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In the

Supreme Court of the United States

CLAUDIO CASTANEDA, SHERIFF,

Petitioner,

v.

RODRIGO PARTIDA,

Respondent.

No. 75-1552

Washington, D.C.
November 9, 1976

Pages 1 thru 34

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No. 75-1552

Washington, D. C.,

Tuesday, November 9, 1976.

The above-entitled matter came on for argument at
1:34 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

THOMAS PARKER BEERY, ESQ., Assistant Criminal
District Attorney, Hidalgo County, Edinburg, Texas;
on behalf of the Petitioner.

DAVID G. HALL, ESQ., 103 East Third Street, Weslaco,
Texas 78596; on behalf of the Respondent.

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Thomas Parker Beery, Esq.,
on behalf of the Petitioner

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David G. Hall, Esq.,
on behalf of the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1552, Castaneda v. Partida.

Mr. Beery, you may proceed whenever you are ready.

ORAL ARGUMENT OF THOMAS PARKER BEERY, ESQ.,

ON BEHALF OF THE PETITIONER

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

I represent the petitioner herein, Sheriff Claudio Castaneda, of Hidalgo County, Texas. In March of 1972, State District Judge Jose Alamillo, a Mexican-American, residing over the 92nd District Court of Hidalgo County, Texas, selected five persons to serve as grand jury commissioners of that term of court. Three of those five persons were of Mexican-American or Spanish-American descent. Those five commissioners in turn selected twenty persons to serve as potential grand jurors. This list of twenty persons is known in Texas as the grand jury panel or list or pool. The person that summoned those twenty persons to open court to be empaneled later by Judge Alamillo is the petitioner herein, Sheriff Claudio Castaneda.

Ten out of the twenty persons chosen by the grand jury commissioners were Mexican-American; ten were Anglo-American. Three Mexican-Americans that were to be served by Sheriff Castaneda could not be located. One was listed on the return of the summons as being out of state. Two Anglo-

Americans, shown by the record, were excused by the court prior to the formal empanelment of March 16, 1972.

On March 16, 1972, Judge Alamia empaneled the grand jury panel in open court. One Mexican-American at that time was absent from the proceedings. Thirteen persons showed up. Five Mexican-Americans had been absent, out of state, or could not be found by Sheriff Castaneda. Two Anglo-Americans had already been excused by the court, leaving 13 persons to be empaneled.

Judge Alamia at that time only needing at that time twelve persons to serve on the grand jury, had at his option excusing one person for some sort of emergency excuse, one man by the name of Mr. Faulkner, an Anglo-American, asked to be excused because he had a business over in McAllen, Texas, having to do with a drug store; one Mexican-American by the name of Mr. Calvillo, who seemed to have a more pressing matter, he had a father who was due for heart surgery in Houston the next week; and Judge Alamia, after considering both excuses excused the Anglo-American, Mr. Faulkner, and kept Mr. Calvillo on the grand jury.

That grand jury also, Judge Alamia, on that same day, on March 16th, appointed a Mexican-American as foreman of the grand jury. The next day, on March 17th, 1972, that particular grand jury, consisting of five Mexican-Americans and seven Anglo-Americans, indicted the respondent herein for the offense of

burglary of a private residence in the night with the intent to commit rape.

QUESTION: Mr. Beery, is there a fixed size for grand juries in Texas?

MR. BEERY: At least twelve, Your Honor.

QUESTION: And is there a minimum number that have to vote for indictment?

MR. BEERY: Yes, nine, at least nine.

QUESTION: Do you accept or do you challenge the figures that -- of 79.2 percent?

MR. BEERY: No, I do not challenge those figures at all.

QUESTION: Are you aware that they are totally inconsistent with what the Bureau of the Census has in its files and records?

MR. BEERY: I was relying on the exhibits that were introduced by the respondent back in 1973 in the motion for a new trial.

QUESTION: And you didn't undertake to test those by finding out what the Bureau of Census had to say about it?

MR. BEERY: Not at that time, Your Honor, to be honest with the Court, along those regards. The reason I did not is that there was such a clear waiver in this case of challenging the grand jury that indicted the respondent that I did not feel it was necessary to even contest anything at the

motion for a new trial.

QUESTION: On the waiver point, what do you do with Francis v. Henderson?

MR. BEERY: Excuse me, Your Honor, I didn't hear?

QUESTION: The case of Francis v. Henderson.

MR. BEERY: I believe that if we follow that case, I believe it applies very directly to this situation.

QUESTION: The trouble is, your state appellate courts that consider the merits as pointed out by the Court of Appeals, the federal Court of Appeals.

MR. BEERY: It is very unfortunate that they did so. I have devoted over half of my brief to the waiver issue to the Court of Criminal Appeals. There was a case exactly on point by the name of Valdez v. State, found in 408 Southwestern 2d, page 209, that took care of the situation. I have no excuse for the Court of Criminal Appeals not getting to the waiver situation before that.

QUESTION: Well, you started on the merits. Didn't the judge testify on the merits?

MR. BEERY: Judge Alamia testified --

QUESTION: In the Federal district Court.

MR. BEERY: -- in the federal habeas corpus before Judge Garza.

QUESTION: By the way, why didn't the commissioners testify, any reason at all?

MR. BEERY: I can't explain that. I personally did not handle that particular hearing, Your Honor.

QUESTION: Well, how can we ever find the state's reasons for this if we don't have them to testify?

MR. BEERY: I understand that it probably should have been done but was not.

QUESTION: Well, isn't that a failure for the State of Texas?

MR. BEERY: It is a failure, but I do not believe that the --

QUESTION: And we can't remedy it, can we?

MR. BEERY: I believe that there are other facts and figures --

QUESTION: Can we surmise as to the reason?

MR. BEERY: I believe that there are other facts and figures within the record that tend to explain the disparity shown by the respondent.

QUESTION: What facts?

MR. BEERY: Well, the fact, Your Honor, on page 249 of the original transcript introduced by the respondent. It is shown that Hidalgo County, Texas, that there was some 25,637 males with Spanish surnames over 25 years or older, some 5,791 completed no school years whatsoever, representing -- I compute that to be some 23 percent.

Also on the same page 249 of the original transcript,

out of 30,312 females with Spanish surnames, 25 years or older, in 1970, who lived in the Hidalgo County area, 7,026 also completed no school years whatsoever, representing also 23 percent. Now, some of those perhaps could have qualified as grand jurors, but one of the qualifications for being a grand juror in the State of Texas is that you be able to read and write the English language.

QUESTION: But wouldn't it have been much better if the people who picked the grand jury testified that "we did not discriminate at all," wouldn't that have been helpful, wouldn't it have looked good in the record?

MR. BEERY: Oh, yes, it would have looked --

QUESTION: Well, I assume that the reason it is not in the record is because it wouldn't be their testimony.

MR. BEERY: No, not at all, Your Honor.

QUESTION: Well, why wasn't it in the record?

MR. BEERY: Again, Your Honor, I did not handle that particular hearing so I cannot explain to the Court why it was not done.

QUESTION: You said you were standing on the waiver proposition.

MR. BEERY: That was at the motion for new trial.

QUESTION: That was in the state court system?

MR. BEERY: The state court system, prior to the writ of habeas corpus hearing with Judge Garza's court. At that

particular time, I was with the District Attorneys office but left for a short while and then came back and did not handle the habeas corpus hearing over in Brownsville, in front of Judge Garza.

QUESTION: Do you have any Supreme Court cases to back you up on the waiver point?

MR. BEERY: On the waiver point?

QUESTION: Yes. You only cited three Supreme Court cases in your brief, all in one paragraph.

MR. BEERY: Well, the recent case of Francis v. Henderson came out in May, that I was unaware of.

QUESTION: Do you think that helps you?

MR. BEERY: I believe so, Your Honor. It is a case where there was a waiver in the state court, although we have the problem in this Court, in this particular case, that the state court jumped over the waiver issue and went into the merits of the situation, which was unfortunate.

QUESTION: Where did you cite Francis in your brief?

MR. BEERY: I do not cite Francis, Your Honor, in that brief.

QUESTION: Well, you can speak about what the other guy or lawyer did who tried the case, but you did this brief, didn't you?

MR. BEERY: Yes, sir, I did.

QUESTION: Well, do you rely on Francis now?

MR. BEERY: I want to rely on it, Your Honor, but I did not include it in my brief because, quite frankly, I was unaware of it at that particular time.

QUESTION: It would have been one thing if the Texas Appellate Courts have relied on the waiver, then Francis v. Henderson would say that the federal habeas corpus court would have to also. But here you can't rely on Francis v. Henderson, as I think you understand and told me in answer to a question, because the Texas Appellate Courts did proceed to the merits, and that was all pointed out by the Federal Court of Appeals here.

MR. BEERY: Yes, I think it was quite clearly on that particular point.

QUESTION: Before you proceed, it seems to have been held by the Federal District Court that a prima facie case was shown and the District Court held that that prima facie case had been rebutted and the Court of Appeals, without independent examination as I read its opinion, simply accepted the proposition that a prima facie case of discrimination had been shown and differed with the District Court in its holding that that prima facie case had not been rebutted. Do you accept the proposition that a prima facie case has been shown? I ask because it seems, as I read these statutes of Texas, that jurors to even be eligible for consideration must be citizens, and the prima facie case consisted not in showing the percentage of

citizens but of showing the percentage of population --

MR. BEERY: That is very true.

QUESTION: -- which is something quite different, isn't it?

MR. BEERY: That's very true. Also I believe around page 266 of the original transcript, there is shown I believe the figure of some 22,000 to 28,000 people in Hidalgo County, Texas as of 1970 that were foreign born. Now, how many of those persons were citizens or have become citizens, no one knows.

QUESTION: So do you or do you not accept the proposition that a prima facie case has been shown?

MR. BEERY: I would accept the proposition, as Judge Reynaldo Garza did, that a bare prima facie case --

QUESTION: Well, if jurors, in order to even be eligible for consideration, have to be citizens, how do you prove a prima facie case by showing the proportion of residents?

MR. BEERY: I would leave that to the respondent to answer that particular question. I don't know. I don't know how many there are in the county. I don't think anybody knows, in particular.

QUESTION: Then why do you tell me you accept the finding that there was a prima facie case?

MR. BEERY: Well, I think even when we subtract the 22,000 to 28,000 persons that are shown by those census figures

in 1970 to be foreign born, that you still are going to come out with a disparity of some sort.

QUESTION: You are.

MR. BEERY: The disparity here was 30 percent. Of course, there is 80 percent supposedly of the population, or 79.2 percent --

QUESTION: Population but not census.

MR. BEERY: Right -- not eligible population. But even subtracting that 22,000 --

QUESTION: Why didn't you put any of what you arguing in your brief?

MR. BEERY: Your Honor?

QUESTION: Why didn't you put any of what you are arguing now in your brief? Why did you save it to spring it on us?

MR. BEERY: I have no answer for that, Your Honor.

QUESTION: I mean I have you filed any brief other than this?

MR. BEERY: No, sir, that is the only brief I filed.

QUESTION: And you say here you don't have waiver in here any place.

MR. BEERY: No, Your Honor, I do not.

QUESTION: It is not in there.

MR. BEERY: No. I was relying on the federal cases. I said that once the state court has reached the matter,

reached the merits and jumped over the waiver issue, then the federal courts would be bound by that particular ruling.

QUESTION: You might be right about it, but I think you can put it in here, in the brief. I mean this brief doesn't help me at all, and I guess I will just have to read the transcript of this argument.

QUESTION: And my understanding is you are not relying on waiver in this Court, are you?

MR. BEERY: I don't believe that I can rely on waiver in this Court.

QUESTION: You can't.

MR. BEERY: I don't believe I can because the Court of Criminal Appeals did not ride on the waiver issue, although they referred --

QUESTION: All right.

MR. BEERY: -- were squarely faced with the issue.

QUESTION: Let's move on to the merits then.

MR. BEERY: All right. Even assuming that a prima facie case was made by the respondent of 30 percent in this particular case, we did come back, the petitioner, in the hearing on the writ of habeas corpus before Judge Reynaldo Garza, with the sworn testimony of Judge Alamia, who did testify that he did not discriminate against Mexican-Americans in choosing the grand jury commissioners.

Also I think if we look at the cases cited by the

respondents, especially *Muniz v. Beto*, we can see readily in those cases that, especially the *Muniz* case, over a ten-year period of time there had been some 150 grand jury commissioners and none of those had been of the supposed excluded class Mexican-Americans but were all Anglo-Americans.

Also we would rely on the decision of Judge Garza, Reynaldo Garza, that Mexican-Americans, at least in our county, constitute a governing majority, and at the time, in 1972, Judge Alamia was the only district judge that handled criminal matters and was the only district judge that selected commissioners who in turn selected grand jurors.

QUESTION: Mr. Beery, doesn't that assume that members of an ethnic group will not discriminate against other members of an ethnic group?

MR. BEERY: Yes, that is one of our assumptions, Your Honor.

QUESTION: Do you think that is a valid assumption?

MR. BEERY: I believe so. I believe it comports with human experience, at least when they constitute a governing majority. It would be reasonable, in my opinion, for Judge Alamia and grand jury commissioners to discriminate against other Mexican-Americans.

QUESTION: Is there any evidence in this record that supports your governing majority theory?

MR. BEERY: There is some evidence, Your Honor. For

example, the population figures of some 80 percent is some support for that particular proposition. Also on the amended hearing on the motion -- the amended motion for new trial at the state judge level, I believe it is at page 216 that I ask the respondent at that time if he knew of any Anglo-American officials in the county, and I believe his answer was no. Also Judge Alamia at that particular time asked him if he knew if there was any Anglo-American officials at all in the county, and again his answer was no. And I believe that Judge Alamia also asked him about the sheriff's department or police department, if there were any Anglo-Americans on those particular departments that he knew of, and he also said no.

Also I believe the record shows that Judge Alamia, as an elected official, elected state district judge of Texas at that particular time was the only one that handled by custom criminal cases in our court.

QUESTION: Going back now to my first question, you think it is not possible in southern Texas for a state judge and the commissioners here to practice discrimination in favor of an Anglo-American minority?

MR. BEERY: Oh, I believe it is possible, but I would think in that type of situation perhaps it ought to be on the respondent to prove that it was as a result of discrimination by Mexican-Americans against another Mexican-American, because I just don't believe that that proposition comports

with your human experience.

QUESTION: Well, I gathered you want us to really take judicial notice of that fact when you speak of human experience?

MR. BEERY: Yes.

QUESTION: What is it that you want us to take judicial notice of?

MR. BEERY: That Mexican-Americans would not purposely and intentionally discriminate against other Mexican-Americans on selection of grand jurors.

QUESTION: I cannot agree -- and I can get you many a study to show you to the contrary.

MR. BEERY: I would be perfectly willing to see those studies, Your Honor.

QUESTION: Well, I can't take judicial notice of something that is in dispute.

MR. BEERY: At least Judge Garza of the United States District Court believed that to be the case, that they would not, especially elected officials, discriminate against the people who elected them.

QUESTION: I didn't think you put it on the elected official point, I thought you put it on nationality.

MR. BEERY: Well, the elected official in this case --

QUESTION: And you say there is not a single Spanish-speaking person in the country who would do harm to another

Spanish-speaking person?

MR. BEERY: No, I haven't said that at all.

QUESTION: Well, what are you saying?

MR. BEERY: I am saying the elected officials down there like Judge Alania would not intentionally discriminate, purposely discriminate against the people who elected him.

QUESTION: I didn't think the charge was against the judge, I thought it was against the commissioners.

MR. BEERY: Well, as I understand it, it is against the whole system, and the judge is part of the system because he appoints the commissioners.

I believe that is all I have at this particular time, and I might save some for rebuttal. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Hall.

ORAL ARGUMENT OF DAVID G. HALL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The single most salient and important fact in this case is Hidalgo County itself and the county's demography. It is 79.2 percent Mexican-Americans. That is almost 80 percent. Now, it is true that we are talking about total population here, rather than, as some of the cases that have been presented in this case, have talked about in terms of adult population.

None of the cases in this Court that I am aware of,

in response to Mr. Justice Stewart's inquiry to my friend Mr. Beery, have talked about it in terms of citizens as being the norm by which we compare.

QUESTION: Well, was there any evidence in those other cases that the state had a requirement of citizenship for grand jury service?

MR. HALL: I am not aware of any state that does not have a requirement of citizenship for jury service.

QUESTION: Was that discussed in any of the other cases?

MR. HALL: It has not been discussed in any case, either this one by the -- it hasn't been alleged by the state in this particular case, and --

QUESTION: Well, if it is a requirement of citizenship, wouldn't the most logical statistical approach be in terms of citizens?

MR. HALL: The question, Your Honor, it comes down to who bears the burden of proving that, and I think that the clear import of the decisions of this Court, and particularly the Fifth Circuit as well, are to the effect that the state bears that burden as a matter of explanation for the disparity. If the state is going to say, well, yes, this 40 percent disparity does exist --

QUESTION: But the question is what do you have to show in order to shift the burden to the state, and what I am

saying is wouldn't the most logical type of statistics for your prima facie case be related to citizenship rather than just residence?

MR. HALL: Well, on at least four occasions in this Court, in *Avery v. Georgia* --

QUESTION: Well, you said that none of those refer to a requirement of citizenship, have you not?

MR. HALL: That is correct. The disparity between the population and the jury pool is based upon total population in *Avery*, *Turner*, *Carter* and *Eubanks*.

QUESTION: Mr. Hall, isn't it probable that in each of those cases the total population and the total number of citizens were the same, whereas here there is a probability, it is a border county and there is a probability of a large alien population?

MR. HALL: There is a possibility that there is a larger alien population -- a disproportionate alien population, yes.

QUESTION: Well, there is something in the record that tends to support that, according to your opponent.

MR. HALL: It tends to --

QUESTION: It says there are 22,000 to 28,000 foreign-born persons.

MR. HALL: Mr. Justice Stevens, it really comes down at this point on the basis of the record to pure speculation.

And the question throughout on these kinds of issues -- we can talk about the number of illegal aliens in the population, the number of legal aliens, felons, illiterates, persons of unsound mind, those persons lacking good moral character, all of those of which are qualifications for jury service. The question still comes down to who bears the burden of producing that information, and on --

QUESTION: Do you think the district judge in that district could take judicial notice of the fact that there is a large alien population in a border community?

MR. HALL: No, I don't believe he could, because what we are talking about are -- the case of the prisoner here was a statistical case. It is our opinion that the statistical case can really only be rebutted effectively with the use of statistics and hard information. What the state has consistently relied on here is pure conjecture and speculation. There is some possibility in the record that larger numbers of Mexican-Americans are disqualified on the basis of alien or education or whatever it may be, but it is nothing more than just speculation. And the question still comes down --

QUESTION: When you say speculation, your opponent says there is evidence in the record that 22,000 to 28,000 foreign born persons reside in the district, is that evidence or speculation?

MR. HALL: That -- whether those persons are U.S.

citizens by birth, by virtue of having one parent who is an American citizen, whether they are naturalized individuals -- none of that information is in the record.

QUESTION: Does your proof show anything about what percentage were literate, that is to qualify for jury service?

MR. HALL: Your Honor, once again, the thrust of our proof was the total population by which to compare and then what is the disparity with that actually appearing on the jury list selected by the commissioners, and we did not go into the question of the --

QUESTION: But don't you think that is quite important?

MR. HALL: If I were trying the case on behalf of the state, yes, Your Honor, I would certainly want to go looking for those kinds of statistics to try to explain that disparity of --

QUESTION: Don't you think you have any obligation to show anything about the literacy questions of the total Spanish surnamed people?

MR. HALL: Your Honor, our understanding of the decisions of this Court in *Whitus* and *Turner* and *Avery* and *Patton* and *Hill* indicates to the contrary, that when it comes to -- if the state is going to rely upon a suggestion that the victims of discrimination are victims solely because they lack the qualifications for service, then it is up to them to prove

that fact.

QUESTION: Well, Mr. Hall, the cases you've mentioned say that on the basis of pure statistics in a simple disparity between the population and the proportion of -- and the racial make-up of the panel, an inference may be drawn that there has been systematic racial discrimination and that because there is hardly any other explanation, I gather the cases say that -- and if there is some other explanation, the state ought to prove it. But now the state says that that normal inference of systematic racial discrimination should not necessarily be drawn because it just doesn't make sense, this is their argument anyway, that the people who choose juries would systematically discriminate against their own race. Now, the inference out of the cases rest in human experience and in logic and common sense, and the state is saying that that inference shouldn't be drawn when the great majority of the population is -- well, when the discrimination is not against a minority.

MR. HALL: Well, of course, there are a number of examples where we have seen discrimination against a majority, and the courts have really not talked -- this Court has not talked about it, nor has any other that I am aware of, talked about the -- focused its attention upon who is doing the discriminating.

The thrust of your question, Mr. Justice White, is

perfectly well taken. I think all of us -- this case would have been an easy case in 1969 when Judge Alamia took the bench. This disparity is as grotesque a disparity as has been presented to this Court.

All the state is relying upon, other than this speculation in the record that we talked about insofar as aliens and education is concerned, is what -- and I think what they would like for this Court to do is to erect an irrebuttable presumption that a black cannot discriminate against a black, that a Mexican-American judge and a Mexican-American --

QUESTION: No, I was just going to say that you wouldn't make out your prima facie case based on just the statistics you present, that just a disparity won't prove your case.

MR. HALL: Well --

QUESTION: That is all the state is suggesting, because all you've got is the disparity.

MR. HALL: Not necessarily. We can --

QUESTION: What else do you have?

MR. HALL: Well, first of all, we've got the Texas system itself, which is a totally subjective system. It is totally --

QUESTION: That is part of the same argument, so that is part of the same argument in the cases on the books that go to justify the inference that there is this disparity and there

is this opportunity for discrimination.

MR. HALL: Well, if you remove from the ability to rely upon a statistical case and you remove from us the ability to rely in part proof, as in such cases as Turner, for example, which talks about the subjective -- the discrimination occurs at that point when subjective discretion is permitted --

QUESTION: Now, who in the cases normally were the people choosing the jury?

MR. HALL: The --

QUESTION: In the historical cases, the key man system, they were white jury commissioners choosing juries.

MR. HALL: Without being articulate in the opinions, that seems to be the case, and I would assume that is the case, but --

QUESTION: The power structure was involved. Here the power structure is just the reverse, is it not?

MR. HALL: Not entirely. We are talking --

QUESTION: Not entirely but we are talking in reverse of the one that Justice White was talking about.

QUESTION: In the record, who owns the property down there?

MR. HALL: Well, there is nothing in the record about that.

QUESTION: All right.

MR. HALL: And there is nothing in the record about

the number in 1972 or '71 when this incident occurred as to the number of registered voters and whether they were Mexican-American majority or minority, and whether the numbers of Mexican-American office holders, there is nothing in the record about that, what kind of offices they held.

What this case really boils down to is where do we place the burden of proof in this kind of a situation. And if the burden falls upon the single defendant and the single criminal action to prove that his class, his ethnic group is as qualified or more qualified than the rest of the population in the community, then you have saddled him with an enormous burden that is not shared by criminal defendants in other kinds of jurisdictions.

QUESTION: Mr. Hall, you concede, as I understand it, that you as an individual defendant have the burden of making a prima facie case?

MR. HALL: That is correct.

QUESTION: And I suppose this is the question here then in a case like this, what is a prima facie case.

MR. HALL: That's correct. And as we see it, based upon the decisions of this Court, admittedly, Mr. Justice White, in a different kind of a context, but applying the same rules to Hidalgo County that we apply to the rest of the Nation, that a prima facie case is made by showing some kind of a disparity, a significant disparity --

QUESTION: Could I ask you, to make sure I have it right, what do you think you are entitled to in a grand jury?

MR. HALL: We are not entitled to proportional representation under Swain, of course.

QUESTION: Do you think you are entitled to a fair cross-section?

MR. HALL: I think we are entitled to a fair cross-section.

QUESTION: Where did you get that?

MR. HALL: Of course, Peters and Taylor, the two most recent opinions of the Court --

QUESTION: Well, Peters -- can you cite any majority opinions indicating that --

MR. HALL: No.

QUESTION: -- on a constitutional basis that there is a right to a fair cross-section?

MR. HALL: Of course, Mr. Justice Marshall wrote --

QUESTION: You have got a right to a jury that is picked without racial discrimination, that is what you have got a right to.

MR. HALL: That's correct.

QUESTION: That is as far as the cases go so far on a grand jury, isn't it?

MR. HALL: On grand juries, yes. Now, of course, I believe in your opinion in Peters -- excuse me, in Taylor, you

cited the language of Mr. Justice Marshall used in Peters.

QUESTION: But Taylor was --

MR. HALL: Was a Sixth Amendment petit jury case.

QUESTION: That's correct, petit jury.

MR. HALL: But what focused -- the interesting focus of both Peters and Taylor are upon not the discrimination, like in Taylor it was difficult to say that there was intentional discrimination because it was the women who were refusing to opt into the system that resulted in a jury pool that was not representative of a cross-section of the community.

QUESTION: Yes, but making a prima facie case about if what you have a right to is a cross-section is one thing, and making a prima facie case if what you have a right to is to be free from racial discrimination is something else again.

MR. HALL: That's correct, and I don't want to confuse the two. I understand the distinction, but I just wanted to point out to the Court that there seems to be, at least in those two cases, a renewed emphasis upon the defendant's right to a jury that is representative of his community, at least in the Sixth Amendment petit jury situation.

QUESTION: The Court of Appeals has already disagreed with Judge Garza's determination, and that is perhaps not open to reexamination in many respects. But your showing in the case depended on an assumption that all of the Spanish surnamed people were citizens and that they were all literate, did it

not? That is where you get your 79.2 figure?

MR. HALL: Your Honor, the 79.2 percent figure is total population --

QUESTION: Yes.

MR. HALL: -- and I relied upon Avery, Turner, Carter, and Eubanks, among other decisions in the Fifth Circuit, to support the proposition that we are entitled to use -- let me back off of that for a second.

If the disparity here were less, somewhere in the norm or in the order of, say, 15 to 20 percent, I certainly would have gone off to attempt to show that that could not possibly have been based upon alien, literacy or the others. But here we have a 40 percent disparity, 40-plus. In 1939, this Court decided *Pierre v. Louisiana*, there was a 49 percent disparity there, and it was a total exclusion case. In *Arnold*, in 1964, there was one for 44.7 percent. There are 43 other written opinions of this Court on this subject, and none reach a disparity any higher than this one except the two I just mentioned.

When you've got those kinds of disparities, it is our argument that there is a lot of room there for conjecture about alienage and literacy and sound mind and good moral character and the other statutory qualifications. But the burden properly has to be placed upon the state to explain --

QUESTION: You think your 79.2 shifted the burden to

the state and that the state should then have come in and demonstrated in some way statistically that half of them couldn't speak English and 40 percent of them weren't citizens and so forth?

MR. HALL: Yes, Your Honor.

QUESTION: If they could make that showing?

MR. HALL: If they could make that showing. Of course, they had the testimony of Judge Alamia who had been empaneling the juries for a two and a half year period. One person had disqualified himself for language and he wasn't a Spanish speaker, he was of Polish descent, who didn't speak English. That is the only evidence in the record about language.

QUESTION: Mr. Hall, when you speak of the 43 cases from this Court, are you lumping together petit jury and grand jury cases?

MR. HALL: Yes, Your Honor, I am including all those on the subject of jury discrimination.

QUESTION: And all but one involved discrimination against Negroes?

MR. HALL: Hernandez is the exception, yes.

QUESTION: One exception.

MR. HALL: Yes, Hernandez, in 1954.

QUESTION: And what were the figures in that case?

MR. HALL: Hernandez was 11.1 percent in Jackson

County, Texas, in 1953 or '53, but there were no Mexican-Americans ever having appeared -- it was a total exclusion.

QUESTION: It was a total exclusion case, was it not?

MR. HALL: Right.

QUESTION: Mr. Hall, is there any question about this issue being here? Am I correct in my impression that it was raised for the first time in the appeal in the Texas state courts?

MR. HALL: That's correct, Your Honor, it was raised the first time after the trial on a motion for a new trial, and the Texas Court of Criminal Appeals ignored the state's arguments about waiver and decided the case on the merits -- Coleman v. Alabama, Ervin v. Dowd -- there are a number of decisions of this Court indicating to the lower courts and also to this court, of course, that will reach the merits in that kind of circumstance.

QUESTION: Mr. Hall, your opponent made reference to the number of persons, Mexican-Americans who had had no schooling. Where does that come in the record, is that in the habeas corpus hearing?

MR. HALL: Your Honor, the record is essentially the same record that was made in the state court. Now, what we did was introduce that entire record into the federal --

QUESTION: How would that have been involved in the state court if this issue wasn't raised at the trial lawyer?

That is what puzzles me.

MR. HALL: It was raised on the motion for a new trial.

QUESTION: Oh, I see.

MR. HALL: The state court permitted me to make a showing of this on a motion for new trial.

QUESTION: And then in their response to a motion for a new trial they put in these figures that --

MR. HALL: No, they are relying solely on figures that we put into the record.

QUESTION: Oh, I see.

MR. HALL: The habeas petitioner's figures.

QUESTION: I see.

MR. HALL: The respondent's figures here.

QUESTION: One other question, Mr. Hall, that has trouble me. Supposing that there were a full trial and the evidence showed that the jury commissioners had actually been motivated by a desire to get their social peers on the grand jury, people of the same economic status, would that have stated a claim?

MR. HALL: This was a suggestion I suppose that was raised in the Federal District Court's opinion.

QUESTION: Judge Garza raised that.

MR. HALL: Judge Garza raised that question. He was saying that this was really not perhaps as ethnic or a

national origin discrimination but rather is class or status and --

QUESTION: Which way would that cut, if that were the fact?

MR. HALL: Well, if that were the fact, if that is what it were, then certainly the disproportional impact upon Mexican-Americans, given the economic status of the Mexican-Americans in the county, but then it would raise this whole spectre of the cross-section again and it --

QUESTION: Well, it would cut one way for the petit jury -- it wouldn't hurt you on the petit jury --

MR. HALL: No.

QUESTION: It would help you. But on the grand jury, it is a problem, isn't it?

MR. HALL: Correct.

In closing, the only statement I would like to make to the Court further is that we are talking about an individual's opportunity to be tried before a jury of his or her peers.

QUESTION: Indicted.

MR. HALL: Yes, Your Honor, indicted. Of course, on that point, in *Alexander v. Louisiana*, I believe Mr. Justice White, in a footnote, points out that the standards and principles for judging the kinds of claims are essentially the same.

QUESTION: A court footnote.

MR. HALL: I believe it was a court footnote, that is correct.

QUESTION: Mr. Hall, let me ask you one other question. As I read the Court of Appeals opinion, if the case is remanded for a further hearing and the state will have an opportunity to put in other evidence, is that your reading or do you think the case is over?

MR. HALL: That was not my understanding of it. Now, the state has already had two opportunities for a hearing. As a matter of fact, when this case was first taken into the federal court on the habeas corpus, the state was advised by Judge Garza in a memorandum order that petitioner had shown sufficient evidence to shift the burden of proof to them and that they were expected to come forward with evidence, and this they totally failed to do.

Now, on two occasions they have refused to put in any kind of evidence other than the testimony of the judge --

QUESTION: Well, I understand, that goes to the question of whether they should get another hearing. My question is how do you interpret the mandate -- the court ends up by saying it is remanded for further proceedings, rather than just simply reversing and directing the writ to issue.

MR. HALL: I presume, the way I understood that, I presume what they are suggesting is that it be remanded to the District Court for the purpose of issuing an order requiring a

trial or reindictment or retrial within 90 days. That's my understanding of it.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hall.

Do you have anything further, Mr. Beery?

MR. BEERY: I believe that is all, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:13 o'clock p.m., the case in the above-entitled matter was submitted.]

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