In the

Supreme Court of the United States

John E. Test,

Petitioner,

v.

No. 73-5993

United States,

Respondent.

Washington, D. C.
December 11, 1974

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Wednesday, December 11, 1974.

The above-entitled matter came on for argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WALTER L. GERASH, ESQ., 1700 Broadway, Suite 2317, Denver, Colorado 80202; on behalf of the Petitioner.

WILLIAM L. PATTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 73-5993, Test against the United States.

Mr. Gerash.

ORAL ARGUMENT OF WALTER L. GERASH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GERASH: Mr. Chief Justice, and Associate Justices:

This case involves the plain meaning of the federal Jury Selection and Service Act of 1968; and, more specifically, with the Section 1867 (d) and (f), which deals with the challenging compliance with selection procedures.

In essence, the issue in this case is: Did the federal court, trial court, err when they denied a motion to inspect the master lists and the -- rather, the master and qualified wheel under 28 U.S.C. 1867(d), upon a timely motion accompanied with a sworn affidavit, alleging non-compliance with the Act, in that there was a symstematic exclusion of Spanish-surnamed persons qualified for jury duty.

There is a subsidiary question, which I don't feel it's necessary to reach, but it's implicit in the briefs, and that is: Is this form of requested relief, statutory relief under the Act, separate from a constitutional or collateral attack?

And the answer to both questions is yes.

The facts in this case are undisputed. Prior to the trial of a drug case, counsel filed a motion to dismiss the indictment and a motion to inspect the jury wheels; and, pursuant to the statute, he filed an affidavit of an experience that he had in Boulder, Colorado, which is a county, city and county about twenty miles from Denver.

And in that, he had a case before the State court, at that time the State law mimicked the federal Jury Selection and Service Act, in that it utilized the voting registration lists as a basic source list. And the affidavit that I filed is contained in the Appendix, page 15, and in essence, without going through the Appendix, the conclusion was that this group, that the Spanish-surnamed group were underrepresented by over 50 percent.

QUESTION: Mr. Gerash, let me ask for a little help.

In this case and in others we always have -- where we always have references to people with Spanish surnames, suppose a woman named Perez marries a man named Jones. Now, their offspring is not a person with a Spanish surname, if they follow our system.

MR. GERASH: Well, relying on human nature, it's self-corrective, because the opposite sex does the same thing. And so we've statistically taken -- usually take care of that situation.

It cancels one another, it's really not a problem statistically.

QUESTION: All right. Question No. 2: your motion, it seems to me, is directed to persons with Spanish surnames and students and blacks -- using your phrase -- and then later persons under the age of 35. Then in your affidavit you speak to Spanish surnames and youths under 30, students and workers.

I wonder whether there is a little inconsistency between the supporting affidavit and the motion?

MR. GERASH: Well, what happened is, of course, this Court certified the issue to be Spanish surnames, and did not certify a age grouping or, in this case, blacks. Of course, in this specific case, being denied the lists, we couldn't make any statistical analysis in the federal District Court. But the affidavit -- there was testimony by Professor Bardwell, from the University of Denver, to the effect that these groups were also underrepresented. But that wasn't -- of course that is not the issue that is before the Court.

The court only certified the Spanish-surnamed cognizable group under Hernandez vs. Texas.

QUESTION: Well, I take it, then, you're saying that the inconsistency, which I believe is present between your supporting affidavit and the motion, is irrelevant because we're only speaking of Spanish surnames here.

MR. GERASH: That's right, Your Honor.

QUESTION: And you feel, in response to my first question, that the thing balances out.

MR. GERASH: Yes, it does.

QUESTION: You must mean there a little bit, Mr. Gerash, what empirical data is available to show that it balances out?

MR. GERASH: Well, --

QUESTION: Here you're saying that there are as many Spanish people, people of Spanish origins or Mexican origins who marry non-Spanish names, like Jones or Peterson, as vice versa.

MR. GERASH: Right. Right.

QUESTION: But how do we know that?

MR. GERASH: Well, there have been some studies made, and however the statisticians and mathematicians do have an error of correction, and they take that into consideration.

QUESTION: I don't see how you could do that except by absolute head count.

MR. GERASH: Well, therefore it would be -- it would have been impossible in Hernandez vs. Texas, I suppose, to come to the systematic exclusion constitutional argument.

But I don't know the -- they do do that in the -- the mathematicians sometimes on cross-examination explain --

QUESTION: But mathematics doesn't have much of a play in the marriage problems, does it?

MR. GERASH: Well, no, --

QUESTION: They don't marry on a mathematical basis.

MR. GERASH: That's correct. The --

QUESTION: Well, it's mathematical to this extent: that as many men marry women as women marry men.

MR. GERASH: That's right; that's correct.

QUESTION: But what does that have to do with their antecedents, ethnic antecedents?

MR. GERASH: Well, the U. S. Census met with that problem also, and I quote a U. S. Census finding of the voting characteristics of persons in the 1968 election. And naturally, when they make their random sampling, and they go into the homes and count heads, they actually inquire of national intermarriage, and their statistics are balanced accordingly in their Census figures.

QUESTION: But it is a sampling only?

MR. GERASH: Yes, but it's projected over -- projected over statistically hundreds of thousands of persons. It's a pretty good figure.

Of course, the amicus brief indicates that Spanish-Americans have been underrepresented even in our Census figures. So, theoretically, --

QUESTION: In other words, many of them were missed.

MR. GERASH: That's correct.

QUESTION: Yes.

MR. GERASH: Now, --

QUESTION: The same was true with Negroes and other ethnic groups, was that not true?

MR. GERASH: That's correct. And it -- however, since blacks, Negroes have Anglo names, it's sometimes very difficult for a poor person to do -- to look at 8,000 names, unless their race is designated in the registration procedure, which it is now under the new Act, and I feel we have a very good Act, and we have a very good self-executing Act, and I'd like to deal with that.

Anyhow, the affidavit appears, on its face, to be okay. In fact, my brother Patton indicates that he's never seen a better affidavit, and I have to emphasize that this was a threshold problem.

In other words, we never got a hearing. We never had a determination as to whether or not there was a non-compliance with the Act. We were denied the list outright. And Judge Arraj is an excellent judge, excellent trial judge, I've tried many cases before him, but he stated this, on page 24 of the Appendix:

"Well, that's later, but I want to look at the qualified jury list in order to have a hearing. In other

words, I want a hearing."

"You're not going to have a hearing in this case. If you want to look at the jury list some time, we will hire some extra help and if you come down, you can peek at it all you want to, but it's not going to be had in this case. I have told you that we concede that the percentage of jurors that are black or Spanish in surname are not a pro rata percentage that those groups bear to the total population. We concede that."

"All right."

"That's on the record."

"Mr. Gerash: My position is, though, if I can show it is so overwhelming, it is a violation of due process, and I can't do it. I have nothing to go up to the Tenth Circuit on if I lose this case to show that it is substantial."

QUESTION: What page are you reading from?

MR. GERASH: Page 24.

QUESTION: Of the --

MR. GERASH: Appendix.

QUESTION: -- Appendix.

MR. GERASH: And the court never ruled on the sufficiency of the affidavit, and there is no record on review. And we had no hearing. And, fortunately, or unfortunately, the defendant as convicted of illegal drug dispensing, and we are here.

The plain meaning of the words -- in other words, the words mean what they say. In the Appendix of -- in our brief is laid out the statute that has a Declaration of Policy.

QUESTION: What page?

MR. GERASH: Page 1a, which would be page 50 of Petitioner's Brief.

The Declaration of Policy of the United States is declared to have a random cross-section of the community, and that there should not be any dispute -- that all jurors should be able to serve, regardless of race, color, religion, sex, national origin, or economic status.

In fact, prior to the Act, one year prior to the Act, the court, Fifth Circuit, speaking through Rabinowitz, put the key man in his coffin, and this Act buried the coffin -- buried the key man in the coffin.

And it was very salutory. One cannot help being very impressed with our Legislators in drafting this Act, and it's a good Act, and it has a self-correcting mechanism; and that is, if the voter registration lists in a specific geographic area do not substantially represent a cross-section, and it doesn't have to be a mirror, the court, the Judicial Council, the Judicial Conference of the United States, in its rule-making powers, and the Chief Judge himself can add new lists that would broaden this mirror that is being

polished up.

In other words, it's not necessary to have a constitutional attack, the Act itself is self-purifying. The common law lawyers, in essence, shine up the mirror; they bevel the reflection. And if the reflection is bad, if the reflection doesn't reflect a cross-section of the community, then the court may polish up his own mirror, so to say, by selecting other lists. It's a very viable Act. It's a very vital Act.

And I feel that the democratization of the jury, this gift given to us by the Magna Charta is very strong now and has a -- will have a very great history in the future.

QUESTION: You're speaking now to the Jury Wheel, not to a specific jury?

MR. GERASH: I'm speaking about our Act, the federal Act.

QUESTION: Well, addressing your remarks to what must be done with the total of names going into the Jury Wheel, not the 12 people or 6 people who go in --

MR. GERASH: Exactly.

QUESTION: -- to the box.

MR. GERASH: Exactly. We're not concerned with the jury, because the jury -- in fact, in this case, there were no Chicanos that tried John Test. However, statistically it would be invalid to say, because if the jury doesn't have

two, it's invalid.

I was attempting to get at the 8,000 names, to make a statistically viable analysis, and I was denied that right. Counsel agrees there was error.

However, I'd like to address myself to the fact that we feel that this Act has to be read as a whole, because the Act monitors statistics, the Act enables lawyers, both the government and the defense attorneys, in 1867 on page 9a of the Petitioner's Brief, wherein it talks about "Challenging compliance with selection procedures."

It clearly gives both sides to file motions seven days prior to trial, and it gives them -- "The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion."

The Act recognizes that this is an exclusive means by which a person accused of a federal crime, or the Attorney General of the United States, or a civil party may challenge the -- any jury, in that he was not selected in conformity with any of the provisions.

And there are many other provisions. There are disqualifications, there are excuses that may reflect, perhaps, a bias in some manner.

However, the Act specifically delineates that this shall not preclude any civil -- other remedies, especially

constitutional attacks.

So we claim in this case that not only did we conform literally to the statute, but we alleged a constitutional dimension, that we felt that we would be able to prove if we were allowed into the hearing room and took a look at the statistics.

QUESTION: The government seems, in large part, to agree with you, doesn't it?

MR. GERASH: That's correct.

QUESTION: So this is hardly -- the controversy has been considerably reduced, hasn't it, since the petition for certiorari?

MR. GERASH: That's correct, Your Honor. That's correct.

In fact, both parties asked that it be remanded with instructions to allow us to look at the list, to see if -- we hope we'll be proved wrong --

QUESTION: Right.

MR. GERASH: However, there's a little corollary, and that is that it seems that the Ninth Circuit and the Second Circuit have been requiring the affidavit or the proof, the proof, to have a constitutional dimension, which, as I read the Act and the history of the Act, is really not so.

QUESTION: And the government agrees with you in that

reading of the Act, as I read their brief.

MR. GERASH: That's correct.

QUESTION: You don't contend that you're entitled to a new trial if we agree with you, do you, you're just entitled --

MR. GERASH: No.

QUESTION: -- to an examination of the jury list.

MR. GERASH: Exactly. And if I prove that there is systematic exclusion, I have a right to new trial with a fresh -- with a panel that perhaps has a better statistical cross-section.

We don't want a mirror, as Justice White indicated in the -- one of his cases. We don't want a mirror. We just want a -- we want a fair cross-section, just what the statute calls for.

And these things differ, will difference in every community. They will differ in the South, they will differ when people get politically apathetic, and of course we're not even entertaining the question that could be serious later on, and that is: Why should voting be the criteria of serving on a jury?

Thirty million people don't engage in the political processes, for whatever reason.

QUESTION: This is a -- this isn't voting, this is registration to vote.

MR. GERASH: Registration -- well, it's -- the Act says you could use voter registration lists or actually the people who voted in the last election.

Of course, in Colorado, they're purged if they don't vote in an election. They don't even -- they're just purged from the list.

QUESTION: Just have to mix one election to be purged?

MR. GERASH: That's right.

That's basically -- I would add that the Colorado experience, when they, when the Chief Justice supplemented the list sua sponte, I tested in Fort Morgan, in another county, and I found it not wanting at all. It was self-correcting, and there was no -- there was an adequate cross-section given the defendants, and I was very satisfied.

So I think this heralds a lot of security in a lot of good predictions with the functioning of our federal Act.

Finally, I'd just like to indicate that the Fifth Circuit seems to be particularly sensitive, and particularly sophisticated in this area, and Judge Gwein, in his article in 20 Mercer Law Review and in his opinion in U. S. vs. De Alba-Conrado, indicated that there are really two different remedies: there's the constitutional remedy and a statutory remedy; and, they are not exclusive, they may overlap. And he also indicated that, based upon

his studies, that the further democratization of the jury has maximized the jury's greatness and raised it to a new height of dignity.

And I feel that common law lawyers should be given the opportunity to improve the mirror, without throwing it out in a constitutional attack, but working with the court personnel and the judges in order to perfect our jury, the federal jury system.

I'd like to save -- if there's going to be any rebuttal, I'd like to save some time. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Patton.

ORAL ARGUMENT OF WILLIAM L. PATTON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. PATTON: Mr. Chief Justice, and may it please the Court:

The United States finds itself in the somewhat unusual position of agreeing with the petitioner on the only issue which we consider to be ripe for review in this case.

That is, it is our position that there is an unqualified right under the Jury Selection Act to inspect the jury lists, and that the District Court's denials of petitioner's motion to inspect in this case was error, and we do not believe that it can be properly characterized as harmless.

We think there's an unqualified right to inspect the list, because the statute accords such a right.

Section 1867(f) explicitly states that the parties shall be allowed to inspect and copy all records used in the jury selection process, and the jury lists are of course such records.

The legislative history confirms that the statute means exactly what it says.

Moreover, we believe inspection of the list is necessary to an effective utilization of the Act's challenge procedures.

I would like to correct something Mr. Gerash said in his argument. I have seen better affidavits than Mr. Gerash's affidavit. But I do say it is unlikely that counsel would be able to come up with a better affidavit unless he can see the jury list.

Now, there have been occasional cases which have indicated that the sworn statement, which is required by 1867(a),is a precondition to inspection. But we believe those decisions are plainly wrong, because 1867(f) says that you can inspect the list in preparation of a motion under 1867(a).

Now, the right of inspection does not impose an undue administrative burden. TheDistrict Court clerk need only maintain a copy of the list, available for inspection.

And we do not think that inspection will be used for delay, because the time periods imposed by the Act effectively preclude that.

And we do not think there is any substantial risk that inspection will be used for tampering, because the sheer number of names on the master and qualified list would effectively preclude that.

We do not have a comprehensive survey of District Courts, but based on an informal survey of the United States Attorney, who we deal with, we believe that most District Courts presently allow inspection.

Now, whether or not the error can be deemed harmless in this case depends on an analysis of the Act.

If the Act is read as being directed solely at the prevention of systematic exclusion or purposeful discrimination, then we believe the error was harmless, because the petitioner's sole claim was that the use of registered voter lists in Colorado gives rise to a significant underrepresentation of certain groups, primarily Mexican-Americans or persons with Spanish surnames.

Now, as I will explain in a minute, we don't think the Act can be read in that way, but it does have broader purposes; but if we assume for the moment that it is directed at systematic exclusion, the petitioner does not state such a claim.

The federal jury plan contemplates the use of registered vote lists as the source for prospective jurors and a random selection is the method. And that system is in sharp contrast with the jury procedures that have been found to constitute systematic exclusion in this Court's decisions.

Those systems usually involve a source for jurors that was not racially neutral, and they all involve the subjective selection method, and they produced one of two results: they either produced total exclusion of a group, such as in Norris v. Alabama, where no Negro had served on a grand or petit jury in the memory of living witnesses; or they produced a progressive decimation of a class at each stage of the process, such as in Alexander v. Louisiana.

Now, systematic exclusion denies a member of the group an opportunity to participate, and as this Court held in Peters v. Kiff, it stigmatizes the class exclusion.

Voter lists do not exclude anyone, any person qualified to vote may, simply by registering, obtain the opportunity to be considered for jury service.

Now, the federal selection system resembles fairly closely the Jury Selection Procedure that was at issue in Brown v. Allen, which is reported at 443 United States Reports, involving the Forsyth County, North Carolina, system, and there tax lists were used as the source for prospective

jurors, and the names were drawn by lot. And this Court held there was no constitutional violation, merely because Negroes were underrepresented in proportion to their numbers in the population, so long as the selection procedures were fair.

Congress could constitutionally have made voter lists conclusive, but they did not do so. And in section 1863(b) of the Act, Congress provided that the voter lists were to be supplemented whenever necessary to foster the policies of 1861, the fair cross-section, and 1862, the prevention of discrimination.

QUESTION: That's what had to be done after the voting age was changed, was it not?

MR. PATTON: Yes, Mr. Chief Justice, right after the voting age was changed, the Act was amended, requiring two things: the emptying of the wheel and refilling the master list. And now provides that a person 18 years of age is qualified for jury service.

Now, we think the party challenging the voter list and contending that there's an obligation to supplement bears a heavy burden, and while we believe Mr. Gerash should be entitled to inspect the list and make his claim, we don't think it's likely that he's going to be able to prevail.

QUESTION: Well, is that before us -- the only thing before us is as to whether he has the right to see the

list; is that right?

MR. PATTON: That's right, Mr. Justice Marshall.

QUESTION: And you agree that he does have the right to see the list?

MR. PATTON : Yes, sir, we do.

QUESTION: So what are we going through now?

MR. PATTON: Well, we believe the case ought to be remanded to the Court of Appeals, with instructions to --

QUESTION: You want us to write an essay on this? That both sides agree?

MR. PATTON: No, sir, I don't think it's necessary -- I think it might be helpful if this Court made clear --

QUESTION: Well, you suggested that the -- sometime ago, when we took this case, that it should -- that we shouldn't take it, that it should be remanded.

MR. PATTON: That's right.

QUESTION: So you perhaps should be putting the questions.

MR. PATTON: Well, we're somewhat puzzled and uncertain as to what the Court was interested in, and I -- let me bring up one thing --

QUESTION: Well, I take it you say that the Act is to be construed to mean that any one can inspect the jury lists and what's on the wheel by saying, "I may want to file a motion"; and in order to find out if I do or not, I can

go on this fishing expedition in the jury records. And you say that's exactly what Congress contemplated.

MR. PATTON: That's right. And it is not an administrative burden on the clerk, he only has to maintain a copy of the list. And unless you can look at the list, you can't make a challenge to the Act.

QUESTION: Now, does that include all the records of individual exemptions?

MR. PATTON: The -- well, under the federal Act, the process works basically this way: you start with a voter list, choose at random selection, from that you send out questionnaires. The questionnaires come back, and then excuses, disqualifications and exemptions are noted on the questionnaires.

QUESTION: Okay.

MR. PATTON: The practice has been in the District Courts to permit inspection of the questionnaires. And I think that's appropriate. Because I would -- we would take the position that a party wishing to challenge the Act's procedures must show that not only is there a disparity, but if he wants to go on and make a challenge based on the qualified list, then he would have to look at the questionnaires.

QUESTION: Well, you say the error in this case was that although the affidavit he presented was insufficient,

he should have had an opportunity to present a better one, if he could, after inspecting the lists?

MR. PATTON: That's right. That's the way the challenge procedures were designed to work. You look at the list. Based on what you find, you then do an affidavit. And if the affidavit doesn't state a claim then, then you're out of luck.

QUESTION: But there's no need for any sort of prima facie showing before you have a right to inspect, in your view?

MR. PATTON: In our view there is not.

QUESTION: There's a nonrestricted right, in other words, to see the list --

MR. PATTON: That's right, Mr. Justice Stewart, we believe there is.

QUESTION: -- that's in the statute.

QUESTION: I suppose it has to be a defendant asking for it, it isn't just any member of the public.

MR. PATTON: No, it has to be a defendant or the Attorney General, or either party in a civil case.

Now, it's not faced here, the Act does not preclude constitutional challenges by other persons, but it wouldn't govern whether there's a right to inspect the lists in those cases. And --

QUESTION: Well, they existed before the Act.

MR. PATTON: They existed before the Act, that's right.

That is the only issue in the case, and we think it should be remanded --

QUESTION: I take it, then, you found nothing in the legislative history to counter your view?

MR. PATTON: Nothing, Mr. Justice White, except in 1966, in House debates on a previous bill that was never enacted, a statement was made that inspection might be used for delay or tampering. And, as I've stated, we don't think that's a substantial risk. It's most inefficient --

QUESTION: There is a time limit, isn't there?

MR. PATTON: There is a time limit, yes.

QUESTION: Seven days is it?

MR. PATTON: Seven days, and, in any event, before the voir dire begins.

And the lists are so large that it's, at best, an inefficient way of tampering, so that we're not concerned about that.

Now, we think it should be sent back to the Court of Appeals with instructions to remand to the District Court for action on petitioner's motion to quash the right after he's had an opportunity to see the list. And we may, then, face the question of whether there's an obligation to supplement. But we don't face it now.

QUESTION: What's our -- and if he doesn't make his case, to re-enter the judgment?

MR. PATTON: That's right.

Now, as a matter of interest, I perhaps should inform the Court of a couple of things that have happened since this case has been in this Court. I understand, but we don't have any hard information on it, that the State of Colorado has, under the Uniform Jury Selection Act, which is substantially identical to the federal Act, ordered the supplementation of voter lists.

QUESTION: Is that new, are you saying?

MR. PATTON: It is -- they have done it, we don't know whether -- the Supreme Court of Colorado has ordered the voter lists be supplemented for jury selection in State courts.

QUESTION: Since --

MR. PATTON: Since this case was --

QUESTION: -- the certiorari was granted in this case?

MR. PATTON: That's right.

QUESTION: Unh-hunh.

MR. PATTON: Now, I understand that it took a year to develop the supplemental sources. And one of the things that we're concerned about in this whole area is that if a plan is ever found to be deficient, it's going to be very

difficult, because it's not easy to develop supplemental sources.

The Judicial Conference is working on that problem, they are now running in selected districts some computer projects, and that may solve the problem. And, in addition, the Judicial Conference has a reporting procedure in which district courts around the country report periodically with a statistical sample from their master lists, and that is monitoring the way the system works.

But we don't face those difficult questions in this case.

Unless the Court has any further questions --

QUESTION: Well, an example of this time occurred when the voting age was changed, it took, as I recall it, substantially more than a year to bring that voter wheel up to date.

So that there's bound to be a lag in it when you're dealing with a large omitted group.

MR. PATTON: There is going to be a lag.

Mr. Chief Justice, we haven't had a great deal of experience under the Act, and one reason that we haven't had the experience is that until '72 the questionnaire did not indicate race, at least the indication of race was optional. So that if you wanted to make a challenge that there is underrepresentation of racial groups, it was very difficult to

do.

And we may get more of those challenges.

Now, during the hearings on the bill, Professors Kalven and Zeisel testified, and they recommended that private parties not be allowed to enforce the supplementation requirement, that that be handled by an audit procedure in the Act.

Their suggestions wasn't followed, and experience may show that they were right, but at the present time we're unable to come to that conclusion.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Patton.

Do you have anything further, Mr. Gerash?

REBUTTAL ARGUMENT OF WALTER L. GERASH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GERASH: Just a comment on Justice White's mention of a fishing expedition.

No. 1, I think the sworn statement, it specifically states that the sworn statement must have facts if true which would constitute a substantial failure to comply with the provision of the --

QUESTION: But you don't have to -- do you have to file that before you get inspection?

MR. GERASH: Yes.

QUESTION: Well, then, you say you must make out in your sworn statement, you must have allegations in there

that would entitle you to relief?

MR. GERASH: You have to -- I would liken it to a probable cause affidavit, because --

QUESTION: Well, Mr. Justice Rehnquist asked your colleague if that were so, and he said no.

MR. GERASH: Well, I suppose I should be on this side, and he should be on my side.

[Laughter.]

QUESTION: Well, no, but -- then, your affidavit was insufficient.

MR. GERASH: Well, I don't think it was, because my affidavit was --

QUESTION: Well, the government says it was, and if that's what this case turns on, then we do have an issue here. You have a disagreement between you and the government on the sufficiency of the affidavit.

MR. GERASH: I'm just stating that --

QUESTION: Isn't that right?

MR. GERASH: Not really, no.

QUESTION: Well, why isn't it?

You said your affidavit is sufficient; he said it wasn't.

MR. GERASH: He stated that it was more sufficient than most affidavits he's ever seen. Not the best.

I don't want to quibble, but I want to point out

that this --

QUESTION: Well, then, if you say there's an issue here before the Court, before we can remand we must pass on the sufficiency of your affidavit. If it was insufficient, there's going to be no remand.

MR. GERASH: Well, on --

QUESTION: That's the conclusion from what you're just said, I would take it.

MR. GERASH: I'll stand on the affidavit. I think the affidavit is sufficient.

But the lower court never passed on it.

QUESTION: Well, no, but --

QUESTION: I understood Mr. Patton to say that your affidavit was as good, as sufficient as it could be, without an examination of the list.

QUESTION: Well, but --

MR. GERASH: Right, and I had another --

QUESTION: -- but that isn't the point. That isn't the point. You've just said that you must make outa prima facie case in your affidavit before you're entitled to look at the list.

MR. GERASH: Yes, and I think that prevents a fishing expedition.

QUESTION: Well, how many counties does the Denver district of the District of Colorado draw on for its jury

selection?

MR. GERASH: About twenty counties.

QUESTION: Well, I would think if you have to make a prima facie showing, making it just in Boulder County might not be sufficient.

MR. GERASH: It would be economically impossible. Every criminal defendant would have to be a wealthy man.

QUESTION: Well, I think that maybe militates against the prima facie showing argument, rather than saying that you can make a prima facie showing by one out of twenty counties.

MR. GERASH: Well, then I'll have to move and change my position --

QUESTION: I don't know why you backed off from the fishing trip.

MR. GERASH: I'll have to agree with him; but the point is, if a lawyer swears under oath facts that if true would be a substantial noncompliance, and he has no way of really proving that, other than an experience with the voter registration lists in a county that comprises one of the federal counties --

QUESTION: Well, I had thought the -- maybe I should read the Act again; I had thought the government's position was, and that yours was, that all you needed when you wanted to inspect was to tell the court officials that, "I'm going

to file a motion."

MR. GERASH: Well, the statute doesn't say that. But I suppose that's his position.

QUESTION: Well, he said -- the government position is, I thought yours was, that 1867(f) said that you can inspect for the purpose of preparing the motion.

MR. GERASH: Well, as I read (d), 1867(d), the motion must accompany -- an affidavit must accompany the motion.

QUESTION: I agree. It certainly must.

But 1867(f) says you can inspect in order to prepare the motion.

MR. GERASH: That's correct.

QUESTION: Well, all right.

MR. GERASH: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:40 o'clock, a.m., the case in the above-entitled matter was submitted.]

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