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In the Circuit Court of the First Circuit

State of Hawai`i

State of Hawai`i ) Cr. No.

)

vs. ) Motion Challenging the Array of

) the Jury; Declaration,

) Memorandum in Support of motion

Defendant. )

Motion Challenging the Array of the Jury

COMES NOW, -------------------, through her undersigned attorney, and respectfully moves this court, to dismiss the array of the jury and to call for a new selection of jurors in accordance with the U.S. and Hawai`i State constitutional provisions guaranteeing a jury from a cross-section of the community. This motion is submitted pursuant to not only the U.S. and Hawai`i constitutions but HRS Chapter 612, Specifically §612-23, and pursuant to HRPP Rule 12,

Dated: Wai`anae, Hawai`i, May \_\_ 2019

\_\_/s/ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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Memorandum in Support of Motion:

HRS §612-1 sets forth the policy of selection and service of jurors, stating in part:

**Declaration of policy.**  It is the policy of this State that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this State and an obligation to serve as jurors when summoned for that purpose. [L 1973, c 191, pt of §1]

That declared policy, however is circumscribed by the section regarding qualification and disqualification. It states, at HRS §612-4

(a)  A prospective juror is qualified to serve as a juror if the prospective juror:

     (1)  Is a citizen of the United States and of the State;

     (2)  Is at least eighteen years old;

     (3)  Is a resident of the circuit; and

     (4)  Is able to read, speak, and understand the English language.

     (b)  A prospective juror is disqualified to serve as a juror if the prospective juror:

     (1)  Is incapable, by reason of the prospective juror's disability, of rendering satisfactory jury service; but a prospective juror claiming this disqualification may be required to submit a physician's, physician assistant's, or advanced practice registered nurse's certificate as to the disability, and the certifying physician, physician assistant, or advanced practice registered nurse is subject to inquiry by the court at its discretion;

     (2)  Has been convicted of a felony in a state or federal court and not pardoned; or

     (3)  Fails to meet the qualifications in subsection (a). [L 1973, c 191, pt of §1; gen ch 1985; am L 1996, c 168, §1; am L 2007, c 122, §3; am L 2009, c 151, §22; am L 2014, c 45, §15]

The qualifications and disqualifications provision of the State law runs contrary to the policy of the law as well as to the Constitutions of the U.S. (6th A) and of the State of Hawai`i (Article 1, §14). The Sixth Amendment of the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”

Section 14 of article I of the Hawaii Constitution provides the same guarantee. Trial by jury in criminal cases is fundamental to the American and the Hawaiian scheme of justice. The U.S. Supreme Court has held that the Due Process Clause of the 'Fourteenth Amendment of its constitution guarantees a right of jury trial in all criminal cases which-were they to be tried in a federal court-would come within the Sixth Amendment's guarantee.' Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444 1447, 20 L.Ed.2d 491 (1968). In cases where a defendant in Hawaii in a criminal case is to be tried before a jury, the U.S. Supreme Court's interpretation of the 'impartial jury' requirement of the Sixth Amendment as applied in federal cases is now binding on the courts of this State.

The tradition of trial by jury, necessarily contemplates an impartial jury drawn from a cross-section of the community.' Thiel v. Southern Pacific Co., 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181 (1946). A jury representative of a society will draw a greater respect for its judgment by the general community. Secondly, the role of the jury mitigates the harsh rule of law by bringing the application of legal doctrine into conformity with a “down to earth” contemporary community standards of what justice is. Finally, the cross-section requirement supplements the impartiality requirement in reducing the risk of a biased jury.

However, in examining the Hawaii statute and its judicial application of jury selection, we find that jury selection is not reflective of a cross-section of the community. Instead, we are faced with certain exclusions which simply contradict the concept of a cross-section of the community.

From HRS §612-4(b)(3), we have excluded non-U.S. and Hawaii State citizens, younger than 18 years old, not a resident of the circuit, and unable to read, speak and understand the English language. Immediately, we find a whole swath of people cut out of being potential jurors without any real justification in logic for their exclusion. First is the age exclusion in which a judgment is made that anyone below the age of 18 is, for some reason, unqualified. But where is the evidence to show that age is a determinate of jury qualification? There is only the application of customary thinking that since that has been the way “it always happened”, so we must not part with this for the sake of custom or tradition. If that was the case, Europe and the Americas would still be operating as if the world was flat and that all heavenly bodies circle the earth! Where is the evidence that one’s youthfulness is any less a proper reflection of a community judgment than an elder? Youths are in touch with a different reality, often a greater hopefulness and willingness to change the wrongs of the society with vigor than the general community. Why are those values not just as much honored as part of our community as those held by people over the age of 18?

Second is the exclusion of non-U.S. citizens. Hawaii stands in a unique situation in that many people who were birthed in these islands, who are native to these islands, and who, with an understanding that the U.S. declarations that these folks are part of the “ceded” assets of the Republic of Hawaii to the United States due to a “cession” of Hawaiian lands, waters and citizens are properly belonging to the United States, reject that interpretation of the legal consequence of history. They conclude that they are Hawaiian nationals, not U.S. citizens. Yet they live in these islands, they work in these islands, they raise families in these islands, and they form just as much a fundamental part of the society as do those U.S. citizens who have transmigrated to Hawaii over the past five years! These Hawaiian nationals, not limited to only the native Hawaiian race, but all people who undertake this understanding of the consequence of Hawaii’s colonial history under the United States have a disagreement with the U.S. One can consider the disagreement to be a political one, or a legal one, or a philosophical one. Whatever we call it, it still is not reason enough to exclude such non-U.S. citizens from being considered part of the cross-section of the community. Under this requirement, the defendant herself is disqualified from serving on a jury!

Third, is the exclusion from serving on the jury of people who are unable to read, speak or understand the English language. This is a discriminatory practice which should be struck down simply on its racial, educational, and physical disabilities basis. The Hawaii society has made a valiant effort to be an inclusive community, and to make every effort to overcome these discriminatory barriers. If one is not able to speak the English language, he may speak the Hawaiian language in all legal transactions. If unable to speak in either languages, then an interpreter should be retained to assist in that individual’s full participation in all aspects of the society, especially that important duty of participating as a member of a jury from a cross-section of the community. If jury service is such an important aspect of our civil society and a crucial right of a defendant, why have we taken such an approach as to eliminate non English speaking individuals from jury service. Beyond the ability to speak in the English language is the elimination of people who are not able to read the English language. Why? If such individuals are part of the cross-section of the community and they are able to carry on with their lives without the technology of reading, they are still part of that community. The inability to read may be caused by numerous conditions, including difficulty with processing information from the eyes to the brain, due to attention deficit disorders, lack of educational opportunity, economic necessity requiring the individual begin work at a very early age, inability to attend school, etc. Yet they are still part of the cross-section of the community. Especially hit by this exclusion category is the migrant community due to their lack of English language skills, and the elderly. They too are entitled to serve.

Let us now turn to other areas of jury disqualifications which violate the constitutions of the U.S. as well as of Hawai`i. To become selected to serve on a jury, one must further qualify to be on a “Master List” consisting of 1) all voter registration lists for the circuit, supplemented by 2) lists of taxpayers and 3) licensed drivers. But many are the people living in the circuit who are not registered voters, taxpayers or licensed drivers. There is an unreasoned presumption that those three qualifiers capture the full range of members of our community. But where is the evidence to support this presumption? That is not the case. Common experience to anyone who walks the beaches early in the morning at Ma`ili will see many people who have become residents of that beach area, without any postal address. They use the public transportation and have no need to obtain a driver’s license, and even if they did, could not afford an automobile or the insurance to drive. These individuals are very unlikely to register to vote and generally do not trust the political system. These same individuals do not file a State tax return for a number of reasons, generally because they do not draw sufficient income to require filing a return, or do not feel they should participate in the financing of their colonization by the U.S. government, or disagree with the current polity of Donald Trump, or for a whole array of other reasons. They are excluded from the jury pool. But they are not alone, many others, living in many other conditions also do not meet any of those three requirements. Under these requirements, the Defendant who is not a registered voter, does not have a driver’s license, and is not a tax filer can not be selected to be on the Master Jury list!

Other areas of discrimination resulting in exclusion from the jury rolls are those who are homeless, lacking a permanent postal address, individuals who have been denied certain civil rights as a result of their mental status or having been criminalized. These discriminatory categories are all contrary to the principle of selecting people from a fair cross-section of the community. These categories are not relevant to the ability of the individual to sit among a group of other members of the community to address questions of guilt, proof beyond a reasonable doubt, the fairness and equity of laws and legal principles to be applied in a case in which a jury is to decide.

The current process of selecting jurors in Hawai`i violates the U.S and Hawai`i constitutions as well as the statutory policy of *all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service.*

Dated: Wai`anae, HI May \_\_ 2019

/s/Pōkā Laenui