

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

v.

JORGE VELASCO MELLA (4),

DEFENDANT.

CRIM. NO. 08-036(PJB)

**DEFENDANT JORGE VELASCO MELLA'S (4)
MOTION SEEKING DISCLOSURE OF INFORMATION
REGARDING GRAND AND PETIT JURY SELECTION
IN SUPPORT OF PROSPECTIVE MOTIONS**

TO THE HONORABLE COURT:

COMES NOW, the defendant, JORGE VELASCO MELLA, through his undersigned attorney and respectfully alleges and prays:

1. The trial of the above-mentioned criminal matter is scheduled to begin on February 9, 2008. Mr. Velasco Mella hereby seeks to challenge the method used to select grand and prospective petit jurors in the District of Puerto Rico for the following reasons. He intends to file a motion facially attacking the constitutionality of 28 U.S.C. 1865 (2) and (3) and to raise as an applied challenge. To do that properly Mr. Velasco Mella needs the court's assistance.¹

2. Mr. Velasco Mella's challenge to the jury selection system is based on two contentions. First, Mr. Velasco Mella contends that 28 U.S.C. §1865 (2) and (3) are unconstitutional on their face because they violate the guarantee of substantive due process as well as equal

¹ Mr. Velasco Mella is scrupulously following the protocol articulated in *United States v. Orlando Figueroa*, 229 F.3d 33 (1st Cir. 2000) to seek the requested information.

protection. The statute serves to exclude 72% of Puerto Rico's population. (See Exhibit 1 annexed hereto, current U.S. Census data.) Mr. Velasco Mella submits that 28 U.S.C. § 1866 (e) as applied in this District is unconstitutional when one considers Puerto Rico's size and the fact that only about 28% of Puerto Rico's population is English speaking.

3. Jurors, both grand and petit, therefore, are being required to hear far too many cases, particularly criminal cases to be deemed competent to serve, fairly and impartially. The net result of the jury selection process as it is presently administered and effectuated under the District's plan is that the District Court is creating a pool of professional jurors who are "recycled", and, who, for that reason, are incompetent to serve.

4. The problem relating to frequency of service is aggravated in this case greatly by the unprecedented pre-trial publicity in this case. Additionally, in 1992, the Clerk's Office advised undersigned counsel that fifty percent or more of individuals summoned are not receiving the notices sent to them by mail which advise them that they must report for jury service. Fifty percent or more of the summonses are returned unopened. On information and belief, no alternative to the voting lists is presently being used to summon jurors and the fifty percent return figure has not substantially changed in sixteen years.

5. The principal problem with the federal jury selection system in Puerto Rico though cannot be simply resolved by improving the summons procedure or by expanding the target pool. The systematic exclusion of 72% of Puerto Rico's population is unteachable and unconscionable. Thirteen years after the Court of Appeals held in *United States v. Flores-Rivera* 56 F.3d 319 (1st Cir.1995) that the systematic exclusion for lack of English proficiency was *not* violative of the

guarantees of substantive due process, Mr. Velasco Mella must contend that said holding cannot and should not withstand current constitutional scrutiny.

6. Mr. Velasco Mella submits that the vast majority of prospective jurors are not being permitted to serve because they are unable to speak or understand English. Hence the application of the statute here is serving to deny Mr. Velasco Mella a jury of his peers.

7. Challenges similar to the jury selection system predicated on the legality of the English-speaking requirement have been ventilated in Puerto Rico over the years. See, *United States v. Flores-Rivera*, 56 F.3d 319 (1st Cir.1995); *United States v. Marcano*, 508 F. Supp. 462 (D.C.P.R. 1980), (Torruella, J.), *aff'd*, 622 F.2d 12, 18 (1st Cir., 1980); *United States v. Ramos Colón*, 415 F. Supp. 459 (D.C.P.R. 1976) (Torruella, J.). Mr. Velasco Mella, nevertheless, submits that these precedents must be revisited particularly in a case so affected by adverse pre-trial publicity.

8. Mr. Velasco Mella moreover takes direct issue with the Court of Appeals' articulated notion that the necessity for "English is an almost insurmountable practical consideration." *United States v. Ramos Colón*, *id* at 465. When one examines the compiled data as to how few trials in the federal court here ***are actually conducted in their entirety in English***, the Court of Appeals' reasoning falls short. For this reason, Mr. Velasco seeks the court's assistance in obtaining comprehensive data regarding the use of certified court translators in the District of Puerto Rico. Any regular practitioner is aware that the *majority* of testimony presented in the District of Puerto Rico is presented in the Spanish language. Indeed, in criminal cases, frequently, the most significant testimony and the most damaging to defendants is consistently presented in the Spanish language. In this District, it is common for Task Force agents and federal law enforcement officials to insist on testifying in Spanish and in having their testimony translated to English. The reality, then, is that

only a *portion* of criminal trials celebrated in the District of Puerto Rico are done in English regardless of the Court of Appeals' conclusion that it is an "insurmountable...consideration." Arguments of counsels, objections raised by counsel and bench conferences (which are sometimes conducted in Spanish off the record) are the exceptions.

9. It is true that appellate courts would be inhibited from reviewing cases if trials in the District of Puerto Rico would be celebrated in Spanish but the reality *is that they are being celebrated in the Spanish language and they are being routinely translated*. The reviewing courts, then, for years have not been inhibited in doing their job although much of what occurs in this federal court occurs in Spanish. The "insurmountable...consideration" of appellate review has been surmounted for years without the appellate courts recognizing the reality. They have, for years, been relying on certified translations of testimony and documents to determine a trial's outcome. Mr. Velasco Mella, therefore, contends that he should be given an opportunity to obtain the specific data requested so he can present the appropriate motion, once that data is obtained.

10. In *Duren v. Missouri*, 439 U.S. 357, 364 (1979), the court articulated a three-pronged test to determine if the cross-selection requirement imposed by the Fifth and Sixth amendments were violated.

"In order to establish *prima facie* violation of the fair cross-selection requirement [of the Sixth Amendment], the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) tht the representation of this group in venires from which juries are selected is not fair and reasonable in the community; and (3) that this under representation is due to the systematic exclusion of the group in the jury-selection process."

Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L. Ed. 2d 579 (1979).

Mr. Velasco Mella submits that the test is met herein. First, persons who speak only Spanish are an easily identifiable group in Puerto Rico. Second, their exclusion from federal juries, petit and grand is unreasonable in light of the fact that Puerto Rico's federal trials are already being routinely translated in great part to English by certified court translators without inhibiting the work of the appellate courts. Third, there is no question that the majority of Puerto Ricans are being routinely excluded by the statutorily-imposed language requirement. The solution, consistent with the constitution and the guarantee of substantive due process is that trials here should be conducted, in their entirety in the Spanish language and translated, in their entirety into English. New technology in translation services no longer make this prospect cost prohibitive. By doing so, litigants would be truly guaranteed a jury of their peers and appellate courts could continue reviewing cases exactly as they do now, by reviewing transcripts and documentary evidence produced by reliable certified court translators.

WHEREFORE, Mr. Velasco Mella requests that he court authorize him to access records maintained by the District Court, including, but not limited to:

- a) Data regarding the number of times a grand juror has been summoned and has served within the last five years; the number of times a petit juror has been summoned and has served in the last five years. (Mr. Velasco Mella is not interested in the names of the jurors. Grand and petit jurors can be identified by number;)
- b) A copy of the District Court's plan for the random selection of grand and petit jurors;
- c) The English proficiency test which is administered by the jury administrator to prospective grand and petit jurors;

- d) A description of the list which the District Court has used in the last five years to summon grand and petit jurors;
- e) The data regarding the number of summonses returned in the last five years;
- f) Data regarding the number of grand and petit jurors that have been removed from the wheel due to lack of English proficiency.
- g) Data relating to the totality of the pool of individuals which the District Court has summoned in the last five years.

Mr. Velasco Mella, with the court's permission, reserves his right to amplify this specific request in accordance with statute and case law.

At San Juan, Puerto Rico this 8th day of July, 2008.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I, hereby certify that on this date I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system system which will send notification of filing to Assistant U.S. Attorneys Maria Dominguez, Ernesto Lopez-Soltero and U.S. Department of Justice Trial Attorney Daniel Schwager and all attorneys of record.

At San Juan, Puerto Rico this 8th day of July, 2008.

s/ MARIA H. SANDOVAL