

Appellant's Fifth Point of Error

(a) The trial court committed reversible error by denying Max Soffar's motion to quash the indictment because the grand jury selection process violated equal protection.

(b) The trial court committed reversible error by denying Max Soffar's motion to quash the indictment because the grand jury selection process violated due process and Appellant's right to a fair cross section.

A Harris County grand jury selected by the "key man" system – a system long recognized as "susceptible of abuse," *Castaneda v. Partida*, 430 U.S. 482, 497 (1977) – indicted Max Soffar in 1980. (SCR 4). Appellant sought to quash the indictment on the ground that the grand jury selection system discriminated against women and Hispanics. (6 CR 1738-1820). At a pretrial hearing, he introduced unchallenged evidence showing that Harris County systematically discriminated against women and Hispanics in (1) summoning individuals for grand jury service; (2) selecting individuals for grand jury service; and (3) selecting forepersons and alternates. *See* (7 RR 126-58; 6 CR 1738-1820; 43 RR Defense Exhibits 7, 8, and 9 (Affidavits of Professor Harold J. Hietala and Lucille A Stiffler, and Curriculum Vitae of Professor Hietala)). In addition, he demonstrated systematic discrimination against women in selecting jury commissioners. *Id.*

The trial court denied the motion on the merits. (7 RR 158). This ruling violated Max Soffar's, Harris County women's, and Harris County Hispanics' equal protection and due process rights, as well as Max Soffar's due process and fair cross section rights. *See* U.S. Const. amends. V, VI, VIII, XIV; Tex. Const. Art. 1, §§ 3, 3a, 10, 13, 15, 19.¹

¹**Standard of review and preservation.** This Court reviews *de novo* mixed questions of fact and law, including constitutional challenges to the composition of grand juries. *See Ovalle v. State*, 13 S.W.3d 774 (Tex. Crim. App. 2000) (reviewing *de novo* grand jury equal protection claim and performing its own statistical analysis); *Guzman*, 955 S.W.2d at 87. Appellant preserved the claims set forth herein by filing the motion to quash in the court below

(a) The trial court committed reversible error by denying Max Soffar’s motion to quash the indictment because the grand jury selection process violated equal protection.

The trial court’s rulings denying Soffar’s motion to quash violated the equal protection and due process rights of Appellant, Harris County women, and Harris County Hispanics. *See Rose v. Mitchell*, 443 U.S. 545, 554 (1979) (racial discrimination in selection of grand jury forepersons poses potential for harm and requires reversal of defendant’s conviction); *Castaneda*, 430 U.S. at 501.² A prima facie case of a violation of the equal protection clauses of the federal and state constitutions is met by demonstrating: “(1) the group is a recognizable, distinct class, singled out for different treatment; (2) the degree of underrepresentation is calculable by comparing the proportion of the group in the total population to those called to act . . . over ‘a significant period of time’; [and] (3) the selection procedure is susceptible of abuse.” *Mosley v. Dretke*, 370 F.3d 467, 475-76 (5th Cir. 2004) (citing *Rose*, 443 U.S. at 565). As demonstrated below, Appellant met each of these requirements.

“If the defendant makes such a prima facie showing, the burden shifts to the state to rebut that showing.” *Mosley*, 370 F.3d at 476. *See also Johnson*, 929 F.2d at 1072. In this case, the State made no attempt to rebut Appellant’s prima facie case, and

and by presenting compelling evidence demonstrating the merits of the claims. *See* (6 CR 1738-43; 7 RR 126-58).

² The remedy mandated by the Supreme Court in *Rose* – that “the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed,” 443 U.S. at 551 – does not “depend on any infringement of the petitioners’ right to fundamental fairness, nor on whether the defendant was prejudiced in fact” because the “injury is to the jury system, to the law as an institution, to the community at large, and to the processes of our courts.” *Johnson v. Puckett*, 929 F.2d 1067, 1071 (5th Cir. 1991) (citing *Rose*, 443 U.S. at 556). *See also J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994); *Mosley v. Dretke*, 370 F.3d 467, 477 (5th Cir. 2004).

accordingly failed to overcome the showing of discrimination.

1. Prima Facie and Unrebutted Evidence of Exclusion of Women. Max Soffar established that Harris County discriminated against women in the grand jury selection process during the years 1970 through 1980, and the State offered nothing to rebut this showing. Accordingly, the trial court committed reversible error by denying the motion to quash.

(A). Women are a distinct class. Women are a recognizable, distinct class. *See J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 128 (1994) (so holding); *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Max Soffar has standing to assert the claims of women who suffered this discrimination. *See, e.g., Campbell v. Louisiana*, 523 U.S. 392 (1998).

(B). Women were under-represented over a significant period of time. Soffar satisfied the second prong of the *Rose* test by introducing statistical evidence of the under-representation of women in the grand juror selection process. He presented the unrebutted testimony (via admission through stipulation of an affidavit of fact attached to his motion to quash) of Harold J. Hietala, professor emeritus in the Departments of Anthropology and Statistical Science at Southern Methodist University. Dr. Hietala presented evidence of statistically significant under-representation of women in the selection of commissioners, in the grand jury pool, in the grand jury, and in the selection of forepersons in Harris County in the period 1970 through 1980. *See* (43 RR Defense Ex. 8) (Under-representation of Minority Groups); (6 CR 1738, 1805).

Courts accept Statistical Decision Theory (“SDT”) as a valid statistical technique

for analyzing equal protection claims.³ SDT determines whether an observed pattern of under-representation is “statistically significant,” or unlikely due to chance. One SDT method is to examine whether the difference between the expected result and the observed result is greater than two or three standard deviations.⁴ *See, e.g., Castaneda*, 430 U.S. at 496-97 n.17 (“[I]f the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.”).⁵ Another common SDT method is to calculate the probability value (the P value). “A (P) value below .05 is generally considered to be statistically significant, i.e., when there is less than a 5% probability that the disparity was due to chance.” *Coates*, 756 F.2d at 537 n.13; *Segar v. Smith*, 738 F.2d 1249, 1282-83 (D.C. Cir. 1984) (a 0.05 P value (a 5 percent chance that the occurrence is random), which translates to 1.96 standard deviations, is sufficient to establish prima facie case of discrimination).⁶

³ *Alston v. Manson*, 791 F.2d 255, 257-59 (2d Cir. 1986) (SDT is appropriate technique for analyzing equal protection claims and aims “to determine if chance alone could account for a meager representation of minorities”); *Jefferson v. Morgan*, 962 F.2d 1185, 1189-90 (6th Cir. 1992) (same). *See also Castaneda*, 430 U.S. at 496 n.17 (employing SDT in equal protection case); Hietala Affidavit at 8 (43 RR Defense Ex. 8) (SDT calculates “the probability that the under-representation is the result of random chance”).

⁴ *Coates v. Johnson & Johnson*, 756 F.2d 524, 536 n.11 (7th Cir.1985) (“The ‘standard deviation’ is a number that quantifies the degree to which disparities spread out above and below the mean of distribution, thus describing the probability that chance is responsible for any difference between an expected outcome and the observed outcome in a sample consisting of two groups (a binomial distribution). The greater the number of standard deviations, the less likely it is that chance is the cause of any difference between the expected and observed results.”).

⁵ *See also Waisome v. Port Authority*, 948 F.2d 1370, 1376 (2d Cir. 1991) (noting that a finding of two standard deviations is statistically significant); *Ovalle*, 13 S.W.3d at 782-83 (concluding that three standard deviations is the benchmark for statistical significance and performing its own statistical analysis); *Hazelwood School District v. United States*, 433 U.S. 299, 311 n.17 (1977) (“a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race”) (citation omitted).

⁶ Another important statistical methodology courts use to assess equal protection claims is absolute disparity. Absolute disparity measures the difference between the percentage of the protected class in the general population and the percentage of the protected class selected. (6 CR 1751). An absolute disparity of 10% or more establishes a

Equal protection analysis requires a statistical showing of discrimination “over a significant period of time.” *Mosley*, 370 F.3d at 475-76. Here, Soffar presented data taken from an eleven-year period, from 1970 through 1980. *See Castaneda*, 430 U.S. at 496 n.17 (finding 11-year period significant); *Hobby v. United States*, 468 U.S. 339, 341 (1984) (7 years significant). *Cf. Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3d Cir. 1992) (finding two-year period analysis insufficient). Application of statistical decision theory to the data in this case indisputably establishes a violation of equal protection.

The following chart summarizes the statistical data demonstrating the drastic under-representation of women in Harris County amongst jury commissioners, the grand jury pool, actual grand jurors selected, and grand jury forepersons:⁷

prima facie showing of discrimination. *See, e.g., Jones v. Georgia*, 389 U.S. 24, 25 n* (1967) (14.7%); *Rideau v. Whitley*, 237 F.3d 472, 486 (5th Cir. 2000) (noting Supreme Court decisions using 18% and 14.7%); *United States v. Tuttle*, 729 F.2d 1325, 1327 (11th Cir. 1984) (noting that 10% is the minimum necessary showing in 11th Circuit).

⁷ As explained further in the chart’s first row, the calculations of standard deviations and number of deviations between the expected and the observed are based on the data in the record and this Court’s formulae in *Ovalle*, 13 S.W.3d at 781-83, nn. 22-30, also used by the Supreme Court in *Castaneda*, 430 U.S. at 496 n.17.

1970-1980 Representation of Women Among Components of Grand Jury System:	Number Within Category (6 CR 1805):	Expected Number of Women ⁸	Observed Number of Women (6 CR 1805):	Standard Deviation for Comparison ⁹	No. of Standard Deviations Between Expected and Observed ¹⁰	Probability Absent Purposeful Discrimination (P-value) (6 CR 1805):
Jury Commissioners	633	316 (.5 x 633)	108	12.58 ¹¹	16.6 ¹²	less than 0.0000001 ¹³
Grand Jury Pool	2,480	1,240 (.5 x 2,480)	844	24.90 ¹⁴	15.9 ¹⁵	less than 0.0000001 ¹⁶

⁸ See e.g., *Castenda*, 430 U.S. at 496 n.17 (calculating the expected number by multiplying the total number of persons by the percentage of the population that is Mexican-American). See also, *Ovalle*, 13 S.W.3d at 782 nn.23 & 24 (applying the same calculations to grand jury challenge in Hidalgo and Navarro counties).

⁹ See e.g., *Castenda*, 430 U.S. at 496 n.17 (defining the standard deviation for binomial distributions “as the square root of the product of the total number in the sample . . . times the probability of selecting a Mexican-American . . . times the probability of selecting a non-Mexican-American”; *Ovalle*, 13 S.W. 3d at 782 n.29 (using same calculation); see generally, Robert V. Hogg, *Introduction to Mathematical Statistics*, 59, 158 (6th ed. 2004).

¹⁰ See, e.g., *Ovalle*, 13 S.W.3d at 782 n.30 (calculating number of standard deviations by dividing the observed deviation (expected number minus observed number) by the standard of deviation for the comparison).

¹¹ Here, the standard deviation, 12.58 (rounded), is the square root of the product of 633, the total number in the sample, times the probability of selecting a woman (0.50) times the probability of selecting a man (0.50).

¹² The observed deviation, 208.5, is approximately 16.6 standard deviations ($12.5797 \times 16.5742 = 208.498$).

¹³ There was a 32.94 % absolute disparity between the percentage of women in the Harris County population and the percentage who were selected as jury commissioners, *id.*, another strong showing of an equal protection violation. See, e.g., *Jones v. Georgia*, 389 U.S. 24 (1967); *Rideau*, 237 F.3d at 486; *Tuttle*, 729 F.2d at 1327.

¹⁴ The standard deviation, 24.90 (rounded), is the square root of the product of the total number in the sample (2,480) times the probability of selecting a woman (0.50) times the probability of selecting a man (0.50).

¹⁵ The observed deviation, 396, is approximately 15.9 deviations ($24.8997 \times 15.9037 = 395.9974$).

¹⁶ The absolute disparity between the percentage of women in the population and the percentage of women summoned was 15.97%, *id.*, another indisputable demonstration of an equal protection violation.

Selected for Grand Jury	1,644	822 (.5 x 1,644)	563	20.27 ¹⁷	12.8 ¹⁸	less than 0.0000001 ¹⁹
Grand Jury Forepersons	132	66 (.5 x 132)	11	5.74 ²⁰	9.6 ²¹	less than 0.0000001 ²²

The difference demonstrated between the expected and actual number of women in the grand jury pool, among jury commissioners, among actual grand jurors selected, and among grand jury forepersons ranges from between *nine and sixteen-plus standard deviations*. These statistics overwhelmingly establish a prima facie case of discrimination in each of the above categories. See *Castenada*, 430 U.S. at 496, n.17. Calculation of the probability value (the P-value) for each of these categories also shows that the probability that the under-representation of women in the period from 1970 through 1980 was due to chance was less than 0.0000001. Aff. of H. J. Hietala, Exhibit 7 (6 CR 1805) (p < .0000001). The P-values here of .0000001 translate to an approximately one in 10 million chance that the occurrence was random. They are highly significant and far exceed the level of significance generally considered significant. (6 CR 1751-52, 1805).

These statistics indisputably establish a prima facie case of discrimination against women in the selection of jury commissioners, assembly of the grand jury pool, selection

¹⁷ The standard deviation, 20.27, is the square root of the product of the sample size, 1,644, times 0.50 times 0.50.

¹⁸ The observed deviation, 259, is approximately 12.8 deviations (20.2731 x 12.7755 = 258.9989).

¹⁹ The absolute disparity between the percentage of women in the population and the number of women selected as grand jurors in the years 1970 through 1980 was 15.75%. *Id.*

²⁰ The standard deviation, 5.74, is the square root of the product of the sample size, 132, times 0.50 times 0.50.

²¹ The observed deviation, 55, is approximately 9.57 standard deviations (5.7446 x 9.5743 = 55.0005).

²² The absolute disparity for this category was 41.67%.

of the grand jury, and selection of grand jury forepersons. Put plainly, “[h]appenstance is unlikely to produce th[ese] disparit[ies].” *Miller-el v. Cockrell*, 537 U.S. 322, 342 (2003).

(B). System Susceptible to Abuse. As the United States Supreme Court has held, “a selection procedure that is susceptible of abuse . . . supports the presumption of discrimination raised by the statistical showing.” *Castaneda*, 430 U.S. at 494-95 (citation omitted). During the years in question, Harris County employed a “key man” system under which the district court judges had unfettered discretion to appoint jury commissioners who in turn had unfettered discretion to select grand jurors. See TEX. CODE CRIM. PROC. Arts. 19.01; 19.06; and 19.34; (6 CR 1740; 7 RR 135). As numerous courts, including the Supreme Court, have held, this “key man” system is clearly susceptible to abuse.²³

Because Appellant satisfied all three parts of the *Rose* test, the burden shifted to the State to rebut the showing. *Mosley*, 370 F.3d at 475-76. The State made no attempt to do so. Accordingly, the trial court committed reversible error by denying Appellant’s Motion to Quash.

2. Prima Facie and Unrebutted Evidence of Exclusion of Hispanics

Appellant also established that Harris County’s system of selecting forepersons and alternates discriminated against Hispanics during the years 1970 through 1980, and the state offered nothing to rebut this showing.

Max Soffar satisfied the first prong of the *Rose* test because Hispanics are a

²³ *Castaneda*, 430 U.S. at 484, 494, 497 (“key man” system for selecting jurors, under which judge selects jury commissioners who in turn select prospective jurors, is susceptible to abuse); *Cassell v. Texas*, 339 U.S. 282, 287 (1950) (jury commissioners’ subjective selection of jury venire provided an opportunity for discrimination); *Mosley*, 370 F.3d at 478-70 (similar to *Patrida*); *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991) (similar).

recognizable, distinct class. *Castenada*, 430 U.S. at 494; *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954).

In addition, Soffar satisfied the second prong of the *Rose* test by introducing un rebutted statistical evidence of the under-representation of Hispanics in the selection of forepersons and alternates. (6 CR 1805). For the years 1970 through 1980, Hispanics over the age of eighteen comprised approximately 13.72% of the population in Harris County.²⁴ During this period one hundred and thirty-two grand jury forepersons and alternates were selected in Harris County. *Id.* Of those 132, based on the population data, it would be expected that approximately 19²⁵ of the selected forepersons or alternates would be Hispanic. In fact, there were only seven Hispanic forepersons during this time period. *Id.* The difference between the expected number of Hispanics, 19, and the observed number 7, is 12, approximately three standard deviations, a statistically significant difference.²⁶ Similarly, the P-value is less than 0.0008, again indicating the statistical significance of the under-representation. *Id.*

Appellant also satisfied the third prong of the *Rose* test because, as explained above, the Harris County system of selecting forepersons from 1970 through 1980, whereby the district court judges appointed grand jury forepersons who in turn selected

²⁴ Dr. Hietala calculated the percentage of the population classified as Hispanic using census data and adjusting the data to include only those individuals over age 18. *See* Aff. of H.J. Hietala, Exhibit 6 (6 CR 1791-1804).

²⁵ 13.72% of 132 = 19.

²⁶ The standard deviation is 4.07, which rounded is the square root of the sample size (140) times the probability of selecting a Hispanic person (0.1372) times the probability of selecting a non-Hispanic person (0.8628). *See* (6 CR 1805). The observed deviation, 12, is approximately 3 standard deviations (2.9988 x 4.0709 = 12.2078)). The absolute disparity between the percentage of Hispanics in the population and the percentage of Hispanics selected as forepersons or alternates was 8.72%. *Id.*

grand jurors, was susceptible to abuse. *See* TEX. CODE CRIM. PROC. Art. 19.34; (6 CR 1740); *Mosley*, 370 F.3d at 478-70; *Johnson*, 929 F.2d at 1072.

Because Appellant established under *Rose* a prima facie case of discrimination against Hispanics in selection of forepersons and alternates, the burden shifted to the state to rebut this showing. The state made no attempt to do so. Therefore, the trial court committed reversible error by denying the Motion to Quash.

(b) The trial court committed reversible error by denying Max Soffar’s motion to quash the indictment because the grand jury selection process violated due process and Appellant’s right to a fair cross section.

The United States and Texas Constitutions guarantee criminal defendants that their jury commissioners, grand jury forepersons and alternates, and grand jury pools will be selected from a fair cross section of the community, in accordance with representational due process values.²⁷ *See* U.S. Const. amends. V, VI, VIII, XIV; Tex. Const. Art. 1, §§ 10, 13, 15, 19.²⁸

The test for establishing a prima facie case of a fair cross section violation is “essentially the same” as the test for establishing a prima facie equal protection violation. *Hernandez*, 24 S.W.3d at 851. An appellant must show: “1) that the group alleged to

²⁷ *Carter v. Jury Comm. of Greene County*, 396 U.S. 320, 338 (1970) (“State[s] may no more exclude Negroes from service on the jury commission because of their race than from the juries themselves.”); *Mosley*, 370 F.3d at 478-70; *Hobby v. United States*, 468 U.S. 339, 346 (1984); *Johnson*, 929 F.2d at 1072.

²⁸ *See Hernandez v. State*, 24 S.W.3d 846, 851 (Tex. App. - El Paso 2000, *pet. ref’d*) (“Sixth amendment requires that grand . . . juries be selected from a fair cross section of the community” (citing *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)); *Weaver v. State*, 823 S.W.2d 371, 372, n.5 (Tex. App. – Dallas, 1992, *pet. ref’d*) (both the Sixth Amendment of the United States Constitution and article 1, section 10 of the Texas Constitution require that grand jury venires represent a fair cross section of the community); *see also United States v. Deering*, 179 F.3d 592, 597 (8th Cir. 1999) (Sixth Amendment right to grand jury from fair cross section). *Cf. Duren*, 439 U.S. at 359 (applying fair cross section of the community requirement to include women).

have been excluded is a ‘distinctive group’ in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Duren*, 439 U.S. at 364; *Aldrich v. State*, 928 S.W.2d 558, 560 (Tex. Crim. App. 1996). “[O]nce the defendant has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest.” *Duren*, 439 U.S. at 368.

Max Soffar satisfied all three of these prongs with respect to (1) discrimination against women in the selection of jury commissioners; (2) discrimination against women when summoning grand jurors; (3) discrimination against women in the selection of grand jury forepersons and alternates²⁹; and (4) discrimination against Hispanics in the selection of grand jury forepersons and alternates.³⁰ The State failed to meet its burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest. Accordingly, the trial court committed reversible error by denying the Motion to Quash.

First, both women and Hispanics are distinctive groups. *See, e.g., Duren*, 439 U.S.

²⁹ *But see Hobby v. United States*, 468 U.S. 339 (1984) (defendant could not assert that discrimination in grand jury foreperson selection violated his due process rights in part because foreperson had only ministerial duties and was selected from grand jurors already chosen); *Mosley v. State*, 983 S.W.2d 249, 256 (Tex. Crim. App. 1998) (“as in *Hobby*, the foreman in this case was selected from grand jurors that had already been chosen, and the foreman possessed only ministerial duties in addition to his normal duties as a grand juror”).

³⁰ *But see* cases cited *supra* in the preceding footnote.

at 364; *Castenada*, 430 U.S. at 494. Second, the representation of each of these groups is not fair and reasonable in relation to the number of such persons in the community. As discussed in the section on Equal Protection, *supra*, Statistical Decision Theory analysis powerfully shows significant under-representation of women and Hispanics in various stages of the grand jury selection process discussed. The same conclusion is inescapable under absolute disparity analysis,³¹ the methodology frequently used to assess fair cross section and due process claims. *See, e.g., People v. Burgener*, 62 P.3d 1, 22 (Cal. 2003). An absolute disparity of 10 percent or more indisputably satisfies *Duren*'s second prong. *See Jones*, 389 U.S. at 25 n* (absolute disparity of 14.7% establishes violation); *Rideau*, 237 F.3d at 486 (noting Supreme Court decisions using 14.7% and 18%); *Tuttle*, 729 F.2d at 1327 (holding that 10% is the minimum showing). Appellant satisfied *Duren*'s second prong for women and Hispanics in the categories listed in the below chart:

Category	Absolute Disparity (% of protected class in general population – % of protected class selected)
Women Jury Commissioners 1970-80	32.94% (50-17.06)
Women Jury Commissioners 1980	22.37% (50-27.63)
Women in Grand Jury Pool 1970-80	15.97% (50-34.03)
Women in Grand Jury Pool 1980	6.11% ³² (50-43.89)

³¹ As noted above, absolute disparity measures the difference between the percentage of the protected class in the general population and the percentage of the protected class selected. (6 CR 1751).

³² The P-value, less than 0.02, (6 CR 1805), indicated that this difference was statistically significant. *Coates*, 756 F.2d at 537 n.13 (7th Cir.1985) (“For large samples, statistical significance at a [P-value] in the range below 0.05 or 0.01 is ‘essentially equivalent’ to significance at the 2 or 3 standard deviation level.”). The standard deviation, 8.70, is the square root of the product of the sample size, 303, times .50 times .50. (6 CR 1805). The observed deviation, 18.5, *id.*, is a statistically-significant 2.13 deviations (8.7034 x 2.1256 = 18.4999).

Women Grand Jury Forepersons and alternates 1970-80	41.67% (50-8.33)
Women Grand Jury Forepersons and alternates 1980	16.67% (50-33.33)
Hispanic Forepersons and alternates 1970-80	8.72% ³³ (13.72-5)
Hispanic Forepersons and alternates 1980	13.72% ³⁴ (13.72-0)

Third, by showing that the key-man system utilized at the time of his grand jury was a highly discretionary one, susceptible to abuse and open to discrimination, Max Soffar also met his burden of demonstrating that the under-representation of women and Hispanics was due to their systematic exclusion. *Duren*, 439 U.S. at 364.

Because Appellant established all three elements of the prima facie case with respect to the under-representation of women (in the selection of jury commissioners, the grand jury pool, and forepersons and alternates) and Hispanics (in the selection of forepersons and alternates), the burden shifted to the State to rebut the discrimination. The State failed to introduce any evidence rebutting the prima facie case and, accordingly, the trial court erred by denying the Motion to Quash.

Conclusion. By denying the Motion to Quash, the court violated Appellant's,

³³ This under-representation is statistically significant. *See* subsection (a) (2) (B), *supra*, (discussing the P-value, <0.0008 and the fact that the observed difference was three standard deviations).

³⁴ Although the absolute disparity for this category is high, this is the only category in which the number of standard deviations is under two. This is because the data for 1980 for this category had a very small sample size (N = 15). Of the fifteen, it would be expected that 2 of the forepersons or alternates would be Hispanic. In fact, there were *no* Hispanic forepersons. The P-value, less than 0.011, indicated statistical significance. The standard deviation, the square root of 15 times 0.1372 times 0.8628, was 1.33. The difference between the expected number, 2.058 and the observed number, 0, was 2 – less than two standard deviations. Note, however, that this sample shows the difficulty of testing with small sample sizes: it would be impossible for the difference to be greater than two standard deviations, given that it is not possible to have a smaller number of Hispanics than zero.

Harris County women's, and Harris County Hispanics' equal protection and due process rights, and Appellant's due process and fair cross section rights. Reversal is required.