STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STAY THE PROCEEDINGS

**(State of Oregon v. Leroy Jay Bussey,
Clackamas County Circuit Court,
Case No. CR 01-1502)**

(October 23, 2005)

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

STATE OF OREGON, Plaintiff, -vs- LEROY JAY BUSSEY, Defendant.	No. 01-1502 STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STAY THE PROCEEDINGS

SUMMARY

The State urges the court to deny the defendant's Motion to Stay Proceedings. It is anticipated that the defendant will rely on Sixth Amendment fair-cross section claims and a perceived violation of ORS 10.030 which prohibits discrimination in the opportunity for jury service. Neither of these claims is supported by the applicable law or the data compiled through the jury questionnaire.

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SIXTH AMENDMENT CLAIM

The Sixth Amendment to the United States Constitution provides a criminal defendant the right to a jury selected from a fair cross section of the community. Duren v. Missouri, 439 US 357, 358, 99 S Ct 664, 58 L Ed 2d 579 (1979). The elements of a prima facie case are "The defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the

Legal

group in the jury-selection process." Duren 439 US at 364. The defendant can not adequately meet the requirements of the three pronged test. The groups which the defendant claims are underrepresented are not distinctive groups, there is not a showing that any genuinely distinctive group is underrepresented, and there is not systematic exclusion of any genuinely distinctive group.

DISTINCTIVE GROUPS

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 and significant way. United States v. Potter, 552 F.2d 901 (1977) "There 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." Potter at 904 (rejects 18-34 age as cognizable group, rejects high school education or less as cognizable group). Also see United States v. Kleifgren, 557 F.2d 1293 (1977) (non-high school graduates, non-working people, young people not cognizable classes).

The groups that defendant claims are underrepresented are not cognizable groups. The way in which people have been grouped by the defendant does not reflect a similarity of attitude that is not otherwise adequately represented. What possible "common thread" exists in those whose age ranges from 18 to 39 years of age? Where is the "similarity of attitude" for those grouped into the category of "all other occupations"? Rather than reflecting truly distinctive groups, the defendant seeks to bunch people together into purely arbitrary categories that have meaning only for statisticians and demographers. These groups reflect diverse attitudes and characteristics that defy classification.

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Legal

The defendant's inability to show that any of its arbitrary bunchings reflect actual distinctive groups that deserve constitutional attention should end the inquiry of his Sixth Amendment claim. However, even if the court finds there to be a cognizable group or groups, the defendant's claim fails on other grounds.

REPRESENTATION OF GROUPS ARE FAIR AND REASONABLE

The second prong of the test requires the defendant to show that the percentage of persons in the cognizable group in the jury pool is significantly lower than the percentage eligible to serve on juries. United States v. Artero , 121 F.3d 1256 (1997). The focus of analysis is on the representativeness of the pool of available jurors as compared to the numbers of the eligible group in the community. It does not require that juries in fact reflect the composition of the community at large. Lockhart v. Mcree, 476 US 162, 106 S Ct 1758, 90 L Ed 2d 137 (1986).

The statistical data upon which the defendant relies is based upon information of those jurors that are actually available to serve. The Sixth Amendment does not impose a fair-cross section requirement on juries that ultimately serve. The issue under Duren is whether they are systematically excluded from being a part of the master jury list.

Not all degrees of under-representation of a cognizable group in the jury pool constitute a fair-cross section violation. Any disparity must be significant. Artero at 1262. The statistics upon which the defendant relies is not significant enough to prove a material violation. First of all the census population to which the survey is compared does not actually reflect the population of eligible jurors. ORS 10.030 (3)(a) prohibits a person from jury service if they have been convicted of a felony within the prior 15 years. It does not appear that the census data has excluded this group from its population. This results in percentage

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Legal

differences that over state the actual difference between the assembled jurors and the eligible jurors.

Even when adjusting for actual disparity between the assembled group and the eligible group the defendant can not show what is necessary to actually establish a significant underrepresentation. It is anticipated that the defendant will rely upon a standard that is based upon a "statistically significant" difference. This is a standard that may be meaningful to a statistician, but should have no importance to the court. The State is unaware of any legal support for the proposition that a constitutionally significant standard is determined by statistical analysis. Certainly statistical data can be used by the court to understand the facts upon which a party bases its claim. But to accept that a constitutional standard is to be determined by a statistician is to abrogate the court's responsibility. The court can look to Sixth Amendment case law for guidance in this area. United States v. Suttiswad , 696 F.2d 645 (1983) (7.7% difference deemed unsubstantial and constitutional). However, the State agrees with the defense in that there can be no magic number that defines a significant disparity for Sixth Amendment purposes. It is still the defendant's responsibility to establish a constitutionally significant disparity and he is unable to do so in this case.

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THERE IS NO SHOWING OF SYSTEMATIC EXCLUSION

Even assuming that the defendant has shown that a cognizable group is significantly under-represented, the defendant is unable to show how any under-representation is attributable to the jury-selection process itself. Unless the under-representation is due to a systematic exclusion of a cognizable group, his Sixth Amendment claim fails. Illustrative of this point is the state statue found in Duren that expressly exempted women from jury service on request. The statute further presumed that a request for an exemption from jury service

Legal

had been made when a woman did not appear in response to a jury summons. In Taylor v. Louisiana, 419 US 533, 95 S Ct 692, 42 L Ed 2d 90 (1975) the jury selection process prohibited a woman from serving on a jury unless she filed a written declaration of her willingness to do so. The type of systematic exclusion found in these cases simply does not exist in the jury selection process in Clackamas County. The defendant has provided no evidence that shows a systematic exclusion of any of its arbitrarily determined groups. There is simply no showing that the claims of underrepresentation are caused by the system used to select jurors in Clackamas county. Any claim of systematic exclusion is even further weakened by the fact that jurors that appeared for jury service are ultimately determined by a self-selection process. The single most important factor in a determining if a juror appears for jury service is the jurors own individual choice. This is a fundamentally different circumstance from an examination of the pool of jurors that are complied from the master jury list.

JURY SELECTION PROCESS COMPLIES WITH OREGON STATUTE

The defendant also raises a claim that the jury selection process violates ORS 10.030(1) which states:

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

There is no case law that helps to interpret this statute. However, a plain reading reflects the legislature's intent that the key component to the statute is to protect a juror's opportunity to serve. To protect a juror's opportunity to serve is to preserve the possibility of service. It does not require a showing that various groups actually serve in proportionally

Clackamas County District Attorney
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Legal

equal percentages. Defendant's reliance on perceived discrepancies between census data and jurors who chose to appear does not show that any cognizable group was denied an opportunity to serve. There is absolutely no evidence that any group of jurors' opportunity to serve was denied or limited. At best, the defendant's statistical data shows that jurors with certain characteristics chose not to serve at a rate different from their percentage of the total population of eligible jurors.

It is also important to examine the census data and how it is applied to this statute. As previously noted, it appears that no consideration has been given to the inclusion of convicted felons in the census data. Beyond that problem, the statute specifically recognizes that the opportunity for jury service can be limited by statute. This is important because Oregon statutes do allow for a limitation of jury service based upon the compilation of the master jury list. ORS 10.215 states that "The State Court Administrator shall cause to be prepared at least once each year a master jury list containing names selected at random from the source lists. The source lists are the most recent list of electors of the county, the records furnished by the Department of Transportation as provided in ORS 802.260 (2) and any other sources approved by the Chief Justice of the Supreme Court that will furnish a fair cross section of the citizens of the county." This statutorily authorized limitation results in a group that is generally based upon those who vote or have drivers licenses. It is against this group that the defendant's survey data should be compared. Because the defendant's survey data is compared to the census data, the difference for certain groups is likely to be over stated. For example, if the group of people who did not complete high school is less likely to vote or have drivers license, then the defendant's data will over-state the disparity between those

Clackamas County District Attorney
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Legal

jurors who chose to appear and those who are on the master jury list. This limitation is authorized by law and thus accepted by ORS 10.030.

Finally, this statute does not create new cognizable groups. Had the legislature chosen to create new cognizable groups, it could have easily articulated its intent to do so. The statute does list factors which may not be used to discriminate against recognized cognizable groups. That is different from creating new cognizable groups.

In summary, the defendant has not shown any Sixth Amendment fair-cross section violation. Nor is there a showing that ORS 10.030 has been violated. The jurors in Clackamas County are selected in a fair and impartial way. There is no evidence that the jury selection process creates any unreasonable underrepresentation of cognizable groups. The process does nothing to discriminate against any legally recognized group. It is important to note that this case has now been delayed for over a year. Other important cases have been delayed, awaiting a ruling on this issue. The defendant's own statistics confirm that the jury selection process in Clackamas County has not resulted in discrimination against any cognizable group. This interminable delay has not been without cost. Families of homicide victims have been told repeatedly that their case has been delayed again and again. Witnesses have been put on hold. Defendants have not been able to have their day in court. It is way past time for this issue to been resolved by denying the defendants request for a stay. The state's position can best be stated by quoting the language of the court in Artero at 1262 in affirming the lower courts denial of the defendants Sixth Amendment claim:

> The central inquiry in a criminal case ought to be whether the defendant committed the crime charged. By diverting the inquiry to another subject, "the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." Stone v.

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Legal

Powell, 428 US 465, 489-90, 96 S. Ct 3037, 3050, 49 L.Ed.2d 1067 (1976). There is a cost to looking for defects in the criminal justice system, during proceedings initiated to determine whether a particular individual committed a particular crime. The cost of looking is not only time and money for the search, but corrosion of public respect for a judicial system that loses its focus on what Stone calls "the ultimate question."

DATED this 23 day of October, 2003.

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