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TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION OF CASE BY LOWER COURT 1

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 2

ARGUMENT 2

POINT I. PETITIONER WAS DENIED A FAIR TRIAL BY A JURY OF HER PEERS BECAUSE THE JURY SELECTION SYSTEM UNFAIRLY EXCLUDED A SUBSTANTIAL PORTION OF THE COMMUNITY OF WHICH APPELLANT WAS A PART 2

CONCLUSION 10

CASES CITED

Arnold v. North Carolina, 376 U. S. 773, 84 S. Ct. 1032 (1964) 4

Carter v. Jury Commission of Green County, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970) 9

Cipriano v. City of Houma, 395 U.S. 701 (1970) 8

City of Phoenix v. Kolodziejshi, 38 Law Week 4597 (1970) 8

TABLE OF CONTENTS — Continued

Page

Hernandes v. Texas, 347 U.S. 475, 74 S. Ct. 667 5

Hoyt v. Florida, 368 U.S. 57, 82 S. Ct. 159 5

Jones v. Georgia, 389 U.S. 24, 88 S. Ct. 4 (1967) 3

Kramer v. Union Free School District, 395 U.S. 621 7

Sims v. Georgia, 389 U.S. 404, 88 S. Ct. 523, 14 L. Ed. 2d 634 (1967) 3

Thiel v. Southern Pacific Co., 328 U.S. 217, 66 S. Ct. 984, 90 L.Ed. 1181 6

Whitus v. Georgia, 385 U.S. 545, 87 S. Ct. 643 (1967) 4

STATUTES CITED

Utah Code Ann. (1953) 78-46-8 1

Utah Code Ann. (1953) 78-46-17 .... 3, 5

IN THE SUPREME COURT OF THE STATE OF UTAH

JUDY CAROL LEGGROAN, *Petitioner,* —vs.— JOHN W. TURNER, Warden, Utah State Prison, *Respondent.*	Case No. 12583

BRIEF OF APPELLANT

STATEMENT OF NATURE OF THE CASE

This is an appeal from the judgment of the Trial Court denying petitioner's writ of Habeas Corpus.

DISPOSITION OF CASE BY LOWER COURT

Petitioner's Writ of Habeas Corpus was denied.

RELIEF SOUGHT ON APPEAL

Petitioner seeks a reversal of the judgment of lower court denying his Writ of Habeas Corpus.

STATEMENT OF FACTS

At the trial, the defense challenged the entire panel on the ground that it was selected from the tax assessment rolls which automatically excluded persons who were not record property holders, alleging this had the effect of reducing the number of women, young people, poor people, and members of minority groups—all classes to which the defendant belonged. (T-6, 1,15). There were only ten women on the panel of fifty prospective jurors called for this case, of which only eight fell within the first thirty-two surviving the challenges for cause and all of these were eliminated by the state's preemptory challenges (R-41-43). Apparently there were no members of minority races and the panel was noticeably composed of older people (T-14). Defense counsel proffered evidence as to the method of jury selection (T-6), but instead a stipulation was entered into that the state statutes regarding selection from assessment rolls were followed (T-14, 15).

ARGUMENT

POINT I

PETITIONER WAS DENIED A FAIR TRIAL BY A JURY OF HER PEERS BECAUSE THE JURY SELECTION SYSTEM UNFAIRLY EXCLUDED A SUBSTANTIAL PORTION OF THE COMMUNITY OF WHICH APPELANT WAS A PART.

By excluding from jury service all those people in the community who were not on the assessment rolls of Salt Lake County, the statute, §78-46-17, Utah Code Ann., (1953), excluded a substantial portion of the community, the effect of which was to exclude a disproportionate number of qualified citizens who possess one or more of the following characteristics: black, young, poor, or female. All of these categories of persons are traditionally non-property holders,* as contrasted with those groups of people who are white, older, non-poor, or male, or those who possess more than one of these characteristics. These latter categories of people are traditionally those who hold most of the property. However, as will be shown by the following cases, it is not necessary to show the effect of the exclusion, it is enogh to show that the exclusion itself exists.

In *Sims v. Georgia*, 389 U.S. 404, 88 S. Ct. 523, 14 L.Ed. 2d 634 (1967), the grand and petit jury lists were drawn up from the county tax digests, and were listed by race. Negroes made up 24% of the taxpayers, but only 4.7% of the names on the grand jury lists and 9.8% of the petit jury lists. This was said by the Court not to comport with constitutional standards. This challenge by the defendant was successful because it showed an

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*While females appear often as real property holders, there are a great number of people who are not real property holders of record and who would only appear as automobile owners and usually the automobile is in the name of the male.

exlusion from jury service of a class of citizens. There was no showing of the effect of this exclusion, that is, no showing that the result of the trial would have been different had other groups been included on the jury lists.

Similarly, in *Arnold v. North Carolina*, 376 U.S. 773, 84 S. Ct. 1032 (1969), a case dealing with grand juries, the Court in a per curiam opinion reversed a murder conviction pointing out that the tax records were used to get the jury lists, but that blacks and whites were listed separately on these tax records. In twenty four years, only one Negro had been on a grand jury, and there were 4,800 Negroes in the community of 17,000. This was said to be a prima facie case of denial of equal protection. Here again, the key factor was the showing that there was a systematic and purposeful exclusion and discrimination, and that it was not an exclusion that resulted from chance. Again, there was no require-ment that any effect be shown, it was only necessary to show that in fact the Negroes had been excluded.

Two other cases, *Whitus v. Georgia*, 385 U.S. 545, 87 S. Ct. 643 (1967), and *Jones v. Georgia*, 389 U.S. 24, 88 S. Ct. 4 (1967) illustrate again how this purposeful discrimination was shown, and add a further dimension. In *Whitus*, the Court said the burden was on the defend-ant in a criminal case to prove the existence of purposeful discrimination, but once a prima facie case was made

the burden shifted to the State. In that case, 27% of the taxpayers were black, and under 8% of the names on the petit jury lists were black. The State offered no evidence to explain this, and so the Court held that the State did not rebut the prima facie case of the defendant. It thus appears that once the purposeful discrimination and exclusion is shown, the burden shifts to the State to explain it. Petitioner argues that the statute itself, §78-46-17 Utah Code Ann., (1953), is a purposeful exclusion and discrimination against a class of persons, that is, non-property holders, those not appearing on the assessment rolls. As *Hernandes v. Texas,* 347 U.S. 475, 74 S. Ct. 667 (1953) points out: "The constitutional command forbidding intentional exclusion is not limited to Negroes. It applies to any identifiable group in the community which may be the subject of prejudice." 347 U.S. at 478.

An example of a failure to sustain the burden of proving systematic exclusion, based on other than racial grounds, is *Hoyt v. Florida,* 368 U.S. 57, 82 S. Ct. 159 (1961) where the Court affirmed a second degree murder conviction of a woman by an all male jury. The defendant claimed that women would have been more understanding of her defense than men. The Court said that the Fourteenth Amendment does not entitle a defendant to a jury " . . . tailor made to the circumstances of the particular case, whether relative to the sex or other condition of the defendant." But, it also said that

"All that is required is that the jury be indiscriminately chosen, untrammeled by *arbitrary* and *systematic exclusions.*" 368 U.S. at 58. It is clear that petitioner has no right to a "tailor made" jury, but it is equally clear that in petitioner's case there has not been a jury chosen "indiscriminately . . ., untrammelled by . . . systematic exclusions," as the Utah statute itself systematically and arbitrarily excludes a major portion of society.

There is a case which has held that the exclusion from jury lists of a large class of citizens is reversible error, although the holding was based on the supervisory power of the Court rather than a constitutional basis. *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 66 S.Ct. 98 90 L.Ed. 1181 (1945). In that case, the class excluded was "daily wage earners." The Court said, 328 U.S. at 223: "Wage earners are a substantial portion of the community, a portion that can not be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system." Also 328 U.S. at 220, it was said that: "Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. . . . Jury competence is an individual rather than a group or class matter. To disregard this fact is to open the door to class distinction and discrimination which are abhorrent to democratic ideals of trial by jury." Further, 328 U.S. at 2 "Were we to sanction an exclusion of this nature we w encourage whatever desires those responsible for

selection may have to discriminate against persons of low economic and social status." It must be noted that this was a civil action, for personal injury, by a passenger against a railroad, and the plaintiff complained that the verdict against him below must be reversed because the jury was not made up of a valid cross section of the community, but only contained pro-employer types. The Court agreed with plaintiff and reversed the judgment below. It would seem that this principle would hold more strongly in a criminal matter where personal liberty in involved. Again, it should be noted that plaintiff was not required to show the effect this exclusion had on his trial outcome, in fact, the Court said reversal was required whether or not plaintiff was prejudiced by the wrongful exclusion, or whether or not he was one of the excluded class.

The Supreme Court has, in recent bond election cases, held that groups of citizens can not be excluded from the franchise. While these cases do not deal with jury selection, they are instructive as to what a State can not do in terms of excluding groups of citizens from participating in functions that affect their lives. In *Kramer v. Union Free School District*, 395 U.S. 621 (1970), the Court held that a State can not restrict the vote in a school district election to owners and lessees of real property and parents of school children because exclusion of otherwise qualified voters was not shown to be necessary to promote a compelling state interest. While

this case does not deal with jury selection, it can be persuasively argued that the State has no compelling interest in not allowing non-property holders, who are otherwise qualified to serve as jurors, to serve as jury members.

In *Cipriano v. City of Houma,* 395 U.S. 70 (1970), the Court held that restricting the franchise to property tax payers in an election on revenue bonds violated the Equal Protection Clause of the Fourteenth Amendment, because the non-property holders were effected by the revenue bonds as much as the property holders were. Likewise, in the case of jury service, non-property holders are effected by the makeup of a jury which may try them just as much as a property holder is so effected.

A similar holding as in *Cipriano, supra* is *City of Phoenix v. Kolodziejski,* 38 Law Week 4597, which held that the franchise cannot be restricted to property holders in a general obligation bond election, because the difference between the two classes is not substantial enough to justify excluding the latter, even though possible property holders did have a different interest than non-property holders. Here again, as in the case of jury selection, both of these classes would seem to have an identical interest, and that would be to be tried by a jury that was a true cross section of the community

Holding the franchise in certain elections and inclusion on the list of people eligible for jury service, whether these function be considered duties, privileges, or rights, are not unrelated activities when the criteria that relates them is that all qualified persons should be treated alike.

In *Carter v. Jury Commission of Greene County,* 90 S.Ct. 518, 24 L.Ed. 2d 549 (1970), there was a class action by a group of Negroes, alleging racial discrimination in jury selection. The Court held for defendants, and denied the affirmative relief sought by plaintiffs, but the Court said, 24 L.Ed. 2d, at 557: "Whether jury service be deemed a right, privilege, or a duty, the State may no more extend it to some of its citizens or deny it to others on racial grounds than it may invidiously discriminate in offering and withholding the elective franchise."

There seems to be no reason why in place of the word "racial" in *Carter,* supra the concepts of "non-property holder" and "young person who is a qualified voter" could not be substituted, for surely none of these labels make a person incompetent for jury service. All this is required in Utah to be competent to serve as a juror in Utah is that one be a citizen over 21, be able to read and write the English language, be at least a six-

month resident of the county, be a state taxpayer, and be of sound mind and discretion, § 78-46-8 Utah Code Ann. (1953). It is obvious that a person can be a non-property holder, or a young person, and still have all of these qualifications.

Clearly if competent groups of citizens are excluded from jury service, a truly representative cross-section of the community is not represented on the jury lists, nor on the juries.

CONCLUSION

Because persons who were not property holders of record were excluded from the jury, this court should grant petitioners writ of Habeas Corpus.

Respectfully submitted,

F. JOHN HILL

Attorney for Petitioner