Order

(Denying Motion Challenging Jury pool and Seeking Jury Records)

Hon. Judge Robert Selander

(State of Oregon v. Leroy Bussey,
Clackamas County Circuit Court, Case No. CR01-1502)

(November 3, 2003)

ATTACHMENT TO "Order allowing receipt and denying motion to stay"
State v. Rogers, No. 88-055 to -60

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

STATE OF OREGON, Plaintiff, v. LEROY BUSSEY, Defendant.	)	No. CR01-1502 ORDER

THIS MATTER came before the Court on Motion of the Defendant Challenging Jury pool and seeking Jury Records. The Defendant appeared by and through Laura Graser, of Attorney for Defendant, and Jenny Cooke, trial attorney for Defendant, and the State appeared by and through Chief Deputy District Attorney Greg Horner and Deputy District Attorney John Wentworth. The Defendant challenges both the petit jury pool and the grand jury pool as not comprising a fair cross section of the community, thereby violating ORS 10.030, Art I, sec. 11 of the Oregon Constitution and the Sixth Amendment of the U.S. Constitution.

Defendant does not attack the selection process of jurors from the state master jury list, nor does he attack the initial summons of jurors in Clackamas County. Rather, Defendant suggests that Clackamas County:

1. fails to compel attendance of jurors who have not responded to the jury summons; and/or
2. excuses jurors on grounds other than a strictly worded court policy; and/or
3. both.

No evidence was presented on the practices of the Clackamas County Jury Coordinator or the policies of the county.

The facts are essentially not in dispute. Richard F. Rankin, a demographer, did a statistical comparison between the most current census data ("eligible population") and a survey of 1004 persons who reported for jury service ("assembled group"). In comparing the census data with the jury pool survey, Mr. Rankin did not find a statistically significant difference in the following groups:

1. females;
2. persons under 60;
3. not Hispanic;
4. born in US, Puerto Rico or US Island Areas;
5. white;
6. not black or African American;
7. not American Indian or Alaska Native; and
8. not Asian.

Rankin did find a statistically significant difference in comparing census data and the jury pool in the following groups (the statistical difference listed in parenthesis):

1. persons 40 or older, (13%);
2. having no sensory of physical disability, (5%);
3. married, (9%);
4. high school diploma or higher; (11%);
5. no associate, bachelors or graduate degree; (-11%);
6. employed; (5%);
7. management, professional or related occupations; (18%);
8. incomes of $25,000 or greater; (-8%); and
9. incomes of $40,000 or greater, (12%).

Defendant argues that the Clackamas County jury pools are statutorily and constitutionally invalid because the assembled jurors do not represent a fair cross section of the community. According to the defendant, jurors are "more likely to be: aged 40 or older, married, and not have a sensory or physical disability. They are more likely to be employed, and if so, they are more likely to be in a 'management, professional or related' occupation. They are more likely to have a high school (or higher) degree, and an associates (or higher) degree." Defendant further argues "their income is disproportionately over $25,000 a year, and over $40,000 compared to the eligible population."

DISCUSSION

In determining whether or not there was a statistically significant difference, Rankin testified that he arranged groups in a manner in which to find a statistically significant difference, if one existed. This practice is apparent in many of the statistical groupings. For example, there is not a statistically

significant difference in comparing persons aged 18 to 29 against other groups, but there is when persons aged 18 to 29 are grouped with persons aged 30 to 39. As another example, no statistically significant difference is found between persons employed and unemployed, but one is found when "not in labor force" is grouped with the unemployed. Even the Management group is expanded to include "farmers," an assemblage one might not typically define as "management." While this procedure is not improper and does not render invalid the accuracy of the figures, it does cause the Court to question the application of the statistics.

STATUTORY CHALLENGE

ORS 10.030 provides:

> "Except as otherwise specifically provided by statute, **the opportunity for jury service shall not be denied or limited** on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state." [Emphasis added.]

Defendant argues that "this is the law that sets out cognizable classes." The Court however, rejects any argument of the defendant that this statute creates "cognizable classes." By its' very wording, this statute sets out the rights of jurors. ORS 10.030 simply states **factors** which cannot be used to deny or limit jury service against a "cognizable class." [Emphasis added.]

Defendant claims that litigants may raise the rights of prospective jurors. E.g., Powers v. Ohio, 449 U.S. 400, 111 S. Ct, 1364 (1991). The right to be

raised is that "opportunity for jury service shall not be denied or limited." There is no claim opportunity for jury service is denied. Rather, the defendant seeks to expand the statute to create "distinctive" groups that have constitutional protections. That is not the intent or purpose of ORS 10.030.

CONSTITUTIONAL CHALLENGE

Art I, sec. 11 of the Oregon Constitution provides in part: "[i]n all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed . . . ." Oregon courts have been instructed to address issues of state constitutional law before resolving issues of federal constitutional law. *See State v. Cookman, 324 Or. 19, 25, 920 p.2d 1086 (1996).* For purposes of this case, I am going to assume that the state and federal guarantees are the same. *See State v. Rogers, 313 Or. 356, 363, 836 P.2d 1308 (1992).*

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. Amend. VI.

The prima facie case that "[t]he defendant must show is (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in

the jury-selection process." Duren v. Missouri, 439 US 357, 358, 99 S Ct 644, 58 L Ed 2d 579 (1979).

No precise definition has been presented for the term "distinctive." In Hernandez v. Texas, 347 U.S. 475, 74 S. Ct. 667, 98 L.Ed. 866 (1954) the Court explained that throughout history, groups defined by race and color have required the aid of the court in "securing equal treatment," but because community prejudices are not static, other groups may need the same protection. More recently, the U.S. Supreme Court reiterated its' unwillingness to define the term "distinctive group", but in doing so, stated

> "[t]hat the concept of "distinctiveness must be linked to the purposes of the fair-cross section requirement. *In Taylor v. Louisiana*, 419 U.S. 522, 538, S. Ct. 692; 42 L. Ed. 2d 690 (1975)] we identified those purposes as (1) '[guarding] against the exercise of arbitrary power' and ensuring that the 'commonsense judgment of the community' will act as a 'hedge against the overzealous or mistaken prosecutor,' (2) preserving 'public confidence in the fairness of the criminal justice system,' and (3) implementing our belief that 'sharing in the administration of justice is a phase of civic responsibility.'"

Lockhart v. Mcree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986)

African-Americans and women have been identified as "distinctive" groups by the Courts and in need of the aid of the Court in securing equal treatment for historically valid reasons. Defendant desires to create other "distinctive" groups based on census data and statistical comparisons. However, not every factor that is the subject of the census creates or identifies a "distinctive" group under the law.

> "Distinctive" means "[t]here must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which . . . cannot be adequately represented if the group is excluded from the jury selection process. . . . The group must have a community of interest which cannot be adequately protected by the rest of the populace." United States v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *affirmed*, 468 F. 2d 1245 (2d Cir.), *cert denied* 410 U.S. 937, 93 S. Ct. 1397, 35 L. Ed. 2d 602 (1973).

Defendant has failed to establish a "common thread" in any of the groups identified as having a statistically significant difference.

Finally, the Defendant invites the Court to establish a standard based solely on statistical disparities. This Court is unaware of any precedence for setting a statistical standard and expressly rejects the invitation of the defendant for the reasons stated in the preceding paragraph.

In deciding Defendant's motions, I have applied these legal principles:

1. For a group to be accepted as a distinctive or cognizable group it must be distinct from the rest of society in an

objectively discernible way. United States v. Potter, 552 F.2d 901, (1977).

2. An accused is entitled to a fair cross-section of the community when the names are put in the pool from which the jury panels are drawn. Lockhart v. Mcree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

3. Systematic does not mean intentional.

4. "The States are free to grant exemptions from jury service to individuals in case of special hardship or incapacity. . . ." Rawlings v. Georgia, 201 U.S. 638 (1906) and "to prescribe relevant qualifications for their jurors and to provide reasonable exemptions. . . " Taylor v. Louisiana, 419 U.S. 522, 538; 95 S. Ct. 692; L. Ed. 2d 690 (1975).

CONCLUSIONS OF LAW

1. "Statistically significant" does not mean that a group is "distinctive" and/or "cognizable."

2. The Defendant has not identified a "distinctive" and/or "cognizable group." No group identified by the Defendant is particularly homogeneous, purports to share a similarity of attitude, or shares interests and ideas, which cannot be represented by others.

3. The Defendant has failed to establish a prima facie case that the petit and grand jury pools do not constitute a fair cross section of the community.

4. The Defendant has failed to show that under representation is due to systematic exclusion of the group in the jury-selection process, The Defendant has failed to establish a prima facie case. The Motion of the Defendant to Stay the Proceedings is denied.

DATED this 3 day of November, 2003.

ROBERT R. SELANDER
Presiding Circuit Judge