CAUSE NO. 11-272925

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| STATE OF TEXAS | § | IN THE COUNTY COURT |
| VS. | § | AT LAW NO. 5 OF |
| BRYAN OBERLE | § | MONTGOMERY COUNTY, TEXAS |

**MOTION CHALLENGING JURY ARRAY AND TO QUASH JURY PANEL**

TO THE HONORABLE JUDGE OF SAID COURT:

The Defendant requests this Court, under the authority of the 6th and 14th Amendments to the United States Constitution, Article 1, Sections 3 ("all free men have equal rights"), 10 ("public trial by impartial jury"), 13 ("shall have remedy by due course of law"), 15 ("right of trial by jury shall remain inviolate. The Legislature shall pass laws … to maintain its purity…."), 19 ("no citizen of this State shall be deprived of … liberty … except by due course of law.") of the Texas Constitution, and the Texas Code of Criminal Procedure §§ 34.02, 34.05, 35.06 and 35.07, to quash the instant jury panel because there was an intentional exclusion of a distinctive group of Montgomery County residents which has resulted in there being an unfair cross section of the community in the jury panel. In support hereof, the Defendant would show:

I.

This jury panel is solely composed of persons who responded to an email for jury service. The legal profession community in Montgomery County has named this type of panel as an "E" jury panel. The Defendant, under Section 35.07 of the Texas Criminal Code of Procedure, is challenging the legality of this jury because it is not fairly representative of the cross section of this community.

II.

To narrow the matter at issue, it must be understood that the electronic jury selection process, under Article 34.05 of the Texas Code of Criminal Procedure, is not what is at issue in this motion. Rather, what is at issue, is the County's instructions to "E" jurors that they report directly to a **specific courtroom**; which has the effect of excluding all non "E" jurors (who the county tells to report to the **Jury Assembly Room**) thereby tainting the process of getting a fair cross section of the community. Because a sufficient number of "E" jurors always report to the court, no non "E" jurors are ever called to report there. The constitutional and statutory defects here are that the "E" jurors do not fairly represent African Americans and Hispanics, both of which are distinctive representative groups within Montgomery County.

III.

To establish a *prima facie* constitutional violation of the "fair cross section of the community represented" requirement, a 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."

*See Pondexter v. State*, 942 S.W.2d 577, 580 (Tex.Crim.App. 1996). Noncompliance with the mode and manner of summoning venire members set out in Texas Government Code is error whenever a defendant establishes harm. *See Lewis v. State*, 815 S.W.2d 560 (Tex.Crim.App. 1991); TEX. GOV'T CODE ANN. §§ 62.001, *supra* (Vernon 2007).

IV.

Defendant objects to an "E" jury deciding this case. According to the US Census Bureau, African-Americans and Hispanics respectively account for **5%** and **18%** of Montgomery County's population. *See* Exhibit 1: Montgomery County QuickFacts from the US Census Bureau. *See also Feagins v. State;* 142 S.W.3d 532 (Tex. App.—Austin 2004) (Appellate court recognizes 9.2% of the population of Travis County is African-American and thus a distinctive group). A jury panel without this distinctive group is not a constitutional and statutory fair cross section of the community.

In 2009, it was shown that, nationwide, 76% of whites use the internet while the rate for African-Americans and Hispanics were 70% and 64% respectively. *See* Pew Internet & American Life Project and the Graduate School of Library and Information Science and the University of Illinois at Urbana-Champaign report "*Report: Internet, broadband, and cell phone statistics"* (December 2009). The "E" jury here is unfair and unreasonable in relation to the number of such persons in the Montgomery County community when this jury panel only contains ___ African-American and ___ Hispanic people in a ____ person venire and **all** are "E" jurors. (For example: a 24 person panel should contain roughly 1 African American and 4 Hispanics; 36 – 2 and 6; 48 – 2 and 9; and a 60 – 3 and 11 African-Americans and Hispanics respectively).

A venire with all "E" jurors is unfair and unreasonable when the population numbers in Montgomery County reflect that approximately 50% of potential jurors respond *via* email because the other half of the population reports to the Crighton and is

never included in an "E" jury, further creating an unfair cross section of the community. *See* Exhibit 2, Montgomery County Clerk Certified Statistics of 2009 Jury Data. Excluding the half of the population that do not report *via* email, coupled with 5% of African-American and 18% Hispanic percentages in Montgomery County, creates an exponential increase of the discriminatory effect of an "E" jury, especially in the Hispanic demographic. The policy of allowing jurors to respond electronically to the jury summons and allowing the "E" juries to compromise the entire venire panel systematically creates an unconstitutional under-representation of African-Americans and Hispanics. *Feagins v. State;* 142 S.W.3d 532 (Tex. App.—Austin 2004) (keeping the ratio of internet to in-person responses the same in venires as it is in the overall response population…works to ensure that a systematic exclusion does not take place).

Most recently, the Supreme Court noted "the Sixth Amendment is concerned with social or economic factors when the particular *system* of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel." *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), *rev'd* 130 S.Ct. 48, n.6 (U.S. September 30, 2009) (No. 08-1402). Accordingly, when African-Americans and Hispanics are further disqualified for a jury based on whether they have internet access, then the Sixth Amendment is absolutely affected by the social and economic factors that accompany internet access, i.e. financial ability to own a computer, computer literacy, internet access, etc… Consequently, the "E" jury does not represent a fair cross section, is an unfair representation of the community which constitutes error, and denies the Defendant an opportunity to have his case decided by a lawful jury.

## PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests this Honorable Court to quash the instant jury panel and requests a panel be brought in that does represent a fair cross section of the Montgomery County community: "E" and non "E" jurors.

Respectfully submitted,
THE THIESSEN LAW FIRM

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Attorneys for Defendant,
BRYAN OBERLE

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion for has been furnished to the Attorney District Attorney presently assigned to this case, on this the ____ day of _____, 2013.

_____
MARK RYAN THIESSEN

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**ORDER ON DEFENDANT'S MOTION TO QUASH THE PANEL**

On this day came on to be heard the Defendant's Motion Challenging Jury Array and To Quash Jury Panel, and after hearing argument of the parties:

GRANTS the Motion and quashes this panel. The Montgomery County Clerk is ORDERED to establish a new jury which is comprised of "E" and non "E" jurors that fairly represents Montgomery County.

SIGNED this ___ day of _____, 2013.

_____
JUDGE PRESIDING