ORIGINAL

In the

Supreme Court of the United States

BILLY DUREN,

Petitioner,

v.

MISSOURI,

Respondent.

No. 77-6067

Washington, D.C.
November 1, 1978

Pages 1 thru 39

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v.	:	No. 77-6067
MISSOURI, Respondent.	:	

Washington, D. C.,

Wednesday, November 1, 1978.

The above-entitled matter came on for argument at 1:35 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:

LEE M. NATION, ESQ., Assistant Public Defendant, 1305 Locust Suite 202, Kansas City, Missouri 64106; on behalf of the Petitioner.

RUTH BADER GINSBURG, ESQ., American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016; on behalf of the Petitioner.

APPEARANCES [Cont'd.]:

NANETTE LAUGHREY, ESQ., Assistant Attorney General of Missouri, Supreme Court Building, Jefferson City, Missouri 65102; on behalf of the Respondent.

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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 will hear arguments next in 77-6067, Duren against Missouri.

Mr. Nation, you may proceed whenever you're ready.

ORAL ARGUMENT OF LEE M. NATION, ESQ.,

ON BEHALF OF THE PETITIONER

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

In March of 1976, petitioner Billy Duren appeared for trial in the Jackson County Circuit Court. Appearing with Mr. Duren was the jury panel. That panel of 53 people included only five women. Billy Duren moved to quash the jury panel on the basis that the Missouri procedure for selecting jurors violates his right to a reasonably representative cross-sectional jury.

QUESTION: Mr. Nation, excuse me, there's a crank on the side there; you can get that up.

MR. NATION: Okay. Thank you. I think I'm okay.

QUESTION: I mean the microphone.

QUESTION: We can hear you better.

QUESTION: No, up the other way.

MR. NATION: Mr. Duren's motion to quash, filed before trial, was overruled, and he was convicted of murder in the first degree by an all-male jury.

Of course our challenge here is bottomed upon Taylor

vs. Louisiana. Taylor holds first that petitioner Billy Duren can raise such a challenge concerning women on juries; and second, that if women are not in juries in sufficient numbers, Billy Duren's right to a fair cross-sectional jury panel has been defeated.

The Missouri court --

QUESTION: Wait a minute. Did you say on the jury or on the jury panel?

MR. NATION: On the jury panel.

QUESTION: Not the jury.

MR. NATION: The Missouri court and the State here attempt to distinguish Taylor in two ways: first, that the effect of the Missouri system is different than the effect of the Taylor system.

I will speak to that issue. My co-counsel, Professor Ginsburg, will speak to the distinction the State makes with respect to the operation of the women's exemption.

The facts of this case speak strongly. Jackson County is 54 percent women. The voter registration rolls are used to pick the master jury wheel, and we would assume that the voter registration rolls, through the statistics in our brief, would mirror the population characteristic of 54 percent.

Each year the voter registration rolls are subjected to a random computer search, which draws out 70,000 names.

These names are then sent questionnaires to determine whether or not the 70,000 names meet Missouri's law as to eligibility for service. The questionnaire also contains the women's exemption.

The first question on the questionnaire is "State your sex" and, parenthetically, "if you are a woman and do not desire to serve, see the bottom of the page."

Missouri makes it very easy at this stage for women to opt off, and they do in significant numbers.

This questionnaire procedure unquestionably causes the diminution from 54 percent women in the community to the panel which is 30 percent women -- excuse me, the master jury wheel is 30 percent women. Our inquiry does not stop there, however, because women are given a second opportunity to opt off the juries.

Each week before trial summonses are sent out. These summonses compel only the attendance of men to serve on the juries. The questionnaire in red -- excuse me, the summons in red states: "Women, if you do not desire to serve, contact the Jury Commissioner."

The Jury Commissioner, John Fitzgerald, also testified that if women just ignored the summons, she would be deemed to have exercised here exemption. She was, in Mr. Fitzgerald's words, an excused female. Men, however, their names, if they fail to appear, would be -- their names would be sent to the

bailiff or the presiding judge, who would attempt to contact them.

This summons procedure is the only reason for the diminution between the master jury wheel, which is 30 percent, and the number of women appearing for trial week after week.

QUESTION: Mr. Nation, the Supreme Court of Missouri expressed some dissatisfaction with your numerical claims. In what posture do you think we find that factual question?

MR. NATION: Well, the Missouri Supreme Court cited new -- can you be specific as to which claim you're referring to?

QUESTION: Well, it's the Court's majority opinion. I don't have the opinion directly before me, but it's a phrase that casts some -- gives some indication it is not satisfied that you have satisfactorily demonstrated the fact on which you rely, but goes on to treat it as if you had, and I would like --

MR. NATION: Yes. There are several things. First, they didn't like the fact that we used 1970 population statistics, which of course are the only statistics that are available. They didn't like the fact that in the opinion, that the master jury wheel count was, as they said, only an unverified pencil sketch. Apparently they forgot to read the transcript, because there was testimony concerning the actual count of the jury wheel.

Week after week after week, prior to Billy Duren's

trial, the panels averaged 14.5 percent women. They questioned the statistics, but I believe the statistics in this case are in such a posture that we can reach the merits certainly.

Further, a woman is again given an opportunity to opt off jury service even after she appears -- even after she appears, at any point before she is sworn as a juror. She can decide to go home.

Petitioner Billy Duren's jury panel in this case of 53 people, with five women; there were almost ten times as many men on the jury panel as there were women.

Now, the State and the Missouri Supreme Court have said that these facts are not conclusive. In sum, what they want petitioner to do is to prove that there is no conceivable or even inconceivable reason which would cause this under-representation. As was noted in the amicus brief filed by the Solicitor General, the constitutional provision allowing women to opt off juries is the only possible explanation for the under-representation. Further, petitioner --

QUESTION: You mean the federal constitutional provision or the Missouri constitutional --

MR. NATION: The Missouri constitutional provision.

Further, it is petitioner's position that we have made a prima facie case, that we have shown, first, that the jury selection procedure in Jackson County is non-neutral, that women are given an exemption which men are not. And, second,

we have shown that in week after week jury panels appear for jury service that are only 14.5 percent women in a community that is 54 percent women.

QUESTION: Is that because of some lesser registration in the voting process by women?

MR. NATION: Well, the statistics that are in our brief indicate that in Missouri men register to vote -- 71 percent of the men register to vote, and 69.9 percent of the women register to vote. Therefore, I think we can assume that right around 54 percent will be what the voter role is.

Further, --

QUESTION: Then, when the wheel is made up, it does not reflect the voter population, on your figures, --

MR. NATION: That's right.

QUESTION: -- you've got roughly 70 to 60.

MR. NATION: That's correct.

QUESTION: Any explanation for that in the record?

MR. NATION: It's 70 to 69 percent.

QUESTION: Well, roughly 70 to 60.

MR. NATION: Excuse me, I didn't -- what was your question?

QUESTION: Any explanation for why the drawings don't average out fairly close to --

MR. NATION: I imagine the computer selects people from the voter registration rolls, and we don't know exactly

what percentage of those people selected, or those people who are sent questionnaires, are men and women, because obviously some of the questionnaires never return. People either ignore them or they're lost, or people have moved away or died. So we have no way of knowing who is mailed questionnaires.

But presumably, if it is randomly drawn from voter registration rolls, it would be about, again, 54 percent female.

Petitioner Billy Duren asserts here that we have made a prima facie case, that we have shown a non-neutral jury selection method and that we have shown under-representation. Thus, it is now incumbent upon the State, upon the respondent, to give some constitutionally permissible reason for the fact that Billy Duren's jury panel was 9 percent women.

There's one point that I agree with, with respondent and with the Missouri Supreme Court. Jackson County is not as bad as Taylor. The Taylor panel of one percent was very, very low. But I don't believe a fair reading of Taylor, that Taylor stands for the proposition that anything above one percent is constitutionally permissible. Instead, the thrust of Taylor is obviously that any system which denies an accused his right to a panel with reasonably representative participation of the elements of society also violates his right to jury trial under the Sixth Amendment.

The importance of a jury, Your Honor, as everyone knows,

is that it is the body that is interposed between the accused and the accusor. It is our way of guaranteeing a man a fair trial, and thuse it must be woven from the fabric of the community; that we cannot exclude any identifiable group, that they must be represented on jury panels, so that the individual can have a possibility of having these people on his final jury.

QUESTION: Well, where do you get that from? That the Federal Constitution prohibits a State from excluding any identifiable group?

MR. NATION: From the past precedents of this Court.

QUESTION: Such as?

MR. NATION: Such as Taylor.

QUESTION: Is that what Taylor said?

MR. NATION: That a State cannot exclude an identifiable group by -- on juries.

QUESTION: Would you carry that beyond discrimination between the sexes? What other identifiable groups?

MR. NATION: Blacks, Mexican-Americans.

QUESTION: How about beyond that?

MR. NATION: I think that's about as far as we've gone.

QUESTION: How about lawyers and judges and dentists and doctors and clergymen and teachers?

MR. NATION: That doesn't -- the prior cases in the federal circuits have not held those to be identifiable groups.

QUESTION: They are, in the common meaning of that phrase.

MR. NATION: Well, the identifiable groups in a common sense language, in terms of juries and the jury cases, they have not been recognized as important enough that we need to include them on juries.

QUESTION: Don't you think a lawyer can make a much bigger impact if he's a member of a jury than a woman as a woman or a Mexican-American as a Mexican-American?

MR. NATION: Well, perhaps he might be able to. However, lawyers are a very small percentage of the community, and even the possibility of their being on juries is de minimis.

Finally, this system which denies a defendant his right to a reasonably representative cross-sectional jury panel violates the Sixth Amendment and should be reversed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Ginsburg. You may lower the lectern, if you would like.

ORAL ARGUMENT OF MRS. RUTH B. GINSBURG, ESQ.,

ON BEHALF OF THE PETITIONER

MRS. GINSBURG: Mr. Chief Justice, and may it please the Court:

My argument addresses the citizen's duty tied to a defendant's fair cross-section right, and the complete absence of justification for exempting any woman.

Though Jackson County jury panels are dominated by men, the Missouri Supreme Court said that the right affected is unimpaired. That reasoning, in two key respects, is topsy-turvy.

First, the right central in this case, the right secured by the Sixth Amendment, is the criminal defendant, here Billy Duren's right to a fair chance for a jury genuinely representative of the community's complexion; and, second, the vaunted women's privilege, viewed against history's backdrop, simply reflects and perpetuates a certain way of thinking about women. Women traditionally were deemed lesser citizens --

QUESTION: That wouldn't concern Mr. Duren, would it?

MRS. GINSBURG: Mr. Duren has a right to a jury drawn from a panel reasonably representative of the community. And as this --

QUESTION: Yes, but he wouldn't be interested in the factor you mentioned, whether this is fair or unfair to the women, --

MRS. GINSBURG: Yes.

QUESTION: -- to be called for jury service or not called.

MRS. GINSBURG: But that was the traditional justification given by States, first, for excluding women altogether, and then the second step was providing an exemption for "any woman", the notion being that women are not really needed, not really wanted for participation in the democratic processes of government.

Viewed in that light, this is hardly a privilege, this is hardly a favor to the supposedly favored class.

But as to the core right at stake, Judge Seiler, dissenting below, pointed out that a defendant's fair cross-section right can be meaningful only if it hinges on a correlative duty, the duty of the citizen to show up for jury service when summoned. A privilege to avoid service at whim, prominantly advertised and readily available to any woman or any man or any other large stable distinctive population group debases the defendant's cross-section right. That right is real only when the obligation to service is placed on citizens without automatic exemption, based solely on their race, national origin, or sex.

QUESTION: I take it that very few doctors serve on juries in Missouri State Courts, as is true in most States. Would you regard that as --

MRS. GINSBURG: Exemptions that apply on the basis of one's occupation reflect determinations by the State that certain occupations, for the good of the community, should be

pursued uninterrupted. And it makes no difference whether a person is male, female, black or white, it's the neutral functional category that is excluded, doctor, lawyer, dentist, clergy, not "any woman" --

QUESTION: Would that preclude the State from saying that, without getting into that old cliche about "woman's place is in the home", if the State said, in fact, mothers of small children belong at home, not serving on juries. Now, suppose it were narrowed to housewives with children under 16?

MRS. GINSBURG: There are several --

QUESTION: Would you still have the same problem?

MRS. GINSBURG: There are several States that have exemptions for persons primarily responsible for the care of young children.

QUESTION: So that would be husbands or wives?

MRS. GINSBURG: That could be husband or wife, yes.

QUESTION: And you --

MRS. GINSBURG: But by using the term, assuming that it will be the woman here or in a more general "any woman" excuse, the STate is providing an ineludable method that the male citizens are counted by government as the essential participants in the administration of justice, but the female citizens are not so counted; their service is expendable.

I would like to stress --

QUESTION: Mrs. Ginsburg, may I ask a question?

If we look at it from the point of view of the defendant, and you take the view, as I think you do, that men and women are essentially fungible for purposes of jury service, how is the cross-section hurt if women are excluded?

MRS. GINSBURG: That was an issue that the Court addressed in Taylor v. Louisiana. Yes, men and women are persons of equal dignity and they should count equally before the law, but they are not the same; there are differences between them that most of us value highly. This Court said twice, first in Daughtrey v. United States and then in Taylor v. Louisiana, that there is a certain quality that would certainly be missing from that jury --

QUESTION: What is the relevant difference between men and women for purposes of jury service, from the point of view of the defendant?

MRS. GINSBURG: What is the relevant --

QUESTION: Yes.

MRS. GINSBURG: It is that indefinable something --

[Laughter.]

QUESTION: That sounds kind of like a stereotyping.

MRS. GINSBURG: I think that we perhaps all understand it when we see it and when se feel it, but it is not that easy to describe; yes, there is a difference.

In any event, Missouri's insistence that 9 to 15 percent representation of women is quite enough -- although it

is an exorbitant argument -- is understandable for the State to this day has urged no justification whatever for exempting "any woman". Missouri makes no claim that this women's excuse is even minimally rational. Though, to overcome a defendant's Sixth Amendment right, Taylor held merely rational grounds would not suffice. The Court said in Taylor that it is untenable to suggest it would be a special hardship for a women to perform jury duty simply because of her sex.

Post-Taylor, then, a woman's work, whether at home or on the job, and the administrative convenience of treating all women as expendable, these are not even arguable bases for diminishing the defendant's Sixth Amendment right by diluting the quality of community judgment a jury trial provides.

Moreover, eliminating the exemption for "any woman" clouds not reasonable jury service exemption, only two States, Missouri and Tennessee, today maintain a solely sex-based exemption. Other Missouri exemptions are tied to occupation, prior service, individual hardship; not to an unalterable identification each of us is marked with at birth, and identification bearing no necessary relationship to one's capacity or life situation and therefore inherently unreasonable as a basis for jury duty avoidance.

In sum, no sense at all nourishes Missouri's solely sex-based exemption implemented by Jackson County's prominent invitation to "any woman" to sign off. And the Jury Commission-

er's assumption, from a woman's inaction, that she doesn't want to serve. Habit, yes; but surely not analysis or actual reflection accounts for an excuse based simply on a woman's sex and not on what she does or is capable of doing.

Finally, the Court's 8-to-1 judgment in Taylor leaves no roof for the Missouri argument that Billy Duren must show how he, in particular, might have been disadvantaged by violation of the fair cross-section requirements. Selection of a criminal trial jury from a representative cross-section, the Court held in Taylor, is an essential component of a defendant's Sixth Amendment right.

Neither Missouri nor this Court is at liberty to apply or dispense with the cross-section rule, based on the view of prosecutor or of judge, of the strength of the evidence against a defendant, full respect for the cross-section command is required of a State, because the constitutional safeguard is guaranteed to all, and it may be relied upon by every person, the most low and the least deserving to the same extent as the most upright and virtuous.

QUESTION: Mrs. Ginsburg, somewhere in these briefs, the opposing briefs, there's a suggestion that if Mr. Duren prevails here, the Missouri jailhouse doors might be opened. Do you have any comment -- what is your response to that suggestion?

MRS. GINSBURG: I think it's certainly the case that

this objection is available only to the defendants who have properly raised it below and pursued it on appeal.

Moreover, it would be relevant only in the case of Jackson County. That questionnaire and that summons in the record that flags and signals repeatedly that women may take themselves off, those are used only in Jackson County and no other county in Missouri. So I would say we are talking about one county only, about trials post this Court's decision in Taylor v. Louisiana, and only in cases where the objection has been properly raised and pursued under Missouri law.

QUESTION: Do you know what the follow-through in the Louisiana case was?

MRS. GINSBURG: Yes. Billy Joe Taylor was retried and reconvicted.

QUESTION: But was that ruling specifically held and not retroactive?

MRS. GINSBURG: You held that it was not retroactive.

QUESTION: And so the result is that the Louisiana jails were not opened; and you think this would follow here also?

MRS. GINSBURG: In Taylor v. Louisiana, you overturned a 1961 precedent in Hoyt v. Florida.

QUESTION: But you would think, you would argue, I suppose, that Taylor mandated invalidation of the Missouri

law?

MRS. GINSBURG: Well, I certainly think so.

QUESTION: And that this ought to go back at least to Taylor?

MRS. GINSBURG: At least, yes.

QUESTION: Yes.

MRS. GINSBURG: Although that's not a necessary part of the case that's here today. Yes, that was the message that New York got, and other States, all States except Missouri and Tennessee got that message.

To conclude, the unconstitutionality of Missouri's excuse for "any woman" as it operates to distort Jackson County jury panels is plainly established. Any sensible reading of this record juxtaposed with this Court's 8-to-1 judgment in Taylor lead ineluctably to that conclusion.

QUESTION: You won't settle for putting Susan B. Anthony on the new dollar then?

[Laughter.]

MR. CHIEF JUSTICE BURGER: I think you have no jurisdiction to make that concession, Mrs. Ginsburg. Thank you.

Miss Laughrey.

ORAL ARGUMENT OF MISS NANETTE LAUGHREY, ESQ.,

ON BEHALF OF THE RESPONDENT

MISS LAUGHREY: Mr. Chief Justice, and may it please the Court:

I think there are three issues that we have to address here. First of all, does Missouri's jury selection system systematically exclude women? Which I believe is what was held in Taylor vs. Louisiana to be unconstitutional if it resulted in jury panels which are almost totally male.

I think we also have to find out what degree of disparity must be proven in order to make out a violation of the Sixth Amendment. And I think there's also a question as to the allocation of the burden of proof in these cases.

I will first address the question as to whether Missouri's jury selection system systematically excludes women.

I think there is a distinct factual difference between our system and the Louisiana system, in that in Louisiana women were not included in the jury wheel, unless they took affirmative action. There was an assumption that they were not interested.

In Missouri, on the other hand, women are treated at the inception of the process in exactly the same way as are men. The voter registration lists are used, and names are selected at random from those lists and questionnaires are sent out.

QUESTION: Are you suggesting that they are generally in the category of physicians and others who, it was conceded by, I think, your friends on the other side of the table, would be a permissible exclusion on the part of the States for reasons of public policy?

MISS LAUGHREY: I think an exemption does not exclude women or doctors, it gives them the opportunity not to participate if they choose.

QUESTION: Well, whether you call it exemption or exclusion, since it gives the woman the opportunity to get off the jury more readily than it gives other people, carpenters and bookkeepers, then why is it different -- you suggest it is essentially the same as that dispensation given to physicians? Is that part of your argument?

MISS LAUGHREY: Yes, Your Honor, it is essentially the same as any exemption which the State of Missouri grants.

QUESTION: Well, wasn't it true that they have -- the woman has two, a woman doctor has two exemptions.

MISS LAUGHREY: That is correct, Your Honor.

QUESTION: And you don't see anything wrong with that?

MISS LAUGHREY: I think it is wrong if there is a violation of the Sixth Amendment. I don't think the question is whether the fact that we give women a special privilege is wrong. I think it's a question of whether, as a result of that, Billy Duren's Sixth Amendment rights were violated.

QUESTION: Well, isn't that a direct result of his having only 0.9 women on the jury, the direct result of the Missouri practice?

MISS LAUGHREY: Your Honor, we would submit that

no, it is not, and petitioner has not shown it to be.

QUESTION: Well, what would cause it?

Where you have 54 percent of the population, what would make it possible to have such a small amount to serve on juries?

MISS LAUGHREY: Petitioner -- Your Honor, we do not believe that it is the obligation of the State to show why there were so few women on the jury, but rather that the burden of proof was on the petitioner.

QUESTION: Well, if you are unreasonably requested to do so, can you?

MISS LAUGHREY: No, Your Honor, because --

QUESTION: You can't justify it, can you?

MISS LAUGHREY: What do you mean by justification?

QUESTION: What the word says.

MISS LAUGHREY: The reduction in the number of women available, or the reasons for the exemption?

QUESTION: The reason for the exemption, one --

MISS LAUGHREY: One, no. The exemption originally was given because of the presumed role of women in the home, and that there were so many women in that situation that they should be given an exemption. Also there was some intimation that women should be given a choice as to whether they wanted to participate in the selection of juries, where certain details might be described that they were uncomfortable in

hearing.

QUESTION: And at a time when they weren't even qualified to vote.

MISS LAUGHREY: Yes, Your Honor, that is true, and I think the Court in the past has characterized those --

QUESTION: Or to make contracts -- or to make contracts?

MISS LAUGHREY: Yes, Your Honor. And I think that --

QUESTION: They just couldn't do anything but tend home.

MISS LAUGHREY: I think the question, Your Honor, is not whether we can justify the exemption, because we only need to justify the exemption once it has been shown to be a violation of the Sixth Amendment, and once it has been shown to operate in such a way that there are so few women on the jury panel that it is no longer fairly representative of the community.

And it is our belief that the figures in this case are sufficient to show that there was a fair cross-section of women in the community on the panel.

We would point to the fact that there were 29 percent women on the master jury wheel, even after women were given the opportunity to fill out the questionnaire and take their exemption, it was still 29 percent women, which is three times more than the situation in Taylor vs. Louisiana.

There were 15 times more women on the venires than there were in Taylor vs. Louisiana. In Taylor you stated that it would be a violation if we could -- if it were shown that the exemption or the exclusion resulted in almost totally male panels.

We submit to you that almost totally male is not an accurate characterization of the panels which tried Billy Duren and which are used in Jackson County, Missouri.

As I said before, I agree that what once were justifications for our exemption may be outmoded and archaic, and yet it seems to me that the basis of the petitioner's position is that Billy Duren somehow was deprived of a fair and impartial trial because of the undefinable something that distinguishes men and women.

I submit that is equally outmoded and archaic, and not a basis for finding a violation of the defendant's Sixth Amendment.

QUESTION: Didn't Taylor say so?

MISS LAUGHREY: Yes, Your Honor, Taylor did say so.

QUESTION: Taylor is based on an outmoded stereotype is what you're saying? Is that your argument?

I think it is, isn't it?

MISS LAUGHREY: I submit that is the fact.

I think an important question here also is where the burden of proof is going to be allocated in these cases. In

other cases which are pending before this Court on petitions for cert, you are aware that there has been evidence introduced to show that the reduction from 54 percent to 29 percent on the jury wheel was the basis of the questionnaires and the exemption for women. This, however, is not in the record before this Court, and we submit that it should not be considered by this Court, since it was not considered by the Missouri Supreme Court in the making of their decision.

Even, however, if you do consider that evidence, there is still no explanation for the diminution of the amount of women from 29 percent to 15 percent, because, we submit that if a woman has a right to check the questionnaire and say, "I don't want to serve", and she doesn't, then we can't assume that she is later, when she's called to serve, going to say "Well, the only reason I'm not interested in serving is because I am a woman." And there is no proof in the record here as to why women were excused for cause by the judge, as evidenced in the tables which are in the Appendix.

QUESTION: Miss Laughrey, let me get back for a moment, if I may, to your comment about the outmoded stereotype in response to Justice Stevens' question. Actually juries -- lawyers who pick juries operate largely on stereotypes, don't they? In the sense that, you know, people of certain nationalities are believed to award higher personal injury verdicts than others, and other types are supposed to be more

favorable to criminal defendants, others kind of hardhearted and favorable to the prosecution. There may be very little to them, to the stereotypes, perhaps, that are not justified; but certainly a lot of lawyers use them in the picking of juries, and using their preemptory challenges.

MISS LAUGHREY: That may be, Your Honor, I don't know. Is there a question?

QUESTION: Well, the question -- you say, in effect, that it didn't make any difference to Billy Duren that there weren't that many women on the jury because there really isn't much -- the concept that women would react differently than men is outmoded. Or do I misinterpret your answer?

MISS LAUGHREY: No, that was correct, Your Honor.

I think, though, that when we're talking about a violation of the Sixth Amendment and saying that he did not have a fair and impartial trial, that -- and not allowing the State of Missouri to justify their exemption on the basis of outmoded and archaic ideas, it seems inconsistent to rely on those kinds of ideas to fashion the Sixth Amendment violations.

I'd like to discuss the question of burden of proof for a minute, as it relates to the reduction of women from 29 to 15 percent and from 54 to 29 percent.

The Solicitor General would like this Court to say that there's some kind of a prima facie case made out when you show a non-neutral selection process. And you show under-

representation. And they try to relate this to the situation in which this Court has found discrimination in exclusion of a particular group from a jury on the basis of a lower representation of that group and a non-neutral selection process, a subjected selection process, and have shifted the burden to the State.

We submit that there is no reason to make such an allocation of the burden of proof in these cases because of the fact that the same situation is simply inapplicable here that is applicable in a discrimination case.

When you're talking about trying to point at some place in a subjective process where discrimination has occurred, it is impossible for the defendant to go into that process and find out at what point that happens, and therefore there is a reason for developing these rules about the prima facie case and shifting the burden of going forward with the evidence to the State.

We submit that there is no similar reason here, that there is nothing in our process which makes it easier for the State to show why it is not the exemption for women than it is for the defendant to show that it is the exemption for women that results in the under-representation.

As evidenced by the fact that they have counted the questionnaires, they have found out the reason as far as other cases go.

QUESTION: Suppose it was thought that a prima facie case had been made out, does the State -- what's the State's strongest argument in justification?

Or do you have one?

MISS LAUGHREY: Are you talking about justification for the exemption?

QUESTION: Yes. For treating women different than men in terms of excuse.

MISS LAUGHREY: We recognize that women still play a primary role in the home, and that even though women may in fact be working mothers, does not mean that they have been relieved of the responsibilities of their obligations to the home or to their family. And that just because they work is not a sufficient reason for saying that they no longer carry the responsibilities that they were once thought to have.

QUESTION: Is that a legislative -- do you think that's a legislative decision?

MISS LAUGHREY: The justification for this exemption? I don't know what the legislative justification was, we do not have any evidence. I submit that that is the strongest justification that the State of Missouri can make for the exemption.

QUESTION: Well, under McGowan v. Maryland, if there was any rational reason for it, we give that considerable weight, I suppose, would we? Should we?

MISS LAUGHREY: Yes, but again it's not an equal protection case. I don't think the question is whether our exemption is good or bad, it's the question of whether it fits into the mold of Taylor vs. Louisiana. And in Taylor vs. Louisiana there were certain statements about what made out a violation of the Sixth Amendment. There had to be systematic exclusion of women.

We submit that there was not exclusion of women here, because we did not assume that they were not going to serve on juries merely because they did not opt in to the jury selection process.

I would like to point to one place in the petitioner's reply brief that I think is an inaccurate characterization of the fact. On page 3, they indicate that if women do not return their questionnaires and do not respond to the Jury Service summons, it is assumed that they do not want to serve. And that is not true. If a woman does not return her questionnaire, she is automatically put in the pool from which juries are selected.

The second part of that statement is true. If a woman does not respond to the summons, they do assume that she's going to exercise her right to an exemption. But I think there is a distinct difference between a process which at the beginning does not include women in the jury selection system, and a process at the end which does not send the police out

to arrest women because they may have used their exemption, is a distinct factual difference.

I think also if you look at the statistics in the Appendix, in the tables which petitioner has provided, you will see that the number of women who dod not respond to summons is insignificant in comparison to the number who have appeared for jury duty, who are excused, and for other reasons, and end up appearing on the jury wheel.

QUESTION: What happens to a man who does not respond to a summons?

MISS LAUGHREY: The testimony is that the police will make an attempt to find out why he has not responded.

QUESTION: Well, if they find him and he says, "I just didn't want to serve" --

MISS LAUGHREY: There is a distinction at that point.

QUESTION: And he tells the police, "I just didn't want to serve; that's the reason I didn't respond."
Then what happens to him?

MISS LAUGHREY: He is subject to being held in contempt of court.

Now, in the record in this case, there is no great discussion about how many men in fact are found to be held in contempt of court or whether they do anything about it.
I would point you, however, to a footnote in the petitioner's

reply brief, page 2, footnote 1, when they talk about the St. Louis jury system and state that if we were to amplify, we would indicate that in St. Louis they do not assume, from the fact that women do not answer the summons, that they do not to serve.

In talking with Mr. Ruland, who is the author of the authority which they cite, the situation in St. Louis is that for a period of time they experimented and they went out and tried to find out why people did not show up. And if a woman did not show up, they did nothing to her. In exactly the same way as in Jackson County. What they really --

QUESTION: Is Jackson County Kansas City?

MISS LAUGHREY: Jackson County is Kansas City, Missouri.

QUESTION: How many counties are there in Missouri?

MISS LAUGHREY: Your Honor, I do not have the answer to that question. There are more than a hundred.

Jackson County, Missouri, of course is one of the largest population areas.

QUESTION: So a case based on statistics from Jackson County, although it would affect a substantial number of people in Missouri, would not be determinative of other convictions obtained in other counties, I take it?

MISS LAUGHREY: I think that is the -- certainly the import of Taylor is that it is only when it results in an under-

representation. In a particular case. And if it doesn't result in under-representation in St. Louis or Boone County, does that mean that, you know, the exemption is still valid.

QUESTION: So a federal habeas judge sitting in the Western District of Missouri may be scanning convictions of -- if the Supreme Court of Missouri is reversed here -- fifty different counties, and he's going to have to get evidence as to the functioning of the jury system in each of those counties before he can decide.

MISS LAUGHREY: Well, that's true, Your Honor, but we would submit that even if the Missouri Supreme Court were reversed in this case, that this is not a situation that should be made retroactive; that we think that the rules which were applicable in Taylor vs. Louisiana are equally applicable in this case, for two reasons: No. 1, because of the factual distinctions between Taylor vs. Louisiana and the situation in Missouri, we do not think that Taylor is so dispositive of the question that we can just say this is an application of Taylor; we submit that it is an extension of the rationale in Taylor.

Largely because it's based on statistics. We never know what is going to be a fair cross-section of the community, Your Honor. We know that one percent is too small, and we know that 54 percent would be an exact mirror. We never know where, in between that, the Sixth Amendment violation occurs.

And therefore to say that it's merely an application of Taylor, I do not think is correct.

And before, you have stated in Daniel and in Stowall vs. Denno, the standard that you want to consider when you're deciding whether something is retroactive or not. Two of the standards, in addition to our reliance on prior law, would be the interest that the constitutional provision was intending to protect; and, as you stated in Daniel, you're not submitting that Billy Duren was prejudiced in any way. That, you know, it may not have made one iota of difference to Billy Duren whether there were women in his pool or on his jury or whatever.

So there is not the kind of inherent prejudice and problems that would be where a defendant is denied the right to an attorney during the process of a trial.

QUESTION: Are you hinting at a harmless error, even assuming all that your friends say, that it's harmless error?

MISS LAUGHREY: No, Your Honor. We, of course, submit that we do not think that there is any prejudice in this case.

QUESTION: No, an alternate -- I wondered whether you were making an alternative argument, that this is harmless error even if otherwise --

MISS LAUGHREY: No, I'm saying that if you decide that it was error and it was unconstitutional, and you are

considering whether it is retroactive or not, you look at the question of what did the constitutional provision protect, and in Daniel you indicated that what the Sixth Amendment fair cross-section protects is not of the kind that would necessitate a retroactive application.

The third most important thing is what happens if you make this retroactive. The petitioner has tried to minimize the effect that it would have on the administration of justice in Jackson County by saying that it is only one county in Missouri. I am sure that this Court is aware of -- that half the population of the State of Missouri is in the metropolitan Kansas City area.

QUESTION: I didn't know that.

MISS LAUGHREY: And that there is going to be a substantial undermining of the administration of justice in Jackson County, Missouri.

QUESTION: And what percentage of the convicts who were convicted in Jackson County -- what percentage of those still in, who have been convicted since Taylor are still there?

MISS LAUGHREY: Your Honor, we of course do not have those statistics at this time. You are aware, though, of how many petitions for cert have already been filed in this Court, that they are in limbo at this time, that the petitioner can certainly tell you that there is certainly more than 150 cases in which this issue has been raised and in which the statistics

have been made out.

And one of the issues that you indicated that you would consider in Stowall vs. Denno, Daniels vs. Louisiana, is the effect on the administration of justice. And to make the State of Missouri re-try all of those cases would have a devastating effect on the administration of justice in our State.

QUESTION: Daniels v. Louisiana was the case that held the Taylor doctrine not retroactive?

MISS LAUGHREY: That is correct, Your Honor.

QUESTION: I don't -- is it cited in your brief?

MISS LAUGHREY: No, it is not. We did not discuss it --

QUESTION: Do you remember the citation for it? It's 400-something. 415, maybe.

MISS LAUGHREY: I do not have the citation with me, Your Honor.

QUESTION: No, it would be after Taylor, it would be 420-something.

MISS LAUGHREY: If there are no further questions, I thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Nation?

MR. NATION: Yes.

MR. CHIEF JUSTICE BURGER: We seem to have -- there

seems to be a disagreement on the factual situation between you and the State, about women who do not return their questionnaires. She says they are automatically put in, you said they were automatically out.

REBUTTAL ARGUMENT OF LEE M. NATION, ESQ.,

ON BEHALF OF THE PETITIONER

MR. NATION: The statement made in our reply brief was that women who do not return the questionnaires and who do not follow the request of the summons do not appear for jury service.

QUESTION: That isn't quite the way you put it in your oral argument. I think there was a little --

MR. NATION: It was something like that in the brief, that -- yes, that's the reason that the wheel is as high as it is, that's the reason there are 29 percent women on the wheel; is because if they don't return the questionnaire, they are put onto the wheel, and then they opt off when they receive the summons.

I'm not sure what we could further prove prior to trial, to prove a case, I believe, under the precedents of this Court, a prima facie case has been made. We showed a non-neutral selection procedure, and we showed marked under-representation of women.

Now it is incumbent upon the State to come up with some reasonable explanation. And attributing the fact that 14.5

percent of jury panels could possibly be random chance, or something else, the possibility of that happening is infinitesimal.

QUESTION: You don't claim that the Missouri statute, though, is unconstitutional in all situations; it has to be accompanied by your Jackson County statistical showing.

MR. NATION: Well, under Taylor you have to prove that there is an exemption and that there is under-representation. No statute is per se unconstitutional; but in its effect here in Jackson County, it is.

Further, the only reason --

QUESTION: That is because of your statistical showing as well as because of the practices and procedures in Jackson County?

MR. NATION: Yes.

QUESTION: I see.

MR. NATION: The exemption is the same for other counties in the State, but other people hide the exemption from their women.

QUESTION: In a specific case could this ever, in your view, be harmless error?

MR. NATION: Only in a case where there is absolutely no question of credibility for the jury. In any case where the jury has to determine the credibility of witnesses, it is impossible to say that it's harmless error or harmless constitu-

tional error.

QUESTION: Well, what if a defendant on the stand, under cross-examination, as has happened in some cases, testified in a way that it added up to essentially a judicial confession of the crime, would you think that would be the kind that could be harmless error?

MR. NATION: Well, Your Honor, as a criminal defense lawyer, I have occasionally had instances where my client -- the only reason where a trial is not to contest the facts but to try and receive a light sentence, because in Missouri the jury sentences. And it's my experience that women are much more sympathetic towards defendants than men are.

So in that instance, even in that situation, --

QUESTION: And they are not fungible, as was suggested.

MR. NATION: No, I don't think they are fungible.

QUESTION: I think we're going to get in a lot of trouble, because that wasn't my experience.

[Laughter.]

MR. NATION: There is -- I don't know how many, there are seven, I believe, petitions for certiorari on this issue before the Court. And I have nowhere near 150 cases; but I am not sure what the number is. But we believe as far as retroactivity that this case falls squarely under Taylor, and that anyone who raised it prior to trial,introduced evidence,

requested the court to quash the jury panel and give him a reasonably representative jury at trial, should be afforded a new trial.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 2:26 p.m., the case in the above-entitled matter was submitted.]

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