

## Appellate Court Finds That County Jury Selection System Meets Constitutional Standards

June 17, 2004

Gary Blair, the Santa Barbara Court Administrator and Jury Commissioner, won an important victory from the Court of Appeal this week, including clarification on two questions of importance to jury commissioners, court administrators, and judges throughout the State. Mr. Blair was represented on the appeal by the Appellate Practice Group of Hatch & Parent.

The Santa Barbara Jury Commissioner's jury selection system was challenged on Sixth Amendment grounds by Benjamin Ballesteros, a Hispanic defendant charged with murder, based on an alleged disparity between the jury-eligible Hispanic population and the Hispanic representation in the venire. Under California law, the defendant who raises such a challenge 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 group in the jury selection process." *People v. Bell* (1989) 49 Cal.3d 502, 524-525; *Duren v. Missouri* (1979) 439 U.S. 357, 364.

The parties agreed that Hispanics constituted 24% of the total population of the County, 14% of the jury-eligible population, and 8% of the persons serving in the jury venire. The "absolute disparity" in this case was 6% (14% minus 8%) and the "comparative disparity" was 40% (6% divided by 14%). The Superior Court found that the venire did not satisfy Sixth Amendment standards because (a) there was a 40% comparative disparity between the percentage of jury-eligible Hispanics and Hispanics in the venire, (b) Hispanics had a higher non-response rate to jury questionnaires than non-Hispanics, and (c) the jury commissioner did not conduct "follow-up" with persons who did not return their questionnaires.

In an opinion published June 15, 2004, the Court of Appeal overruled the trial court and found that the "absolute disparity" of 6% satisfied Sixth Amendment standards. This holding was based on a long line of cases holding that the Constitution tolerated up to a 10% absolute disparity. The Court of Appeal also clarified the following issues:

**The Measure of Disparity.** Prior to this decision, no California Court had definitively answered the question of whether a finding regarding inadequate cross-representation could be based on comparative disparity alone. The Court of Appeal held that, unless the defined minority group in question is "small," absolute disparity is the proper test. In the process, the Court characterized comparative disparity as "no more than an expectation."

**Jury Commissioners' Obligations With Respect to "Follow-Up."** The Superior Court found that, once the jury commissioner became aware of the higher Hispanic non-response rate, it was incumbent upon him to take corrective action. The Court of Appeal rejected that reasoning, recognized that "budget constraints" may preclude follow-up measures, and held that "disproportion due to economic, cultural and social mores is not within the court's province."

The Court of Appeal's decision should be very helpful to Jury Commissioners throughout California who may be facing challenges to their jury selection systems.

If you have questions, or would like to receive a copy of the briefs, please feel free to contact Diane Matsinger, head of the Appellate Practice Group, at 805-882-1449 or at [DMatsinger@HatchParent.com](mailto:DMatsinger@HatchParent.com).