How Much is Too Much Discrimination in the Jury Pool?

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September, 2009

CRIMINAL JUSTICE

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Introduction

On September 30, 2009, the United States Supreme Court granted *certiorari* in a case to the Court of Appeals for the Sixth Circuit which raised the question of how the courts are to determine when there is a statistical disparity in the composition of the jury pool. In other words, how many people belonging to a distinctive group must be systematically excluded from jury service before the court will take action.

The grant of *certiorari* has nothing to do with the Court somehow coddling criminals or playing favoritism to one race or another. It is a fundamental right of every jury eligible citizen to participate in the jury system and it is the right of criminal defendants to have a jury pool that is fairly selected from a cross section of the community. That is still the law of the land and is not being challenged in this case.

What is at issue is the manner of determining whether there is enough of a statistical disparity to compel constitutional intervention. This is an issue which was, in 2004, before the California Supreme Court in a case which we litigated here in Santa Barbara. Review was granted by the California Supreme Court but dismissed as moot when the Jury Commissioner agreed to make changes to the system. There remains a split of authority, both within the California state courts and among the federal circuits, as disparity analysis to use.

The Three Prong Duren *Test*

The United States Supreme Court in *Duren v. Missouri*, 439 U.S. 357 (1979), set forth the three prong test to be used to establish a prima facie violation of 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 the venire 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." The burden then shifts to the government to establish that the selection process is constitutional.

The first prong is to show a distinctive (sometimes called, protected) group. Race is a distinctive group as is age and gender. Socioeconomic status may or may not be. The case in which the Supreme Court granted *certiorari*, *Berghuis v. Smith*, involves the systematic exclusion of Black citizens from the venire resulting in an all white jury in a Michigan murder trial. Blacks are a distinctive group and the first prong of *Duren* is not in issue.

The third prong, skipping momentarily skipping the second prong, requires showing that the under-representation is the result of a systematic exclusion. There need not be a showing of deliberate racial animus, just that the exclusion results from a systematic flaw in the jury recruitment process. In the case we litigated here in Santa Barbara (entitled *People v. Ballesteros* in the trial court and then *Blair v. Superior Court* in the Court of Appeals and California Supreme Court), the systematic issue involved "T-Codes" entered into the computer which purged names from the combined DMV and Voter Registration master lists. In the *Berghuis v. Smith* case, the issue was a questionnaire which allowed jurors to be excused if they claimed "child care, transportation or work." The Michigan Supreme Court did not squarely address

this prong, but the Court of Appeals for the Sixth Circuit, found that such an option resulted in a systematic exclusion of Black jurors.

The second prong of *Duren*, however, seems to be the issue upon which *certiorari* is granted by the United States Supreme Court. It is the issue that has been briefed represents a split in the circuits. The second prong asks whether, regarding a distinctive group, there is a ". . . fair and reasonable in relation to the number of such persons in the community." It is those words which have prompted a long debate, one which the Supreme Court may finally decide this term.

The year before our *Ballesteros/Blair* case was pending review, the California Supreme Court, in *People v. Burgener* (2003) 29 Cal.4th 833, stated that the United States Supreme Court has "not yet definitively spoken on either the means by which disparity may be measured or the constitutional limit of permissible disparity." The Court in *Burgener* did not undertake to resolve it and we had hoped to do so in *Ballesteros/Blair*. It appears that the U.S. Supremes will now do so.

Absolute Disparity v. Comparative Disparity

The question is whether the second prong of *Duren* is measured by a test of "absolute disparity," "comparative disparity" or otherwise The absolute disparity test may make sense in a population that contains a distinctive group which approximates 50%. For instance, while there are generally slightly fewer men in the general population than woman, it is close to 50-50. So a 10% absolute disparity in women being called for jury duty would mean that there would be 40% women compared to the total jury population but it would be a 20% disparity in the reduction of the number of women as a group.

The flaw is that absolute disparity, particularly with a fixed number like 10%, does not address discrimination as to distinctive groups whose absolute number in the population as a whole is relatively small. For instance, if the distinct group represents less than 10% of the population, the most blatant discrimination would never result in a remedy. Justice Kennard observed in a concurrence in the *Burgener* case that, "Even a 5 percent absolute disparity test would permit counties to adopt jury selection methods that systematically excluded Blacks in many

California counties (including Riverside County), Asians in almost all counties, and Native Americans in every county, because these minorities comprise less than 5 percent of the county population."

The briefs before the United States Supreme Court in the *Berghuis v. Smith case acknowledge the same problem in Michigan. Respondent, the Defendant below, argues that, if the 10% absolute disparity test were adopted, defendants in only five Michigan counties could challenge the exclusion of Blacks, "while defendants in the remaining 78 counties would be mathematically barred from complaining."*

The Remedies

There are two ways to deal with the inadequacy of the absolute disparity analysis in satisfying the second prong of *Duren*. One is to use a method of comparative disparity which would analyze the reduction of the percentage of the distinctive group itself. Smaller populations would be protected against systematic exclusion. In the *Ballesteros/Blair* litigation, Judge Ochoa found that the Hispanic (the term used by the U.S. Census) jury eligible population in Santa Barbara County was 14.6% of the population but that only 8.8% ended upon the venire list. That means that there was a 40% underrepresentation of Hispanics by group but that 40% reduction of the group only represented 6 percentage points of the entire population. The comparative disparity analysis allows significance of this underrepresentation to be recognized.

The second remedy is to simply eliminate the second prong of *Duren*. There is no logical requirement that the systematic exclusion of a protected, distinct group from jury service is only objectionable if certain numbers or percentages are met. Under *Batson*, it is already a part of our jurisprudence that the improper exclusion of even one member of a protected group during *voir dire* requires reversal. There is no reason why this same prophylactic rule should not be imposed in the overall juror qualification process. In other words, the systematic exclusion of any members of a distinctive group shifts the burden to the government.

Conclusion

The United States Supreme Court in *Berghuis v. Smith will have an opportunity to resolve this important issue both for the federal and state courts. Absolute disparity is illogical. It is an arbitrary number used for convenience in cases involving larger distinct groups. Where percentages of distinct groups in the population are small, it makes no sense. Comparative disparity makes more sense and is consistent with statistical analysis in science and economics. But, the question remains, do we need it at all?*