NO. 000000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	198th JUDICIAL DISTRICT
JOE SMITH	)	BANDERA COUNTY, TEXAS

DEFENDANT'S SECOND MOTION TO SET ASIDE THE INDICTMENT
[Equal Protection and Fair Cross-Section]

TO THE HONORABLE JUDGE OF SAID COURT:

This indictment must be set aside. Section 273.024 of the Texas Election Code is unconstitutional as applied to Joe Smith because it granted blanket discretion to the Attorney General of Texas to obtain this indictment in Medina County, and to move the prosecution from there, where it properly belongs, to Bandera County, to which it has no logical connection, thereby denying Mr. Smith the Equal Protection of the Laws, guaranteed to him by the Fourteenth Amendment to the United States Constitution, and Article I, §§ 3 and 3(a) of the Texas Constitution. Additionally, trial in Bandera County will deny Mr. Smith his right to a jury before a fair cross-section of the community appropriate for this trial, which is Medina County, in violation of the Sixth Amendment to the United States Constitution, and Article I, § 10 of the Texas Constitution.

I.
The Facts

1. Not a single act alleged in Mr. Smith's indictment, or in the indictments of the three persons he is said to have collaborated with, occurred in Bandera County. Each of this indictment's 35 counts purport to charge crimes that occurred "in Medina County, Texas, a county adjoining Bandera County." Despite this, the indictment was returned by a grand jury empaneled in Bandera County – not in

Medina County – and, from all appearances, the prosecution will seek to try the case in Bandera County – not in Medina County.

2. Given the language in its indictment, it is clear that the State of Texas relies on TEX. ELECTION CODE ANN. § 273.024 to support its unilateral action to move this case to Bandera County, notwithstanding the fact that that county has no connection to the case other than that it adjoins Medina County.

3. Joe Smith is a resident of Medina County, and a Hispanic person, as are each of the other three persons named as co-defendants in Count One of this indictment.

4. As shown in Exhibit A, according to data published in July, 2019 by the United States Census Bureau, the Hispanic population of Bandera County is 19.8%; the Hispanic population of Medina County is 52.6%.

5. Exhibit B shows the Census Bureau's data regarding the Hispanic population of the four counties,[1] other than Bandera, that adjoin Medina County:

- Atascosa County (64.8%);
- Bexar County (60.7%);
- Frio County (79.9%);
- Uvalde County (72.7%),

6. Remarkably, of the five counties that adjoin Medina County, and from which the State could have chosen to move the case under § 273.024, it chose the county with the smallest proportional Hispanic population of all.

7. According to recent research by the American Civil Liberties Union, since the current Attorney General took office in 2015, at least 72% of that office's Election Code prosecutions appear to have been against Black and Latinx individuals. [Exhibit C]

II.
The General Rule, Versus § 273.024

The general rule in Texas is that felony offenses are investigated by grand juries empaneled in the counties where the offenses allegedly occurred, and they are tried by

[1] Depending on the definition used, Kendall County (24.6%), and Zavala County (94.0%), are also adjoining counties.

petit juries in those counties. To be sure, the Court, the prosecution, and the defense, may all move to change venue for good cause shown. TEX. CODE CRIM. PROC. ANN. arts. 31.01 – 31.03. Additionally, there are a limited number of statutes that purport to authorize prosecutions in counties other than the county of alleged commission. One such statute is § 273.024 of the Election Code, which provides: "An offense under this subchapter may be prosecuted in the county in which the offense was committed or an adjoining county."

III.
Equal Protection Of The Laws Is Guaranteed Under Both The United States And The Texas Constitutions

The United States Constitution guarantees Equal Protection of the Laws:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND XIV.

The Texas Constitution contains similar protections:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

TEX. CONST. Art. I, § 3.

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.

TEX. CONST. Art. I, § 3a.

IV.
The Equal Protection Violation In This Case

A. The State may not purposefully exclude jurors based on race.

More than 140 years ago, the United States Supreme Court recognized that the State denies a defendant equal protection of the laws when it indicts and tries him before juries from which members of his race have been purposefully excluded. *See Strauder v. West Virginia*, 100 U.S. 303, 304 (1879). *Strauder* made clear that

> the *central concern* of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure. That decision laid the foundation for the Court's unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn.

Batson v. Kentucky, 476 U.S. 79, 85 (1986)(emphasis supplied).

"In the decades after *Strauder*, the Court reiterated that States may not discriminate on the basis of race in jury selection." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2239 (2019)(citing nine Supreme Court cases decided over a span of eighty-three years). *Flowers* is the most recent in the long line of cases striking down State procedures that give "blanket discretion" to prosecutors to skew the racial composition of grand and petit juries in ways that "clash with the dictates of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 2238. Quoting *Batson*, *Flowers* reminds readers that the Fourteenth Amendment's *central concern* "was to put an end to governmental discrimination on account of race." *Id*. at 2240-41.

Just as the West Virginia statute in *Strauder*, and the jury selection strategies in *Batson* and *Flowers*, § 273.024 gives Texas prosecutors who are of a mind to do so

blanket discretion to unconstitutionally manipulate the racial composition of grand and petit juries. We submit it is no coincidence that the Attorney General chose to move Mr. Smith's case from his home county to a different venue – one with less than half the proportional Hispanic population, and a significantly smaller proportion than exists in every one of the other adjoining counties.

B. The test for establishing an equal protection violation.

Batson did not create a new substantive rule of equal protection. Instead, recognizing that previous cases had imposed a "crippling burden of proof," the Court established a three-part test for a trial court to use to determine race-based governmental discrimination:

> 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.'

Snyder v. Louisiana, 552 U.S. 472, 476–77 (2008).

Although *Batson* dealt with peremptory challenges, it is undeniable that the same three-part test applies to any "governmental discrimination on account of race." *See Flowers v. Mississippi*, 139 S.Ct. at 2241. "[T]he Constitution prohibits all forms of purposeful racial discrimination in selection of jurors." *Batson v. Kentucky*, 476 U.S. at 88. It also "forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 139 at 2244. If the State cannot strike even one juror for a

discriminatory purpose, it most certainly cannot manipulate an entire venire by moving the case out of the county it belongs in, to another county with a much smaller Hispanic population. *See Mallett v. Missouri*, 494 U.S. 1009, 1010 (1990)(Marshall,, J., dissenting)("Just as state prosecutors may not use peremptory challenges to exclude members of the defendant's race from the jury . . . state trial courts may not transfer venue of the trial to accomplish the same result by another means."). The three-part test established in *Batson* is the proper one for determining whether that action violated Joe Smith's right to the equal protection of the laws.

C. A *prima facie* case of discrimination exists.

Those who challenge governmental discrimination bear the initial burden of making a *prima facie* case. "A prima facie case represents the minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true." *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd by an equally divided Court sub nom., Tompkins v. Texas*, 490 U.S. 754 (1989). Establishing a *prima facie* case is not an "onerous burden." *Dewberry v. State*, 776 S.W. 2d 589, 591 (Tex. Crim. App. 1989). Our Court of Criminal Appeals has enumerated a variety of ways that a *prima facie* case can be made. *See Keeton v. State*, 749 S.W. 2d 861, 867 (Tex. Crim. App. 1988). Removing a suspiciously large number of minority venirepersons – "numbers larger than one would expect if race had nothing to do with it" – can be compelling. *Linscomb v. State*, 829 S.W. 2d 164, 166 (Tex. Crim. App. 1992). In *Linscomb*, the Court held that the appellant had made a *prima facie* case where

> the prosecutor exercised peremptory challenges against black veniremembers at more than twice the rate one would expect from a random selection. Because she was not made to reveal her actual motives, we have no reason to suppose that this disproportionately large number was merely coincidental. Rather, from the limited information available, it seems more likely that her jury selection strategy was actually based on a racially sensitive assessment of the panel.

Id. at 166.

Joe Smith is Hispanic, as are each of his three co-indictees, and by moving the case to Bandera County from Medina County, the State has radically altered the racial composition of his potential petit jury pool (from 52.6% to 19.8%). Those facts – which are at least as suspicious as the facts in *Linscomb* – are alone sufficient to establish a *prima facie* case of racial discrimination. *Linscomb v. State*, 829 S. W. 2d at 165-166; *Cook v. State*, 858 S.W. 2d 467, 472 (Tex. Crim. App. 1993) (the use of three of five peremptory strikes against minority venirepersons makes out a prima facie case); The circumstantial evidence for discrimination is stronger still when coupled with statistics showing that 72% of the Election Code violations prosecuted by Attorney General Paxton have been against persons of color.

D. The prosecutors must rebut this *prima facie* case.

"[O]nce a *prima facie* case of racial discrimination has been established, the prosecutor must provide race-neutral reasons for the strikes. The trial court must consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties. The trial judge's assessment of

the prosecutor's credibility is often important." *Flowers v. Mississippi*, 139 S. Ct. at 243–44. The State may not rebut the case by merely denying a discriminatory motive, or claiming its good faith. *Batson v. Kentucky*, 476 U.S. at 98. And the proffer of a "pretextual explanation naturally gives rise to an inference of discriminatory intent." *Snyder v. Louisiana*, 552 U.S. at 485.

E. The defense must have the opportunity to show that any proffered race-neutral explanations are pretextual.

Counsel for Mr. Smith are aware of nothing the State can put forth to rebut the *prima facie* case of governmental discrimination we have established. Should the State attempt to provide rebutting, race-neutral explanations for its decision to move the case away from Medina County, we must be given the opportunity to show that those explanations are pretextual. *Batson* says that the State must do more than merely generally deny a "discriminatory motive." *Batson v. Kentucky*, 476 U.S. at 98; *see Emerson v. State*, 851 S.W. 2d 269, 272 (Tex. Crim. App. 1993)(explanation must be clear and specific, and not just a broad assertion of non-discrimination, or that the venireperson would be biased because of common race.

F. Showing proferred race-neutral reasons are pretextual requires access to information.

A variety of things can show pretext. In *Salazar v. State*, 795 S.W.2d 187, 192 (Tex. Crim. App. 1990), the Court held that the defense was entitled to production of the prosecution's jury selection notes. In *Foster v. Chatman*, the defense obtained copies of the prosecution's files and used evidence therein to successfully disprove the State's

claim that it had exercised its strikes in a "color-blind manner." 136 S. Ct. 1737, 1747, 1752 (2016)(rejecting the State's explanations as "implausible" and "fantastic" that could "only be regarded as pretextual").

If the State claims here that it had race-neutral reasons for moving Mr. Smith's case from Medina County to Bandera County, we request that this Court order the State to provide to the defense all writings, including, but not limited to, policy manuals or directives, memoranda, emails, and texts, that reflect any inter-office communications within the Office of the Texas Attorney General regarding its decisions to move any of its election fraud cases to adjoining counties pursuant to § 273.024, including its decision to move Mr. Smith's case from Medina County.

V.
The Fair Cross-Section Violation Made Possible By § 273.024 Of The Texas Election Code

At issue in *Taylor v. Louisiana*, was a statute that, although it did not disqualify women from jury service, its "systemic impact" was that a grossly disproportionate fraction of women eligible for jury service were actually called for service. In Taylor's case, no women were actually on the venire from which the petit jury was formed. The Supreme Court held that the jury selection system enabled by this statute excluded women — an identifiable class of citizens constituting 53% of the eligible jurors. The Court held that this statutory system did not comport with the Sixth Amendment's fair cross-section requirement. 419 U.S. 522, 525-526 (1975).

Section 273.024 of the Election Code has the same unconstitutional, "systemic

impact" in our case: it ensures that significantly fewer Hispanics will serve on any petit jury selected in Bandera County, than would serve if the case were tried in Medina County. Because Mr. Smith's indictment does not comport with the fair cross-section requirement of the Sixth and Fourteenth Amendments to the United States Constitution, it must be set aside. *E.g.*, *Smith v. Texas*, 311 U.S. 128, 130 (1940)("well-settled" that conviction based upon an indictment returned by a juries selected so as to exclude persons based on race is a denial of equal protection); s*ee Mallett v. Missouri*, 494 U.S. 1009, 1011 (1990)(Marshall, J., dissenting from denial of *certiorari*)(Justice Marshall would have granted *certiorari* to decide whether the fair cross-section requirement is violated by the trial judge's decision to transfer venue to a county with no members of Mallett's race).

VI.
The State Is Not Without A Remedy If It Believes A Fair Jury Cannot Be Selected in Medina County

There is absolutely no reason to believe that the State of Texas cannot get a fair trial if this case were to be indicted in Medina County, then tried there. According to the latest figures published by the United States Census Bureau, the population of Medina County is 51,584. [Exhibit A] Surely, from a population so large, the parties can find 12 fair and impartial jurors. But if the State insists it cannot get a fair trial in Medina County, it can do what every other litigant must do in a criminal case in Texas — seek a change of venue as permitted by § 31.02 of the Texas Code of Criminal Procedure. The State does not need § 273.024 to ensure its right to a fair trial.

VII.
Prayer

Joe Smith prays that the Court set this matter for an evidentiary hearing, and, after hearing evidence and argument of counsel, that the Court grant this motion and aside the indictment in this case.

Respectfully submitted:

/s/ Mark Stevens
MARK STEVENS
310 S. St. Mary's Street, Ste. 1920
San Antonio, TX 78205
(210) 226-1433
State Bar No. 19184200
mark@markstevenslaw.com

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of Defendant's Second Motion To Set Aside The Indictment has been electronically delivered to assistant Attorneys General, on August 3, 2021.

/s Mark Stevens
MARK STEVENS

NO. 000000

STATE OF TEXAS	)	IN THE DISTRICT COURT
VS.	)	198th JUDICIAL DISTRICT
JOE SMITH	)	BANDERA COUNTY, TEXAS

ORDER

On this the _____ day of _____, 2021, came on to be considered Defendant's Second Motion to Set Aside the Indictment, and said Motion is hereby

(GRANTED) (DENIED).

_____

JUDGE PRESIDING