MEMORANDUMOF LAW REGARDING JURY POOL

**(State of Oregon v. Dayton Leroy Rogers,
Clackamas County Circuit Court,
Case No. CR88-055 & 88-060)**

(October 7, 2005)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

STATE OF OREGON, Plaintiff, vs. DAYTON LEROY ROGERS, Defendant.	No. 88-055 to -060 MEMORANDUM OF LAW REGARDING JURY POOL

The defendant claims that the Clackamas County jury pool is not a fair cross section of the population. He challenges both the grand jury and the petit jury pool, although this memorandum focuses on the study of the 2003 pool and the petit jury. The same analysis applies to the composition of the grand jury.

The defendant asks that his trial be stayed until the County provides him with a jury pool which is drawn from a fair cross section. This memorandum is in support of that motion.

This case (with a few others) was part of the hearings in *State v. Leroy Bussey*, Clackamas County No CR 01-1502. The parties agreed that *Bussey* would be the lead case, and the others would follow. 5/23/03 Tr at 2-3. All the other defendants have settled, and the *Rogers* case is the only one remaining that was part of that group of cases. In a separate motion, we have asked that the *Bussey* record formally be made part of the record in this case. We have provided three exhibits, in three bound volumes marked as exhibits 1, 2 and 3. Two volumes are transcripts of the testimony of expert demographer Richard Rankin, from May 23 and October 23, 2003, before Hon. Robert R. Selander. A third volume contains documents received during those hearings and Mr. Rankin's

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August 2005 report. In addition, the third volume includes material from Tillamook County, *State v. Edward Paul Morris*, No. 02-1283. The material from Tillamook County is substantially similar to the material from this county, and thus corroborates it. The relationship between the data from the two counties is discussed in Richard Rankin's report, a part of exhibit 3.

The facts

The facts show that the members of Clackamas County jury pool are significantly 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. Their income is disproportionately over $25,000 a year, and over $40,000.

The facts are presented in the three exhibits to this memorandum, which is offered as substantive evidence.

Legal argument

1. What does a criminal defendant have a right to have?

Answer: A jury that is a *representative sample* of the *eligible population.*

The source of this right is the federal Sixth Amendment (the "right to a ...public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."). This federal right applies to the states.

Moreover, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." The fair-cross-section requirement is fundamental to the jury trial guarantee. Taylor v. Louisiana, 419 US 522, 528-29, 95 SCt. 692 (1975).

In Duren v. Missouri, 439 US 357, 364, 99 SCt. 664 (1979), the Court established

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a three-part test under the Sixth Amendment for discerning whether a particular panel violates the fair cross-section requirement. 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 the 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 the systematic exclusion of the group in the jury selection process.

"Systematic" does not mean "intentional." For example, in Louisiana before Taylor women could serve on juries only if they filed a declaration stating they wished to do so. As a consequence, there were not many women on juries. This violated the Sixth Amendment. Mr. Taylor, a man, had standing to complain. In Duren women (but not men) were automatically exempted from jury duty upon request. The discrimination arose from the system, although it was not done with discriminatory intent.

Challenges to the jury pool occur regularly, although not frequently, in federal court. A federal statute requires that prospective jurors provide their own demographic information. 28 U.S.C. § 1861 *et seq.* In a case decided less than two months ago, the Ninth Circuit held that it was reversible error to deny public funds for an indigent defendant to hire an expert to analyze the data of the jury pool in the Eastern District of California. United States v. Rodriquez-Lara, 421 F3d 932 (9th Cir 2005).

In a case decided last month, a federal district judge in Boston ordered immediate significant changes to the jury pool to make it more accurately reflect a cross-section of the community. United States v. Green, et al., CR 02-10301-NG (9/2/05), *available at:* http://pacer.mad.uscourts.gov/dc/opinions/gertner/pdf/greenjuryvenire.pdf (last visited

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10/6/05).

The Sixth Amendment test is in contrast to that under the Fourteenth Amendment, where intentional discrimination must be shown. This challenge is under the Sixth Amendment; the defendant alleges systemic, but not intentional, discrimination.

The defendant also claims the same right under the Oregon constitutional guarantee of the right to a trial by "an impartial jury in the county in which the offense shall have been committed." Art I, § 11. The arguments we make are under both constitutions. *See e.g.*, State v. Ferman-Velasco, 333 Or 422, 441, 41 P3d 404 (2002), State v. Compton, 333 Or 274, 287, 39 P3d 833 (2002) (same analysis under both constitutions).

2. What is the "eligible population"?

The eligible population is the residents of the county who are over 18 and citizens.

As a practical matter, determining the dimensions of this population involves a sophisticated analysis of the census. On April 1, 2000, the census took a "snapshot" and is releasing the data as they process it. The census breaks the data down into "census blocks" which are literal physical blocks in a neighborhood. The census reports information about small groups, but it does a good job of "masking" the actual identity of the respondents. (In an extreme example, if a block contains one Black with an income over $1,000,000, the census will suppress information so you cannot learn more.)

A demographer works with the census data to describe the "population of interest"-- everybody eligible to be a juror in the county. The census measures "US citizenship," and "over 18" and "resident of county." There is considerable expertise involved in estimating the population that is all three. Demographers call this a "cross-

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tabulation." That is what has been done in this case. The process was presented in the October 23, 2003, *Bussey* hearing.

We note here that for eligibility to sit on a criminal trial, the court must inquire about selected prior convictions, under ORS 10.030(3)(D) and the new Oregon Constitutional provision, Article I, section 45 which sets out the felon (past 15 years) and misdemeanor (involving violence or dishonesty in past 5 years) disabilities for criminal trials and grand juries.)[1] This factor is not measured by the census, so it is not factored in that this point by the demographer. In any event, these jurors can sit on civil juries, so they should be summoned and appear as part of the assembled group.

3. What characteristics do we measure in the "eligible population"? What's a "cognizable class"?

Another way to put this questions is: what is a "distinctive group" such that it matters that members are excluded? *See, e.g.,* Duren v. Missouri, 439 US 357, 364 (1979):

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be

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[1] ORS 10.030 (3)(D) provides a prospective juror cannot sit if the prospective juror: "Has had rights and privileges withdrawn and not restored under ORS 137.281." That statute addresses the withdrawal of civil rights of a person in prison.

Article I, section 45 (1) provides that:

> In all grand juries and in all prosecutions for crimes tried to a jury, the jury shall be composed of persons who have not been convicted: (a) Of a felony or served a felony sentence within the 15 years immediately preceding the date the persons are required to report for jury duty; or (b) Of a misdemeanor involving violence or dishonesty or served a sentence for a misdemeanor involving violence or dishonesty within the five years immediately preceding the date the persons are required to report for jury duty.

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> excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Unfortunately, case law is not much help in determining what is a "distinctive group" (or "cognizable class") in this context. Obviously, race and gender are two classes. The Ninth Circuit has rejected the theory that "non-whites" form a distinctive group. United States v. Luong, 255 F Supp 2d 1123, 1127 (E.D. Calif. 2003) (this case includes a review of current Ninth Circuit law.) Some state courts find race plus gender to be a distinctive group, and some do not. Commonwealth v. Jordan, 439 Mass 47 (2003) (surveying states). In 1978 one Ninth Circuit opinion characterized the state of the law as being in "disarray." United States v. Brady, 579 F2d 1121, 1131 (9th Cir 1978). There has been little clarity since.

The Clackamas County study showed that the balance of men and women was not disproportionate. From our data we have learned that in a fairly pure-white county such a Clackamas (94% white; 1% Black/African-American, 2% Asian, 1% Native American, 2% "other"), race and "Hispanicness" (4%) are too small to be a factor. (If, for example, if *nobody* had identified him/herself as "Hispanic/Latino" in the questionnaire, that would have been noteworthy, but 2% did, so the statistician reported it as not significant.)

Thus, race and gender--the topics of the case law we have found-- are not a factor. To put it another way, we have been unable to find any case law to assist in determining in a meaningful way the "distinctive groups" for this county.

What is a *legal* "cognizable" class for these purposes? Where do we look? General Equal Protection cases tell us about race, gender, poverty, and so on, but in

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contexts very different from the jury issue.

The Oregon legislature has spoken on this topic, although not in a way that is precisely on point. ORS 10.030 articulates the rights of jurors (not litigants). However, there is ample case law holding that litigants may raise the rights of prospective jurors (because the prospective jurors who are not called cannot articulate their own rights). *See e.g.*, Powers v. Ohio, 449 US 400, 111 SCt 1364 (1991).

As this is the only source of law we could find, and it is directly on the subject of the composition of a jury, this is the law that sets out the cognizable classes. It is not the statute that directly gives the defendant his right to an accurate jury pool: it is the Sixth Amendment (and Article I, section 11). The statute fleshes out the constitutional right.

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 supplied.]

For the phrase "any other factor" we added three categories that the census measures, (1) **educational attainment,** (2) **marital status**, (3) "**Hispanic**" (an issue in an earlier opinion in this case, State v. Rogers, 334 Or 633 (2002).) These three questions are also asked on the federal questionnaire given to all prospective jurors in District Courts (which was an exhibit in the previous hearing.)

We added **physical/vision/hearing impairment** because ORS 10.030(4) includes it.

> (4) A person who is blind, hearing or speech impaired or physically disabled shall not be ineligible to act as a juror or be excluded from a jury list or jury service on the basis of blindness, hearing or speech impairment or physical disability alone.

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We note that the federal statute (28 USC §1862) refers to race, color, religion, sex, national origin, and economic status.

In sum, ORS 10.030 sets out what is a "cognizable class" for these purposes.

4. Compared to what?

Answer: the sample of interest is the "assembled group."

The defendant does not have a right to a fair cross section of the population in the box after voir dire. The jury pool challenge here does not involve any voir dire issues. The focus is on the representativeness of the pool of available jurors as compared to the pool of eligible jurors in the county. Lockhart v. McCree, 476 US 162, 173 (1986).[2]

What is the "pool of available jurors" in Oregon? It is the people who show up for jury service. No other argument makes any sense.[3]

In other words, under the Oregon system, the defendant has a right to a fair cross section of the people who show up in the jury assembly room, available for voir dire. We have deemed this the "assembled group." It is not the people that show up on a particular

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[2] Holding that "death qualification" does not violate the fair cross section requirement, even though as a result distinctive groups are reduced.

[3] The "master list" for example, is simply too remote to the actual people who are "available." For example, in 2002, Washington County's master jury list contained 85,000 names. The county used the list from January-December. By September 2002, the county had used 30,000 names. (Rainbolt testimony, State v. Spencer hearing, C00-0928CR). Similarly, the list of people who are summoned for jury duty (the "term list") is closer, but still quite remote. For example, in 2002 in Washington County, the jury coordinator testified there was little or no follow-up of prospective jurors who did not show up after a summons was mailed.. She sends out 250-350 summonses a week, and 100-140 people simply do not show up. State v Spencer, at 138-39.

More details are in Mr. Rankin's report, part of exhibit 3.

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day, but the category of people.

5. The Clackamas County study

If a sufficient number of members of the "assembled group" are surveyed, we can compare that to the eligible population. We match cognizable categories. If the two populations do not match, it shows that cognizable groups are being excluded by the jury-summoning process.

How did we determine who was in a cognizable group? We used the same methodology as the census does, as the census is the "gold standard" for a lot of research. What do they do? Answer: they ask, and take the answer. (This is known as "self-reporting"). For example, an "Hispanic" is a person who answers "yes" to the question, "Are you Hispanic?" Period.[4] And the same is true of "race." The census goes through the same process for other demographic categories.

We completed a study of the prospective jurors in this county. It is described in detail in the exhibits. As noted above, we did a similar study in Tillamook County which corroborates the information from the study in this county. The Tillamook County study is described in exhibit 3.

6. How different does it have to be?

There is no articulated legal standard in Oregon law, and other case law involved studies that are much different from the one just completed.

The match (between the "eligible population" and the "assembled group") obviously does not have to be perfect. What discrepancy is significant, and what is

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[4] Some investigators have relied on surname analysis, but this is an invalid technique. *See e.g.*, Commonwealth v. Arriaga, 438 Mass 556, 781 NE2d 1253 (2003).

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insignificant?

A look at Ninth Circuit law is in order.

In the earlier *Rogers* litigation, the state consistently cited United States v. Suttiswad, 696 F2d 645, 648 (9th Cir 1982) for the proposition that a disparity of 7.7% is not legally significant. In that case, the issue was denial of funds for an expert. The defendant claimed a 2.8% under- representation of Blacks, 7.7% for Hispanics, and 4.7 for Asians. Based on that showing, it was proper for the trial court to deny funds for more research.

In United States v. Esquivel, 88 F3d 722, 726, *cert denied* 519 US 985 (1996) the federal defendant compared the number of Hispanics in the district in the "master jury wheel" in 1993 (9.7%) with the census count of Hispanics in the district in 1990 (22.3%). The study did not consider citizenship, a glaring flaw. On appeal the court took judicial notice of census data that Hispanics citizens over 18 in the district were only 14.6%. Thus the disparity was 4.9%, which was not legally significant.

Judge Boochever's sparse concurring/dissenting opinion cited Suttiswad for the proposition that 7.7% is not enough for a challenge, and cited an old US Supreme Court case, (Jones v. Georgia, 389 US 24, 25 (1967)[5], to suggest 14.7% would be enough. A recent case found 15.4 percent to be enough for a challenge. Randolph v. California, 380 F3d 1133 (9th Cir 2004).

We note that the federal cases compare the people in the jury pool with the *entire* population. The sample we used was a demographer's professional estimation of the

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[5] Holding that the burden is on the state to explain disparity, and it could not rely on the evidentiary presumption. It appears the petitioner presented a prima facie case.

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eligible population. This is a much more rigorous comparison than using the entire population. That is, the federal comparisons are more likely to exaggerate the misrepresentation. A 9% difference (income under $25,000) for example in our findings is more significant as it is 9% of the eligible people in that bracket rather than simply people in general in that bracket. This factor would be particularly important when considering Hispanics, who are more likely to be non-citizens than other major groups.

Also, the federal cases only look at race and gender, and we are claiming more categories are significant. Finally, the federal cases are not based on studies the courts found to be credible. For example, in Luong, *supra*, the court noted that the "reliability of [the defense expert's] 'advocacy research' has been called into question by the Ninth Circuit." 255 FSupp2d at 1129.

The federal cases are too factually distinct to be helpful for our analysis here.

There are a few state cases that we have found, but none are helpful because they are factually distinct. For example, in Commonwealth v. Arriaga, 438 Mass 556, 781 NE2d 1253 (2003) the court determined that the study done was not statistically significant, because a very small sample (the prospective jurors on a particular day) was studied.

There has to be a standard, but no case gives a precise number with any basis. This court has to determine what the standard is. Rather than pull a number out of the air, the court should look outside the decided cases, and consider the standards used by demographers and statisticians. If scientists think the distinction is significant, than it is. The legal standard should be the same as the universally accepted research standard.

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Conclusion

The data convincingly show that the people who appear for jury service are a group that is significantly different than the eligible population.

Based on that standard, the defendant's motion to stay his should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served the within proposed Memorandum on opposing counsel October 7, 2005. I previously served him with the three exhibits on September 24, 2005.

Greg Horner
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I also will send a courtesy copy of this memorandum and the three exhibits to:

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