

CHALLENGES TO THE VENIRE:
FAIR CROSS-SECTION AND
EQUAL PROTECTION

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I. Constitutional Provisions

- A. “In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .” (U.S. Const., Amen. VI.) “Trial by jury is an inviolable right.” (Cal. Const., art. I, § 16.) Venire lists must represent a “a fair cross section of the community.” (*Taylor v. Louisiana* (1975) 419 U.S. 522, 526.)
- B. “No state shall make or enforce any law which shall . . . deny to any person . . . Equal protection of the laws.” (U.S. Const., Amend. XIV.) “A person may not be . . . denied equal protection of the laws.” (Cal. Const., art. I, § 7.) Venire lists must be generated without discriminatory purpose. (*Castaneda v. Partida* (1977) 430 U.S. 482, 492-493.)
- C. Federal and state protections are coextensive. (*People v. Howard* (1992) 1 Cal.4th 1132, 1159.)

II. Statutory Provisions

- A. selected at random (Code Civ. Proc. § § 191, 197);
- B. from the population of the area served by the court (*ibid.*);
- C. jury commissioner to manage system in an efficient, equitable, and cost-effective manner (*ibid.*);
- D. sources inclusive of a representative cross section of the population including
 - 1. “customer mailing lists, telephone directories, . . . utility company lists” and
 - 2. “list of registered voters and the Department of Motor

Vehicles' list of licensed drivers and identification cardholders" for the venue. (§ 197.)

III. Preserving Issue for Appeal

- A. Written motion (Code Civ. Proc. § 225, subd. (a)) presenting a prima facie case that the jury panel either does not represent a fair cross-section of the community or was the result of discriminatory list generation methods. Failure to make motion in trial court forfeits claim on appeal. (*People v. Fauber* (1992) 2 Cal.4th 792, 816; *People v. De Rosans* (1994) 27 Cal.App.4th 611, 618.)
- B. Challenge "the venire," not the "particular panel assigned to the court." (*Duren v. Missouri* (1979) 439 U.S. 357, 364; *People v. Bell* (1989) 49 Cal.3d 502, 525-526; *People v. De Rosans, supra*, 27 Cal.App.4th at p. 618.)
 1. Venire is list of prospective jurors compiled from master list derived from the sources provided in section 197. (*People v. Massie* (1990) 19 Cal.4th 550.)
 2. Not a venue-based challenge. Judicial districts are OK, regardless of disparity between demographics of district and county. (*O'Hare v. Superior Court* (1987) 43 Cal.3d 86, 95; *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; *Williams v. Florida* (1970) 399 U.S. 78, 96.)
 3. Applicable equally to grand and petit jury venire. (*Castaneda v. Partida, supra*, 430 U.S. at pp. 492-493; *U.S. v. Rodriguez-Lara* (9th Cir. 2005) 421 F.3d 932.)

IV. Standard of Review

"Mixed question"

1. trial court's factual findings are entitled to deference to the extent they are supported by substantial evidence; and
2. Whether the trial court properly applied the constitutional standard is a question of law subject to independent review. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

V. Reversible Per Se

"When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." (*Vasquez v. Hillery* (1986) 474 U.S. 254, 263-264; *U.S. v. Rodriguez-Lara, supra*, 421 F.3d at p. 941.)

VI. Prima Facie Case

- A. Identify distinctive group;
- B. Underrepresentation of the group;
- C. Systematic exclusion; and
- D. Inference of discriminatory purpose (in equal protection challenges). (*Duren v. Missouri, supra*, 439 U.S. at p. 368, fn. 26; *Castaneda v. Partida, supra*, 430 U.S. at p. 495].)

VII. Distinctive Group

- A. "[D]istinctiveness" must be linked to the purposes of the fair-cross-section requirement.
 1. "[guarding] against the exercise of arbitrary power;"

2. preserving “public confidence” in the criminal justice system; and
 3. “sharing in the administration of justice” is a “civic responsibility.” (*Lockhart v. McCree* (1986) 476 U.S. 162, 174.)
- B. “excluded for reasons unrelated to the ability to serve as jurors in a particular case;”
 - C. “exclusion of large groups of individuals on the basis of some immutable characteristic;”
 - D. “deprive[s] members of historically disadvantaged group of their right to serve on juries.” (*Ibid.*)
 - E. Not “groups defined solely in terms of shared attitudes” that would “substantially impair” members’ ability to perform their duties as jurors. (*Ibid.*)
 - F. Compare, *Rubio v. Superior Court* (1979) 24 Cal. 3d 93, 98 [“a common thread -- a basic similarity of attitudes, ideas or experience” shared by group “precisely because they are members of that group” and “no other members of the community capable of adequately representing the perspective of the group”]. Cf. *U.S. v. Fletcher* (9th Cir. 1992) 965 F.2d 781, 782. But see, *People v. Harris* (1984) 36 Cal.3d 36, 51 [questioning validity of *Rubio* second prong after *Duren*.]

VIII. Race and Gender

- A. Race (*Peters v. Kiff* (1972) 407 U.S. 493 [“Blacks”]; *Castaneda v. Partida, supra*, 430 U.S. 482 [“Mexican-Americans”]; *U.S. v. Cannady* (9th Cir. 1995) 54 F.3d 544 [“African-Americans,

Hispanics and Asians”]; *U.S. v. Pleier* (D. Alaska 1994) 849 F.Supp. 1321 [Alaska Natives]); or

- B. Gender, i.e., women (*Taylor v. Louisiana, supra*, 419 U.S. 522; *Duren v. Missouri, supra*, 439 U.S. 357; *People v. McCoy* (1995) 40 Cal.App.4th 778.
- C. Caveat: *U.S. v. Luong* (E.D.Cal. 2003) 255 F.Supp.2d 1123 [All “non-whites” is not a sufficiently distinctive group].

IX. Other Groups

- A. Economic Class (see, *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 225 [civil judgment reversed where “daily wage earners” systematically excluded]; *Coleman v. McCormick* (9th Cir. 1989) 874 F.2d 1280, 1284 [failure of record to establish distinctiveness of group claiming financial hardship]);
- B. Religion (see, *Scott v. Dugger* (11th Cir. 1989) 891 F.2d 800, 804 [failure of record to establish that permitting Jews who requested to do so to defer service in order to observe Yom Kippur was systematic exclusion based on religion]);
- C. Age (see, *People v. McCoy, supra*, 40 Cal.App.4th at pp. 785-786 [failure of record to establish distinctiveness of mindset of group of relatively young and/or relative older jurors]);
- D. Physical disability (see, *People v. Fauber, supra*, 2 Cal.4th at p. 817 [failure of record to establish that including hearing impaired persons necessary to the goals of the fair cross-section requirement]).

X. Underrepresentation

- A. Standards

1. Absolute disparity: comparison of percentage of identified group in the community to the percentage in the venire. (See, *Duren v. Missouri*, *supra*, 439 U.S. at pp. 364-365 [gender – 40% disparity constitutionally significant]; *People v. Bell*, *supra*, 49 Cal.3d at p. 527 [race -- 5% disparity not significant].)
 - a. Absolute disparity under 10% not likely to meet *Duren* prima facie showing. (See, *People v. Bell*, *supra*, 49 Cal.3d at pp. 527-528 [5% absolute disparity insufficient]. See also, *Castaneda v. Partida*, *supra*, 430 U.S. at pp. 495-496 [citing cases holding disparities from 14.7% to 23% sufficient]. But see, *Alexander v. Louisiana* (1971) 405 U.S. 625, 629-630 [7%-8% disparity unexplained by any non-invidious cause]; *People v. Buford* (1982) 132 Cal.App.3d 288, 296 [4% sufficient].)
2. “Comparative disparity” expresses absolute disparity as a percentage. (*People v. Currie* (2001) 87 Cal.App.4th 225, 234 [3.8% absolute disparity – 45.2% comparative disparity].)
3. Statistical significance: “measures the probability of the disparity occurring by chance in a random drawing of corresponding size from the population.” (*People v. Buford*, *supra*, 132 Cal.App.3d at p. 296 [race – 4% absolute disparity less than 3% likely in a random selection procedure]. Accord, *Castaneda v. Partida*, *supra*, 430 U.S. at p.496, fn.17 [race – 40% absolute disparity less than a fraction of a percent likely in a random selection procedure].)

B. Evidence

1. upon a “particularized showing” that underrepresentation in the jury pool or the venire may exist, the court must order disclosure of jury commissioner records (*People v. Jackson* (1996) 13 Cal.4th 1164, 1194 [showing inadequate]; *Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115, 1135 [same]);
2. master list of qualified jurors is a judicial record available to the public (*Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 262);
3. census or other demographic data that reflect the percentage of the relevant group who are adult and thus presumptively jury eligible (*People v. Bell, supra*, 49 Cal.3d at p. 526, fn.12; *People v. De Rosans, supra*, 27 Cal.App.4th at p. 619);
4. data showing underrepresentation over time (*De Rosans, supra*, at p. 619).

XI. Systematic Exclusion

- A. Selection criteria facially discriminatory; or the manner in which criteria are applied. (*People v. Horton* (1995) 11 Cal.4th 1068, 1089-1090 [register voters/DMV list].)
- B. “[T]he result of an improper feature of the jury selection process.” (*People v. Massie, supra*, 19 Cal.4th at p. 580.)
- C. The demonstrated “probable cause” of the disparity. (*People v. Horton, supra*, 11 Cal.4th at pp. 1088-1090 [disproportionate failures to appear not sufficient]; *People v. Currie, supra*, 87 Cal.App.4th at pp. 235-236 [same].)

- D. But see, *Castaneda v. Partida, supra*, 430 U.S. 482 [facially neutral criteria/disparity unexplainable on non-racial basis]; *Alexander v. Louisiana, supra*, 405 U.S. 625 [same].)

XII. Rebuttal of Prima Facie Case

- A. a more precise statistical showing that no constitutionally significant disparity existed;
- B. (in EP challenge) no discriminatory purpose existed; or
- C. a compelling justification for the procedure resulting in the disparity. (*Duren v. Missouri, supra*, 439 U.S. at pp. 367-368; *Castaneda v. Partida, supra*, 430 U.S. at p. 495; *People v. Sanders* (1990) 51 Cal.3d 471.)