent a fair cross section of the community, amounts to an absence of an essential jurisdictional fact.

In supplemental briefing, Plaintiff asserted that if a statutory violation of *Penal Code* section 904.6(e) is the basis for relief at all, it does not require automatic dismissal, but the defendant must first demonstrate prejudice. There is no question that a showing of prejudice is required for *reversal of a conviction* after trial based on a grand jury cross section violation; the violation must have "deprived the defendant of a fair trial or otherwise resulted in actual prejudice." *People v. Corona* (1989) 211 Cal.App.3d 529, 535.[14] Here, however, we are faced with a *pretrial* challenge. The Corona court specifically contemplated a pretrial cross-section challenge without need for a showing of prejudice. "Any right to relief without a showing of prejudice is limited to a pretrial challenge by extraordinary writ." *People v. Corona* at 535, citing *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519. In *Pompa-Ortiz* a trial court erred in denying a 995 motion to dismiss based on irregularities in the preliminary hearing that denied defendant a substantial right. Defendant failed to seek review pretrial. *After trial and conviction*, he was unable to obtain reversal based on the error, absent a showing of prejudice. "The presence of a jurisdictional defect which would entitle a defendant to a writ of prohibition prior to trial does not necessarily deprive a trial court of the legal power to try the case if prohibition is not sought." *Pompa-Ortiz* 27 Cal.3d 519, 529.

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[14] On appeal from a conviction, intentional discrimination in the selection of grand jurors renders the conviction reversible *per se*. *Vasquez v. Hillery* (1986) 474 U.S. 254, *Castaneda v. Partida*, (1977) 430 U.S. 482. On appeal from a conviction, an unintentional violation of the fair cross section requirement requires reversal only on a showing of prejudice. *People v. Corona, supra*.

People v. Brown (1999) 75 Cal.App.4th 916, was also decided upon review following conviction. In *Brown,* Defendant filed a motion to quash indictment on the basis that his grand jury did not reflect a fair cross section of the community. He subsequently brought a 995 motion to set aside the indictment on the same grounds. At a lengthy hearing, he did not establish a traditional fair cross section violation (San Francisco used a criminal grand jury and his pool was randomly selected by use of summons) but he did present evidence that selection criteria for the position of foreperson resulted in exclusion of minorities. The trial court denied the motions, and Defendant was convicted after bench trial, having waived jury. On review, the Court noted that discriminatory selection of grand jury forepersons may give rise to a due process claim. However, it affirmed the conviction finding substantial evidence to support the superior court's conclusion that the claim of discrimination was rebutted. Here, Defendant does not seek reversal of a conviction, and is making a pretrial challenge based on an underrepresentative grand jury pool.

Plaintiff contends that a statutory violation should not justify relief under section 995. In support, Plaintiff cites *Ex Parte Ruef* (1907) 150 Cal. 665, and *People v. Rojas* (1969) 2 Cal.App.3d 767, as examples of statutory violations regarding grand jury process that did not entitle defendants to relief. Neither of these cases involved selection violations that resulted in the absence of a jurisdictional fact. In *Ex Parte Ruef*, a juror was statutorily incompetent to serve, because he had served and been discharged within the year prior to empanelment. The particular statutory violation concerned an individual juror and could not support a motion to set aside the indictment because it was not one of the six specified statutory grounds for challenging an individual grand juror.[15] In the instant case, the challenge is not to an individual juror's

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[15] "The Penal Code enumerates the grounds upon which an indictment may be set aside. (Pen. Code, sec. 995.) One of these grounds is 'any ground which would have been good ground for challenge -- to any individual grand juror.' The Penal Code (sec. 896) provides for a challenge to an individual grand juror for six specified grounds *only*. *The particular incompetency here relied on is not included*. We think that the legislature, in declaring that persons who had been discharged as jurors within a year should not be competent, and at the same time denying to a defendant indicted by a grand jury including one or more such persons any remedy by way of motion or challenge, in effect provided that if the statutory rule prohibiting the service of such

competence. The challenge is to the manner in which the entire grand jury is gathered, selected and constituted.

In *People v. Rojas*, supra, the violation of a statute prohibiting the presence of non-testifying witnesses during grand jury interrogation (Penal Code §939) did not warrant reversal of a conviction, absent prejudice. Both *Ruef* and *Rojas* are examples of statutory irregularities that did not amount to a jurisdictional defect depriving the court of power to proceed with a trial on the indictment. Here, on the other hand, the use of volunteer jurors, rather than compulsory service, has resulted in a grand jury pool that does not represent a fair cross section of the community, and there is an absence of an essential jurisdictional fact.

As in *Bruner*, the statutory defect relates to the formation and composition of the grand jury. "The court has jurisdiction to impanel a grand jury, but it has jurisdiction to impanel it only in accordance with the provisions of law; and when it impanels it without the law; it is acting in excess of its jurisdiction, and such a body is not a grand jury, for it does not fill the test demanded by the section of the code…'Hence that which purports to be an indictment was no indictment, and the party charged could not be put upon trial to answer. It should have been quashed or set aside as a nullity.'" *Bruner,* at pgs. 263-264, citing *Doyle v. State* 17 Ohio, 224.

IV Request for Judicial Notice

In opposing the motion to dismiss, the People requested that the court take judicial notice of certain court filings. These documents contained statements made by the Jury Commissioner and others responding to inquires in another matter. "A trial court may properly take judicial notice of the records of any court of record of any state of the United States. (Evid. Code. §452, subd. … However, a court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file. A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."

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persons were not obeyed, the departure should not invalidate any indictment found." *Ex Parte*

Day v. Sharpe (1975) 50 Cal.App.3d 904, 914. In considering the Motion to Dismiss, the court has taken judicial notice of the existence of the documents as requested, but has not considered their contents for the truth asserted therein. The People were permitted full opportunity to present live testimony.

The court having reviewed the entire file and considered the testimony and evidence presented and the legal argument of counsel, and good cause appearing therefore,

THIS COURT FINDS THAT

This state grand jury was subject to the guarantees found in the due process and equal protection clauses of the 14th Amendment against intentional discrimination. Despite a finding of statistically significant underrepresentation of women on the grand jury, the court finds an absence of any discriminatory purpose in regard to such claims. The 14th Amendment challenge therefore fails.

The 6th Amendment guarantee that trial juries will be made up of a fair cross section does not apply to this state grand jury. California's statutory scheme does, however, require that any grand jury that has the power to issue criminal indictments must be drawn from a fair cross section of the community. Defendant's grand jury was underrepresentative of women, a distinctive group whose representation was not fair and reasonable in relation to the number of such persons in the community. This underrepresentation in the pool from which his jury was drawn was due to systematic exclusion of the group in the jury selection process. There was no statistically significant underrepresentation of Hispanics in the grand jury pool.

Although the exclusion of women was not purposeful, it was the result of an improper feature of the jury-selection process in that a volunteer jury, drawn from a pool that did not represent a fair cross section, was used to issue the indictment, without "meet[ing the] standards specified for criminal grand jury service" as intended by the legislature. There was, as a result,

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Ruef at 666. Emphasis in original.

an absence of an essential jurisdictional fact related to the composition of the grand jury and the indictment must be set aside.

THE COURT THEREFORE ORDERS THAT:

The People's Request for Judicial Notice is GRANTED as to the existence of the documents in the Ventura court's file, but DENIED as to the factual assertions contained therein.

The Motion of Vincent Sanchez to Dismiss Grand Jury Indictment is GRANTED. Pursuant to *Penal Code* Section 997 this court directs that the case either be resubmitted to a grand jury composed in compliance with the cross section requirement provisions of 904.6(e) of the *Penal Code*, or that an information be filed. As provided by *Penal Code* section 999, "An order to set aside an indictment or information, as provided in this chapter, is no bar to a future prosecution for the same offense."

In the companion case of *Schultz*, the Court issued a similar order in which it did not analyze or address the procedure to be followed by the District Attorney if it were to choose to file an information rather than to resubmit to a properly constituted grand jury. The *Schultz* order simply tracked the statutory language. Section 997 is unclear and susceptible to misinterpretation in that it makes no reference to filing of a complaint upon an order of resubmission. It provides that, "If the motion is granted, the court must order that the defendant, if in custody, be discharged … unless it directs that the case be resubmitted to the same or another grand jury, *or that an information be filed by the district attorney*…" (Emphasis supplied.) However, Article I, Section 14 of the *California Constitution* provides that, "Felonies shall be prosecuted as provided by law, either by indictment or, *after examination and commitment by a magistrate*, by information." (*Emphasis supplied*) *Penal Code* §806 provides further that "A proceeding for the examination before a magistrate of a person charged of a felony *must be commenced by written complaint* under oath subscribed by the complaint and filed with the magistrate." *(Emphasis supplied*.) Neither Schultz nor Sanchez have been previously examined or committed by magistrate. Section 997 permits an information to be filed by the district attorney upon the court's resubmission order, "…provided, that after such

order of resubmission the *defendant may be examined before a magistrate*, and discharged or committed by him, *as in other cases*, if before indictment or information filed he has not been examined and committed by a magistrate." Where an *information* is set aside on the ground that the defendant was not legally committed by a magistrate, the filing of another information by order of the court without second examination is void. *Ex parte Baker* (1891) 88 Cal. 84. Pursuant to Article I, Section 14 and *Penal Code* §806, the same appears to be true where an *indictment* is set aside. *Calif. Crim. Defense Practice* §50.13[1][b]. Because Defendant Sanchez was not previously examined and committed by a magistrate, the district attorney should, "as in other cases," proceed by filing a complaint, followed by preliminary examination, if it chooses to proceed by information.

Dated: March 11, 2002

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FRANK J. OCHOA
Judge of the Superior Court