

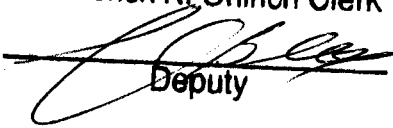
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**In the Supreme Court of the State of California**

<p><b>THE PEOPLE OF THE STATE OF CALIFORNIA,</b></p> <p style="text-align: right;">Respondent,</p> <p style="text-align: center;">v.</p> <p><b>SUSAN DIANE EUBANKS,</b></p> <p style="text-align: right;">Appellant.</p>
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**CAPITAL CASE**

S082915

**RESPONDENT'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE**

Appellant Susan Eubanks filed a Request for Judicial Notice on March 15, 2010, asking this Court to take judicial notice of three charts from the United States Census Bureau purporting to show the Hispanic or Latino populations, and the not Hispanic or Latino populations, for cities within the North Judicial District of San Diego County; for the City of San Diego; and for the County of San Diego, all from the 1990 Census; and also a "Technical Working Paper" entitled "Building a Spanish Surname List for the 1990's." Respondent objects to this request for judicial notice because Eubanks forfeited the related appellate issue by failing to raise it in the trial court; because it is improper to

DEATH PENALTY

raise factual issues on appeal that were not litigated in the trial court; and because the information is not relevant.

Four of Eubanks' arguments on direct appeal challenge the jury selection process in this case. All are forfeited, however, because Eubanks was informed of the jury selection process and never objected to any aspect of it. (See *People v. Ervin* (2000) 22 Cal.4th 48, 73; *People v. Holt* (1997) 15 Cal.4th 619, 666-667.) Eubanks did not bring a motion challenging the jury selection process in any respect. The record contains no information about the populations of different ethnic groups within the judicial district. Any challenges to the jury selection process have been forfeited. The information that Eubanks has now presented to the Court is an attempt to remedy her failure to object in the trial court, but the Supreme Court is not the appropriate forum for raising factual issues for the first time.

In the appellate court, unlike the trial court, it is not mandatory to take judicial notice of specified categories of information. (Compare Evid. C. § 459 with Evid. C. § 453.) Fact-finding is generally not appropriate in the appellate court, and it does not provide a forum for providing evidence and contradictory evidence and for challenging and contesting that evidence. Respondent respectfully requests this Court to decline Eubanks' request to take evidence on the population of the judicial district for the first time on appeal.

The evidence now proffered by Eubanks is irrelevant. It has long been settled that a defendant must demonstrate three prongs in order to establish a prima facie violation of the federal and state constitutional rights to have a jury drawn from a fair cross-section of his community. (*People v. Burney* (2009) 47 Cal.4th 203, 225-226.) The defendant must show ““(1) that the group alleged to be 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.” (*Burney*, 47 Cal.4th at p. 226, quoting *Duren v. Missouri* (1979) 439 U.S. 357, 364 [99 S.Ct. 664, 58 L.Ed.2d 579]; *People v. Anderson* (2001) 25 Cal.4th 543, 566; *People v. Ronoldo Ayala* (2000) 23 Cal.4th 225, 256.) It is

equally well-settled that statistical information alone is not sufficient to show a violation of those rights. (*Burney, supra*, 47 Cal.4th at p. 226; *Anderson, supra*, 25 Cal.4th at p. 566.) “When a county’s jury selection criteria are neutral with respect to race, ethnicity, sex, and religion, the defendant must identify some aspect of the *manner in which those criteria are applied* (the probable cause of the disparity) that is constitutionally impermissible.” (*Anderson, supra*, 25 Cal.4th at pp. 566-567 (emphasis in original); *Burney, supra*, 47 Cal.4th at p. 226; *Ayala, supra*, 23 Cal.4th at p. 256.) Eubanks has not made any such showing. Nothing in the documents submitted for judicial notice provide such information. Without a showing of some impropriety, statistical information is irrelevant.

Moreover, the jury-selection process used in San Diego has been found to be a neutral system. (*People v. Ayala, supra*, 23 Cal.4th at p. 256; *Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115, 1121-1123.) Ronaldo Ayala was tried in San Diego County in 1988. (*Ayala, supra*, 23 Cal.4th at p. 241.) Before trial, Ayala challenged the representation of Hispanics in the jury pool. (*Id.* at p. 256.) The parties stipulated to use former testimony from the coordinator of jury services about the selection process. (*Ibid.*) This Court found that San Diego’s “method does not discriminate on the basis of ethnicity or national origin. [Citation omitted.] Hence, defendant has not shown that the jury selection process contained an ‘improper feature.’” (*Ibid.*) *Roddy* involved the jury selection process in San Diego County in 2005 and 2006. (*Roddy, supra*, 151 Cal.App.4th at p. 1121.) At that time, San Diego County was still using the system of merged voter registration lists and Department of Motor Vehicle lists that has been approved as a neutral system. (*People v. Burgener* (2003) 29 Cal.4th 833, 857; *Roddy, supra*, 151 Cal.App.4th at p. 1133.)

Finally, the census statistics do not list the numbers of Hispanics or Latinos who were citizens or who had sufficient knowledge of the English language to be able to serve on a jury. (See C. Civ. Pro. § 203, subs. (a)(1), (6).) The working paper on Spanish surnames – in addition to the other deficiencies noted – expresses only the views of the two authors and “do not necessarily reflect the position of the United States Bureau of the Census.” It is not an official act of an executive department of the United States, and

does not reflect facts not reasonably subject to dispute. (See Evid. C. § 452, subds. (c), (h).)

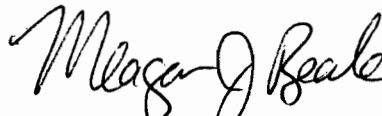
Respondent recognizes that in 1997 this Court took judicial notice of similar documents – federal census data and a paper on Spanish surnames -- in the case of *People v Howard* (1997) 1 Cal.4th 1132, 1160, fns. 6, 7. Nonetheless, these documents are not relevant here and it is not appropriate for this Court to take judicial notice of new facts not presented in the trial court on an issue that was not litigated in the trial court.

For the foregoing reasons, respondent State respectfully requests this Court to deny Eubanks' request for judicial notice.

Dated: March 19, 2010.

Respectfully submitted,

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Eubanks**  
Case No.: **S082915**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 19, 2010, I served the attached **RESPONDENT'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 19, 2010, at San Diego, California.

C. Pasquali  
\_\_\_\_\_  
Declarant

*C. Pasquali*  
\_\_\_\_\_  
Signature