

1968

## State Of Utah v. Dorothy Beasley : Brief of Appellant

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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STATE OF UTAH

*Plaintiff and Respondent,*

vs.

Case No.  
11383

DOROTHY BEASLEY,

*Defendant and Appellant.*

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BRIEF OF APPELLANT

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**Appeal from a decision denying defendant's motion to quash the jury  
panel and her conviction on the charge of grand larceny  
entered in the District Court, Second Judicial District  
Honorable John F. Wahlquist, presiding**

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A method of selecting jurors which does not reflect a fair cross section of the community is unconstitutional, and convictions thereby cannot stand.

The defendant was guaranteed a trial by jury under the laws of the State of Utah. Inherent in the right to a trial by jury in both State and Federal Courts is the right to a jury drawn from a fair cross section of the community. Both the selection process and the persons actually placed on the master jury list must be examined to determine whether a jury is drawn from a fair cross section of the community. When juries are unconstitutionally selected, convictions handed down by them cannot stand.

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The jury commissioners in Weber County departed from the statutory scheme, thereby discriminating against the young, the poor, and the non property owner in drawing the master jury list.

By interpreting the term "Legal Voter" to mean a person who actually voted, the jury commissioners unlawfully limited eligibility for jury service. By limiting jury participation to those persons who own real property, the jury commissioners unlawfully

excluded a large segment of the community from jury service. The jury commissioners unlawfully copied names for the master jury list directly from previous years' master jury lists. The jury commissioners unlawfully ignored a statutory requirement designed to insure that each geographical area of the county was fairly represented on the master jury list.

### POINT III .....

The jury commissioners discriminated against Spanish Americans in drawing the master jury list, and therefore the panel taken from the list, and which tried the defendant, was unconstitutional and her conviction cannot stand.

### POINT IV .....

When a jury is not drawn from a fair cross section of the community, prejudice to the defendant is assumed, and the conviction cannot stand. The jury which tried the case at bar was not drawn from a fair cross section of the community, and defendant's conviction must be set aside. The prosecution must show beyond a reasonable doubt that the prejudice to the defendant was harmless.

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IN THE SUPREME COURT  
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STATE OF UTAH

*Plaintiff and Respondent,*

vs.

Case No.  
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DOROTHY BEASLEY,

*Defendant and Appellant.*

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BRIEF OF APPELLANT

---

STATEMENT OF THE NATURE OF CASE

Appeal from a decision denying defendant's motion to quash the jury panel and her conviction on the charge of grand larceny.

DISPOSITION IN LOWER COURT

Defendant-Appellant was tried and convicted of the crime of grand larceny. Defendant's trial and motion challenging the jury were conducted before the Honorable John F. Wahlquist in the Second Judicial Court. Sentence was imposed for a term of not less than one nor more than ten years and the defendant-appellant was placed on probation.



## RELIEF SOUGHT ON APPEAL

The defendant respectfully requests the court to set aside her conviction on the grounds that the jury which convicted her was improperly selected in violation of Utah statutory enactments and the Utah and United States Constitutions.

## STATEMENT OF FACTS

On March 5, 1968, Dorothy Beasley, a Negro, was charged with the crime of grand larceny, 76-38-4, Utah Code Annotated, 1953, as amended. Immediately prior to trial, defendant's attorney John Blair Hutchison moved to challenge the jury panel on the following grounds:

1. That there were material departures from the forms and statutes prescribed with respect to selecting, drawing, and return of the jury panel.
2. That the forms and statutes prescribed with respect to selecting, drawing, and returning of the jury in the state of Utah are unconstitutional.

The Honorable John F. Wahlquist, one of the Judges of the District Court of Weber County, State of Utah, deferred ruling on defendant's motion until after the case was tried on its merits (T.T.1). On April 18, 1968, the defendant was convicted of the crime of grand larceny. Sentencing was deferred until a hearing could be had and a ruling made on defendant's motion (T.T. 104, 105).

On July 10, 1968, at the hearing on defendant's motion, evidence was introduced which established the following facts:

That the jury commissioners limited jury participation to those persons who had actually voted in the last election

and who owned real property (H.T. 11, 72); that 60% of the names appearing on the 1968 master jury list were taken from the 1967 list (H.T. 48, 166); that proportionate representation, on the master jury list, was not given to all areas of Weber County as required by statute (H.T. 12, 32, 168); and that the Spanish American community in Weber County is grossly underrepresented on the master jury list (H.T. 28, 37, 107).

Judge Wahlquist ruled that the irregularities practiced by the jury commissioners of Weber County were not prejudicial, and denied defendant's motion. From that ruling and defendant's conviction, this appeal was taken.

## ARGUMENT

### POINT I

A METHOD OF SELECTING JURORS WHICH RESULTS IN A JURY WHICH DOES NOT REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY IS UNCONSTITUTIONAL, AND CONVICTIONS THEREBY CANNOT STAND.

A. The defendant was guaranteed a right to trial by jury under the laws of the state of Utah. Section 77-1-8 of the Utah Code Annotated (1953) provides, among other things, that the defendant in a criminal prosecution has the right:

(6) To have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; .....

In this case the defendant was charged with grand larceny, carrying a maximum penalty of ten years' imprisonment and a \$1,000 fine (U.C.A. 76-36-6, 1953), which gives her the right to a trial by jury under the above section.

At this point it should be noted that the United States Supreme Court recently held that the right to trial by jury, as guaranteed in criminal cases in the Federal Courts by Article III of the United States Constitution and the Sixth Amendment, applies through the Fourteenth Amendment to State Courts. Duncan v. Louisiana, \_\_\_\_\_ U.S. \_\_\_\_\_, 20 L.Ed. 2d 491, 88 S.Ct. \_\_\_\_\_ (1968). The Court limited the 6th Amendment's application to crimes of a serious nature and held that a crime with a possible penalty of two years in prison was serious enough to justify application of the Sixth Amendment.

Based on the holding of the court in Duncan, supra, it is clear that the defendant in the case at bar would be guaranteed a right to trial by jury under the Sixth Amendment.

**B.** Inherent in the right to trial by jury in both State and Federal Courts is the right to a jury drawn from a fair cross section of the community. As early as 1880 the Supreme Court held:

Trial by jury contemplates a body of peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880),

Again in Ware v. United States, the Circuit Court of Appeals stated:

Trial by jury necessarily contemplates an impartial jury drawn from a cross section of the community, and this means that prospective jurors should be selected by court officials without systematic and intentional exclusion of any economic, social, religious, racial, political or geographical groups of the community. 356 F.2d 787 (U.S. C.A., Dist. of Columbia 1965).

The courts have uniformly said that inherent in the right to trial by jury is the right to be tried by a fair cross section of the community. Thiel v. Southern Pacific, 328 U.S. 217, 90 L.Ed. 1181 (1946); Hernandez v. Texas, 347 U.S. 475, 98 L. Ed. 866, 74 S.Ct. 667 (1954); Eubanks v. State of Louisiana, 356 U.S. 584, 2 L.Ed. 2nd 991, 78 S.Ct. 920 (1958); State v. Dodge, 12 U. 2d 293, 365 P. 2d 798 (1961); Whitus v. Georgia, 385 U.S. 545, 17 L.Ed. 2nd 599 (1967).

No system of jury selection is constitutional which systematically excludes any economic, social, religious, racial, political or geographical group in the community. Woods v. Munns, 347 F. 2d 948 (U.S.C.A. 10th Cir. 1965); Ware v. United States, supra (1965); Whitus v. Georgia, supra.

Subsection 6 of Section 77-1-8, Utah Code Annotated (1953) guarantees an "impartial" jury. The objective of this requirement is to insure the representative nature of the jury and to protect against the exclusion of certain groups which would prevent the jury lists from being drawn from a cross section of the community. The rationale behind requirements for properly selecting juries is succinctly stated by Mr. Justice Murphy in Glosser v. United States, 315 U.S. 60, 85-86, 62 S. Ct. 457, 472, 86 L.Ed. 680 (1942):

Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.

Section 77-1-8, supra, uses the same language as that found in the Sixth Amendment to the Federal Constitution. Both guarantee an "impartial" jury. The term "impartial jury" means one selected from a fair cross section of the community. Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1880); Whitus v. Georgia, supra.

Both the Federal Constitution and the laws of Utah require that a jury be chosen from a fair cross section of the community to satisfy the due process. Thus, the requirement is fundamentally essential to an overall fair trial. Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799 (1963); Malloy v. Hogan, 378 U.S. 1, 12 L.Ed. 2d 653 (1964); Pointer v. Texas, 380 U.S. 400, 13 L.Ed. 2d 923 (1965).

C. The method of selection of the jurors for the master jury list, together with the results obtained by the selection process, must be examined to determine if the jury represents a fair cross section of the community.

Courts have consistently struck down systems which rely on segregated tax rolls as a basis for selecting a jury list. Norris v. Alabama, 294 U.S. 587, 79 L.Ed. 1074 (1935); Arnold v. North Carolina, 376 U.S. 773, 12 L.Ed. 2d 77, 84 S.Ct. 1032 (1964); Whitus v. Georgia, *supra*.

In the Federal Courts, systems which have excluded wage earners or women have been condemned. Thiel v. Southern Pacific, *supra*, Ballard v. United States, 329 U.S. 187, 91 L.Ed. 181 (1946).

Any jury system in which it can be shown that persons are excluded because of race violates the Fourteenth Amendment. Strauder v. West Virginia, *supra*, Hernandez v. Texas, *supra*, Whitus v. Georgia, *supra*.

In Labat v. Bennett, 365 F. 2d 698 (U.S.C.A. 5th Cir.) (1966), the court held, where jury commissioners excluded daily wage earners from jury lists in State Courts, that the exclusion resulted in prejudice to the Negro race, because of the disproportionately high number of Negroes in the wage earning ranks compared with other races.

The Supreme Court has held that one does not have a right to a representative from each group, which goes to make up the community, on the jury but that any system as it is set up or operated should not result in the systematic exclusion of such a class or group. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965)

Whenever it can be shown that a particular group is available for jury service and that no one from that group has been chosen for several years to serve on a jury, the Supreme Court has held that this constitutes a prima facie case of discrimination and the burden shifts to the State to justify the exclusion. Norris v. Alabama, supra, Patton v. Mississippi, 332 U.S. 463, 92 L.Ed. 76 (1947), Hernandez v. Texas, supra.

It is also important to note that, in those cases upholding the use of tax rolls as a basis for drawing jury lists, the courts have pointed out the fact that such tax rolls included the names of owners of both real and personal property so as to give the jury commissioners a broad base from which to choose. Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1952), Acuff v. State, 283 P. 2d 856 (Oklahoma) (1955), Roach v. Maudlin, 277 Fed. Supp. 54 (U.S.D.C., N.D. Georgia 1967).

In Brown, supra, the Supreme Court noted that all males between the ages of 21 and 50 were required to pay a poll tax, and that the tax rolls included both property, however modest, and polls. The court went on to remark that the name of every property owner and every voter was used in selecting the jury list.

In Roach, supra, the District Court, in upholding a jury selection system which relied on the tax rolls as a source of names for the jury lists, was careful to point out that the tax rolls contained the names of all owners of real and personal property. 277 Fed. Supp. 54, 57 (1967).

In Acuff v. State, supra, the state statute specifically provided that the tax rolls contain the names of both real and personal property owners. 283 P. 2d 856, 863.

D. When juries are unconstitutionally selected, convictions handed down by them cannot stand.

The courts have been uniform in holding that when a jury is unconstitutionally selected its verdict cannot stand, no matter how compelling the evidence. Whitus v. Georgia, supra, Brooks v. Beto, 366 F. 2d 1 (U.S.C.A. 5 Cir. 1966); Rabinowitz v. United State, 366 F. 2d 34 (U.S.C.A., 5 Cir 1966), Avery v. Georgia, 345 U.S. 559, 97 L.Ed. 1244, 73 S.Ct. 891 (1952); Patton v. Mississippi, 332 U.S. 463, 469, 92 L.Ed. 76 (1947).

## POINT II

THE JURY COMMISSIONERS IN WEBER COUNTY HAVE DEPRIVED THE JURY SYSTEM OF ITS INTENDED BROAD BASE. THE YOUNG, THE POOR, AND THE NON-PROPERTY OWNER ARE DISCRIMINATED AGAINST.

Section 78-46-17 of the Utah Code Annotated (1953) reads:

It shall be the duty of the jury commissioners before the 15th day of December after their appointment to select from the names of the legal voters on the assessment roll of the county for the current year a written list of the names from which the grand and trial jurors shall be drawn to serve in the district court of such county during the succeeding calendar year. In making the selection they shall choose only those who are not exempt from jury service, who are in possession of their faculties, who are not infirm or decrepit, who are well informed and free from legal exceptions, and as far as practicable, who are not returned on the jury list of the

next preceding year. No person shall be selected as a juror who is known to them to be interested in or has cause pending which may be tried by a jury to be drawn from persons so selected, or who, either personally or otherwise, has solicited his selection as such. (emphasis supplied)

Based on this statute, the requirements for selection for the master jury list are that a person be a legal voter and have his name appear on the assessment roll of the particular county in which the jury sits.

A. By limiting the definition of the term “legal voters”, as used in Section 76-46-17 U.C.A., to those persons who actually voted in the last general election, the jury commissioners violated the plain intent of the statute and deprived the jury system of its intended broad base.

The jury commissioners testified that the first prerequisite for selection on the master jury list was that one must have voted in the last general election (H.T. 72). To so limit eligibility for jury service violates the plain intent of the legislature and deprives the jury system of its intended broad base. If the legislature wanted to limit eligibility for jury service to “actual voters”, it would have been a simple task for them to use that term rather than the term “legal voters”.

The term “legal voters” refers to those who meet the statutory and constitutional qualifications to vote. It is not limited to those who actually vote. (H.T. 72, 288). Opinion Of The Justices, 230 N.E. 2d 801 (Mass.) (1967); Bilek v. City of Chicago, 396 Ill. 445, 71 N.E. 2d 789 (1947); Wright v. Lee, 125 N.J.L. 256, 15 A. 2d 610 (1940); State v. Billups, 63 Or 277, 127 P. 686 (1912); Woodward v. Barker, 59 Or 70, 116 P. 101 (1911). In Opinion of the Justices, supra, the court gave the following definition of “legal voters”:

Persons who possess the constitutional qualifications to be voters, and who have complied with statutory requirements so that they may lawfully cast votes at an election.



Evidence at the hearing on defendant's motion to quash the jury panel showed that those who voted in the last general election were primarily the older members of the community (H. T. 198, 221), and that fewer of the young and of the minority groups actually vote in off presidential years although many are registered (H. T. 152, 158, 159). By limiting eligibility for jury service to those who actually voted, the jury commissioners violated the statutory mandate and discriminated against the young, the poor, and the minority groups in the community. Thus, the jury commissioners have prevented the jury from being drawn from a fair cross section of the community, as contemplated by the legislature.

**B.** By limiting jury participation to those persons whose names appear on the Real Property Index, the commissioners have unlawfully narrowed the statutory language and thereby excluded a large segment of the community from jury service.

The pertinent part of Section 78-46-17 U.C.A. (1953) provides that prospective jurors are to be selected from:

“ . . . legal voters on the assessment roll . . . ”

1. The term “assessment roll”, as used in the above statute, includes much more than just the real property part of the assessment roll.

Article XIII, Section 2, of the Utah Constitution provides for the taxation, i.e., assessment, of all tangible property in the state of Utah not exempt under the laws of Utah or under Federal law. The section goes on to exempt from taxation property owned by government units, property used for religious or charitable purposes, and certain property of irrigation and power transmission facilities. It

further provides that the legislature may abate the taxes of the poor, and provides for the exemption of homesteads and other personal property. For the extent to which the legislature has provided for such exemptions, see Volume 6, Chapter 2, of U.C.A. as amended (1953). Thus, it is clear that taxable tangible property includes all real and personal property.

Article XIII, Section 3, of the Utah Constitution provides for the assessment of tangible taxable property. Section 59-5-4 of the Utah Code Annotated (1953) enumerates the duties of the county assessor in assessing such property, as follows:

The county assessor must, before the 15th day of April of each year, ascertain the names of all taxable inhabitants and all property in the county subject to taxation except such as is required to be assessed by the State Tax Commission and must assess such property to the person by whom it was owned or claimed or in whose possession or control it was, at 12:00 o'clock noon of January next preceding . . ."

Property which is required to be assessed by the State is listed in Section 59-5-3, Utah Code Annotated (1953). It states:

Pipelines, power lines and plants, canals and irrigation works, bridges and ferries, and the property of car and transportation companies, when they are operated as a unit in more than one county; all property of public utilities whether operated within one county or more; all mines and mining claims . . ., and all other mines and mining claims . . ., and all other mines and mining claims and other valuable

deposits . . . , all machinery used in mining and all property or surface improvements upon or appurtenant to mines or mining claims . . . ; must be assessed by the state tax commission as hereafter provided. All taxable property not required by the constitution or by law to be assessed by the state tax commission must be assessed by the county assessor of the several counties in which the same is situated . . .

Utah law further provides that the county assessor shall assess real and personal property in the county which is not assessed by the state tax commission or exempted by the Utah Constitution, and to deliver a roll of such assessment to the county treasurer each year. U.C.A. 59-5-30 (1953)

It follows that an "assessment roll" as contemplated in the jury selection statute is not limited to real property, but would also include personal property, such as, automobiles, boats, house trailers, and various types of equipment used by persons in business for themselves.

2. By using only the real property part of the assessment rolls in drawing the master jury list, the commissioners have discriminated against the young, the poor, and other non-real-property owners in the community.

Bruce Jenkins, Weber County Assessor, testified that all property both real and personal, not exempt under State law, was assessed and recorded on rolls (H. T. 16). He further testified that the assessment roll was divided into two parts, one for real property and one for personal property (H. T. 231), and that the complete assessment roll, listing both

real and personal property, was available to the jury commissioners if they wished to use it (H. T. 11, 27). The effective result of this practice is that all non-real-property owners are automatically excluded from jury service by administrative fiat of the jury commissioners.

Every single name found on the master jury lists for the years of 1965, 1966, 1967, and 1968, a total of 8,605 names, also appeared on the real property index for that same period (H. T. 160). Thus, by allowing only real property owners to serve on juries you are taking the oldest and more affluent members of society who are buying houses by lease, deed, mortgage transaction, . . . and are excluding the escrow purchasers, the young, and other persons (H. T. 190).

Moreover, the courts have sustained the use of tax rolls as a basis for drawing jury lists only when such rolls included both real and personal property, so as to reflect a cross section of the community. Brown v. Allen, *supra*; Roach v. Maudlin, *supra*; Acuff V. State, *supra*.

By limiting jury service to real property owners who voted in the last general election, the jury commissioners of Weber County have discriminated against the young adult, the poor, and the non-property owners. Evidence of this is indicated by the fact that of approximately 1,000 people polled, the names of whom appeared on the 1968 master jury list, only 134 gave their age as being under 40 years of age (H. T. 163). This is in light of the fact that Mr. Judkins from the Utah State Employment Of-

fice testified that 25.7% of the total population in Weber County consisted of persons between the ages of 20 and 39 (H. T. 27). Also, as indicated before in this brief, all names appearing on the jury lists were those of real property owners.

The jury commissioners in Weber County have placed on jury service, restrictions never intended by the legislature. As a result, the jury which tried the defendant was not drawn from a cross section of the community, and her conviction cannot stand.

C. By copying 60% of the names on the 1968 master jury list from names that appeared on the list from the previous year, the commissioners have violated their statutory duty as set forth in 78-46-17, Utah Code Annotated (1953).

Section 78-46-17, Utah Code Annotated (1953) provides in part that:

... in making the selection they [the jury commissioners] shall choose only those who are not exempt from jury service, who are in possession of their faculties, who are well informed and free from legal exceptions, and, as far as practicable, who are not returned on the jury of the next preceding year.

Evidence at the hearing established that over 60% of the names listed on the master jury list for 1968 were carried over from the 1967 list (H. T. 166), and, in fact, the commissioners testified that they merely replaced the names of persons who had been called for service in the preceding year (H. T. 48).

The statute above cited places a duty on the commissioners to refrain, as far as practicable, from placing the same

names on the current master jury list which appeared on the list of the previous year. The objective of this requirement is to provide as large a segment of the citizenry as possible with the opportunity of jury service; and, while the statute does grant some flexibility to the jury commissioners, this does not mean that they may use it to defeat the purpose of the provision. The term "as far as practicable", as used in the statute, when read in the context in which it appears, requires that the jury commissioners refrain from using the same names year after year. Moreover, there is no right given to copy names directly from the previous year's master jury list. To allow this practice would be to "lock in" certain individuals and limit the chance of others in the community to sit on juries.

As the Supreme Court states in Glasser v. United States, *supra*.

Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.

Thus, when 60% of the names on the 1968 master jury list were copied from the 1967 list, the list was compiled in violation of the statutory requirement and is unconstitutional.

D. The jury commissioners unlawfully disregarded legislative mandate designed to insure that each geographical area of the community be represented on the jury lists, and thereby rendered jury lists so drawn unconstitutional and in violation of Section 78-46-18, Utah Code Annotated (1953).

Section 78-46-18, Utah Code Annotated (1953), in referring to the manner of choosing names for jury lists, provides, in part:

Names shall be selected as far as practicable from the several precincts of the county in proportion to the number of votes cast therein.

The obvious object of the legislature in drafting this section was to insure that each geographical area would be represented on the master jury list, thereby insuring that any jury chosen would be chosen from a list representative of the community as a whole.

The author asserts that the term "precinct" used in the above statute is synonymous with "voting district". Section 20-3-2(d), Utah Code Annotated (1953), in dealing with definitions concerning primary elections defines the term precinct as one or more voting districts, while Section 17-16-5, Utah Code Annotated (1953), defines precinct as a unit of government. In light of such diversity of meaning the term should be given the meaning its' context most suggests. The context in which the term appears indicates that the legislature intended that it should act as an insurance that each area of the community would be represented on the master jury list, and with this in mind it is important to note that a precinct, as a unit of government, no longer exists in Weber County, Therefore, to require that each precinct be proportionately represented would be form without substance. To assume that each city constitutes a precinct would be to defeat the objective of the provision, in that the proportionate number of jurors could be chosen from a city and still deny representation to any geographical area in the city. The above analysis indicates that the only definition which could be given to the term "precinct" which would be in line with the objective of this provision would be that of "voting district."

That the jury commissioners in Weber County failed to comply with the provisions of this section is shown by the fact that voting districts 58, 59, and 60 in Ogden City had no representative on the master jury list although they cast .4, .3, and .4 per cent of the total vote in Weber County, respectively (H. T. 32, 168). Moreover, there were persons in those districts qualified for jury service (H. T. 12). By way of contrast the town of Hooper, which cast only 1.3% of the total vote (H. T. 32), had 41 persons represented on the list (H. T. 168). According to statutory requirement, Hooper should be represented by no more than 30 persons on the master jury list; and districts 58, 59, and 60 should have 9, 7, and 9 representatives on the master jury list, respectively.

The term "as far as practicable" as used in the statute allows the commissioners to equate as near as practicable the percentage of representation on the jury list with the percentage of the total vote cast by a particular district in the last election. It in no way gives the commissioners the power to arbitrarily exclude one district and grossly over represent another. Thus, the jury commissioners in Weber County went beyond the limited discretion allowed them by statute and prevented the master jury list from representing a fair cross section of the community as contemplated by the legislature.

### POINT III

THE JURY COMMISSIONERS HAVE DISCRIMINATED AGAINST PERSONS OF SPANISH AMERICAN ORIGIN IN DRAWING JURY LISTS, AND THEREFORE JURIES DRAWN THEREFROM ARE UNCONSTITUTIONAL AND CONVICTIONS BY THEM CANNOT STAND.

A. The courts have consistently held that any system which



excludes a particular class of persons on the basis of race, from jury service, violates the Fourteenth Amendment of the constitution of the United States.

Since 1880 the courts of this country have held that any system which operates so as to exclude persons from jury service on the basis of race is unconstitutional. Strauder v. West Virginia, supra; Akins v. Texas, 325 U.S. 398, 65 S. Ct. 1276, 89 L.Ed. 1695, (1945); Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950); Whitus v. Georgia, supra.

Although these cases speak in terms of “purpose to discriminate”, and “intentional discrimination”, they also recognize a positive, affirmative duty on the part of the jury commissioners and other state officials not to discriminate, and indicate that it is not necessary to go so far as to establish ill will, evil motive, or absence of good faith, but that objective results are largely to be relied on in application of the Constitutional test.

**B.** People of Spanish American ancestry constitute a class within the community and are being unconstitutionally excluded from jury service.

The Supreme Court has indicated that the essential matters to be considered in determining if a systematic exclusion of a certain class of jurors exists are:

That the class claimed to be excluded forms a substantial segment of the population of the county, that some of the class are qualified to serve as jurors, and that a mere token or no members of the class have served on juries over an extended period of time. Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L. Ed. 1074 (1935), Patton v. Mississippi, 332 U.S. 463, 92 L.Ed. (1947).

1. People of Spanish American ancestry constitute a separate class.

Statistics indicate that 10% of the population of Ogden City have Spanish American surnames and that about 5% of the population of Weber County is of Spanish American ancestry (H.T. 37, 28).

Courts have held under similar circumstances that persons of Spanish American ancestry constituted a separate class within the community, the exclusion of which from jury service would render such juries unconstitutional. Hernandez v. Texas, supra; Montoya v. People, 14 Colo. 2d 9, 345 P. 2d 1062 (1959).

2. There is a substantial number of persons of Spanish American ancestry who are qualified to appear on jury lists and act as jurors.

Section 78-46-17 of the Utah Code Annotated indicates that the jury lists are to be drawn from the legal voters on the assessment rolls.

Testimony at the hearing established that there were 1,329 registered voters with Spanish American surnames (H.T. 158) and that 364 persons on the real property assessment rolls had surnames of Spanish American origin (H.T. 95).

3. Mere token inclusion of persons of Spanish American ancestry renders the 1968 jury list unconstitutional.

The courts have indicated that token summoning of a particular race or class would not meet

constitutional requirements. Brown v. Allen, supra; Akins v. Texas, supra; Montoya v. People, supra.

In Montoya, supra, the court held, when no person with a Spanish-sounding surname had served on a jury for several years, and when only 2 names on a jury list of 1600 had Spanish-sounding surnames in a community of 17,000, 719 of which had Spanish-sounding surnames, that this constituted a prima facie case of discrimination, and ruled that the jury which convicted the defendant was unconstitutionally selected and that the conviction could not stand.

It is important to note that the courts have consistently struck down systems which used, as a basis for drawing jury lists, sources which had persons classified according to race. Norris v. Alabama, supra; Arnold v. North Carolina, supra; Whitus v. Georgia, supra.

By analogy, just as a person of a different race is distinguished by color, these Spanish names provide ready identification of the members of this class. In selecting jurors, the jury commissioners work from a list of names and, while one cannot change the names, the courts should take extra precautions to insure that such names are not used as a basis to discriminate either intentionally or unintentionally.

Out of 2318 names on the 1968 jury list, approximately 14 are names of persons of the Negro race (H.T. 125). This is in light of the fact that only about 2% of the population of Weber County is of that race, and only about 2½ per cent of the popu-

lation of Ogden City is of that race (H.T. 28,37). In contrast, only six persons with Spanish American sounding surnames appeared on the 1968 jury list (H.T. 107) despite the fact that it is estimated that 10% of the residents of Ogden City have Spanish-sounding surnames and that approximately 5% of the population of Weber County is of Spanish American ancestry.

The defendant asserts that, in light of the above analysis, persons of Spanish American ancestry are being discriminated against in the drawing of jury lists in Weber County, thus rendering any jury selected unconstitutional. As a result, any conviction handed down by such a jury cannot stand.

#### POINT IV

WHEN A JURY IS NOT DRAWN FROM A FAIR CROSS SECTION OF THE COMMUNITY, PREJUDICE TO THE DEFENDANT IS ASSUMED AND HIS CONVICTION CANNOT STAND REGARDLESS OF THE RACE OF THE DEFENDANT.

A. The defendant in the case at bar, a Negro, was prejudiced by the method of jury selection in Weber County, and her conviction must be set aside.

The courts have held that any jury selection system which results in juries which are not drawn from a fair cross section of the community infringe upon the defendant's constitutional right of trial by jury, and that convictions by such juries cannot stand. Passer v. County Board, 171 Minn. 177, 213 N.W. 545 (1927); Walter v. State, 208 Ind. 231, 195 N.E. 268 (1935); United States v. Greenberg, 200 Fed. Supp.

382 (U.S.D.C., S.D.N.Y., 1961); Rabinowitz v. United States, *supra*.

In Passer, *supra*, the defendant, a man, challenged the jury on the basis that women were unconstitutionally excluded from jury service. The court in commenting on the right to a jury drawn from a fair cross section of the community stated that:

When a jury is not chosen from a fair cross section of the community, this right may not be legally denied, and if it is denied we must presume that the defendant was prejudiced thereby. 195 N.E. 271.

In Greenberg, *supra*, the court stated:

The defendant here does not claim that any actual or specific prejudice to him has resulted or will result from the methods of selection which he attacks. But his right to relief is not dependent upon the showing of prejudice in his individual case. If as he claims, the list from which his grand jury was drawn was made up in violation of prescribed and accepted standards, then that in itself would entitle him to relief. 200 Fed. Supp. 387.

The court went on in the same case to explain that exclusion of a racial group or economic or social class from jury service deprived the jury system of the broad base that it was designed to have in our democratic society and that such action operated to destroy the basic democratic nature and classlessness of jury personnel. The court further pointed out that under such a system injury is not limited to the defendant but that there was injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

The 5th Circuit applied the same reasoning as the Greenberg court in Rabinowitz v. United States, *supra*, in which the defendant, a white girl, challenged the jury system on the

grounds the Negroes were excluded. The court upheld the challenge and held:

Departure from statutory scheme depriving a jury system of the broad base it was designed by Congress to have may be asserted by any litigant, even though he is not a member of the excluded class. 366 F.2d 37.

See also United States v. Dennis, 183 F. 2d 201 (U.S.C.A. 2nd Cir. 1950), in which Judge Learned Hand, in commenting on the right of the defendant to challenge a jury on the basis that it was not drawn from a fair cross section of the community, stated:

That any party to a suit, civil or criminal, is entitled to have the particular panel which tries his case, drawn at random from a list which is not unlawfully weighted, and that he may complain even though he has not shown that the imbalance has prejudiced him. 183 F. 2d 216.

The defendant in the case at bar was guaranteed a right to trial by jury by Section 77-1-8, Utah Code Annotated (1953). Such a right contemplates trial by a jury drawn from a fair cross section of the community.

The jury commissioners have deprived the defendant of her constitutional rights by drawing jury lists exclusively from voters whose names appear on the real property index and by discriminating against persons of Spanish American ancestry. The result is that the constitutional rights of the defendant have been prejudiced and her conviction cannot stand.

B. The prosecution in the case at bar must show beyond a reasonable doubt that the prejudice to the defendant was harmless.

In 1961 the Supreme Court of Utah held that to require jurors to take a test to qualify as jurors was error, but that

such error was harmless and therefore did not require a reversal. State v. Dodge, supra. However, the court pointed out that the result would have been different had the defendant shown that such a requirement resulted in a jury which was not drawn from a cross section of the community.

In the case at bar the defendant has shown that the jury system as it operates in Weber County results in a jury which is not drawn from a fair cross section of the community.

Recently the United States Supreme Court in two different cases has indicated what test is to be applied in determining if the denial of a constitutional right constitutes harmless error. Fahy v. Connecticut, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963); Chapman v. California, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1966).

In Fahy, supra the court stated that the test was:

... whether there is a reasonable possibility that the evidence complained of may have contributed to the conviction. 375 U.S. 86-87.

Subsequently, in Chapman, supra, the court clarified its holding in Fahy, stating:

That before a constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. 386 U.S. 25, 17 L.Ed. 2d 710.

The defendant in the case at bar was guaranteed a trial by a jury drawn from a fair cross section of the community, and the question of whether the denial of this right was harmless error would have to be decided according to the test laid down above by the Supreme Court. The burden is on the prosecution to show that prejudice to the defendant in the case at bar was harmless. Chapman v. California, supra. The defendant

asserts that the prosecution did not and can not sustain this burden and that her conviction must be set aside.

## CONCLUSION

By limiting the jury selection process to those persons who own real property and who voted in the last general election, the jury commissioners have discriminated against the poor, the minority groups, and those other qualified persons who did not exercise their franchise in the last general election. Consequently, the jury which tried Dorothy Beasley was not drawn from a fair cross section of the community, and prejudice to her is assumed. Her conviction must be set aside.

Respectfully submitted,

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