

JONATHAN MITCHELL,
KYION BALL

Plaintiffs

vs.

LYCOMING COUNTY JURY
COMMISSIONERS, LYCOMING
COUNTY COURT ADMINISTRATOR

Defendants

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA

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: NO. 06-02,171

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: PRELIMINARY OBJECTIONS

Date: February 28, 2007

OPINION and ORDER

Before the court for determination are the Preliminary Objections of Defendants the Lycoming County Jury Commissioners and the Lycoming County Court Administrator filed October 30, 2006 to Plaintiff Jonathan Mitchell and Kyion Ball's Petition for Writ of Mandamus/Prohibition. In the Preliminary Objections, Defendants first assert that the court lacks subject matter jurisdiction over Plaintiffs' Petition because Plaintiffs failed to join an indispensable party. Second, Defendants assert that Plaintiffs have failed to plead in the Petition a claim upon which the relief they seek could be granted. The court will deny in part and grant in part the Preliminary Objections.

I. BACKGROUND

A. Petition for Writ of Mandamus/Prohibition

On October 16, 2006, Plaintiffs Jonathan Mitchell and Kyion Ball filed a Petition for Writ of Mandamus/Prohibition. In the Petition, Mitchell and Ball allege that they are both African-American males charged with criminal homicide and related offenses before the

Lycoming County Court of Common Pleas. Mitchell and Ball also allege that jury arrays in Lycoming County are drawn from voter registration lists and supplemented by driver's license lists and school rolls. Mitchell and Bell further allege that "Lycoming County juries have for many years been under-representative of minorities on panels." Petition for Writ of Mandamus/Prohibition, ¶6. Mitchell and Ball seek a court order compelling the Lycoming County Jury Commissioners to remedy this deficiency. Specifically, Mitchell and Ball seek an order directing the Lycoming County Jury Commissioners to supplement the jury master list with Lycoming County welfare rolls and to summon those individuals who fail to complete and return the juror qualification questionnaire. In addition, Mitchell and Ball seek a court order directing the Lycoming County Court Administrator to collect and compile statistics regarding the racial make up of the jury arrays and jury panels in Lycoming County. Mitchell and Ball assert that these measures would produce a more representative cross section of the Lycoming County community on jury panels, specifically by increasing the number of minorities in the pool of available jurors.

B. Preliminary Objections

The Lycoming County Jury Commissioners and the Lycoming County Court Administrator raise two main preliminary objections. The first is an assertion that the court lacks subject matter jurisdiction over the Petition because Mitchell and Ball failed to join an indispensable party. The Lycoming County Jury Commissioners and the Lycoming County Court Administrator contend that since Mitchell and Ball are seeking a court order directing them to supplement the master jury list with rolls from the Pennsylvania Department of Welfare concerning participation in its programs the Department of Public Welfare is an

indispensable party. The Lycoming County Jury Commissioners and the Lycoming County Court Administrator contend that the court cannot order the Department of Public Welfare to disclose its program participation rolls so that these rolls may be used to supplement the master jury list unless the Department of Public Welfare is a party to the mandamus action.

The second preliminary objection is a demurrer. The Lycoming County Jury Commissioners and the Lycoming County Court Administrator asserts that Mitchell and Ball have failed to sufficiently plead a mandamus cause of action that would entitle them to the relief they seek. First, the Lycoming County Jury Commissioners and the Lycoming County Court Administrator assert that Mitchell and Ball's mandamus action fails because Section 4521 of the Judiciary Act, 42 Pa.C.S.A. § 101, *et seq.*, does not require that they use Lycoming County welfare rolls to supplement the master jury list or summon those individuals who have failed to complete and return the jury qualification questionnaire. As such, the Lycoming County Jury Commissioners and the Lycoming County Court Administrator assert that Section 4521 does not create an official duty on their part to perform the acts proposed in the Petition by Mitchell and Ball. Second, the Lycoming County Jury Commissioners and the Lycoming County Court Administrator assert that Mitchell and Ball's mandamus action must fail because Mitchell and Ball have failed to plead sufficient facts to establish a *prima facie* case demonstrating a systematic exclusion of a distinctive group from the jury selection process, thereby imposing upon the Lycoming County Jury Commissioners and the Lycoming County Court Administrator a duty to take corrective action in the manner proposed by Mitchell and Ball.

C. November 14, 2006 Conference

On November 14, 2006, this court held an in-court, on the record conference regarding the Petition. This conference shed light on the jury selection process in Lycoming County. The Lycoming County Jury Commissioners stated that the annual master jury list is composed of names obtained from the Lycoming County voter registration list, a list of licensed Lycoming County drivers, the old occupation tax record, and a list of names of parents who have children enrolled in various school districts within the county (Williamsport, Loyalsock, and Montoursville Area School Districts). The names and information from these lists are then entered into a data base and updated to eliminate conflicts and duplicates. It is from this central data base that a computer program randomly selects names of potential jurors for the ensuing year. The Lycoming County Jury Commissioners then mail out the jury questionnaire to these individuals. Once the jury questionnaires are returned, the Lycoming County Jury Commissioners examine the questionnaires to determine whether a particular individual is qualified to serve as a juror. The names of those deemed qualified are then deemed to be available for jury service. The names of those in this available pool of jurors are placed in a jury “wheel” consisting of a computer and a computer program randomly selects from this group individuals who will serve on a specific jury panel from which the various criminal trial juries will be selected.

At this conference the parties had no dispute as to the procedures followed nor as to the number of potential jurors summoned and ultimately placed into the actual pool of jurors qualified for service in a specific year. The court requested and has received specific numbers involved in selecting the jurors qualified to serve in 2007. See Appendix “A”. Of the 17,000

jury questionnaires mailed out 11,199 (53%) were returned. Of these 2,259 (13%) were excused as legally ineligible or for undue hardship (mostly medical) reasons. 6,681 (40%) persons were found qualified to serve as jurors and placed into the “wheel”, to be called in at random or needed. As to the nearly 50% of questionnaires not returned, 4,666 (27%) were returned by the post office as undeliverable; 3,394 (20%) were never returned. These statistics are similar to the recent prior years of 2005 and 2006 with 37% of those being mailed questionnaires in each year being found qualified – 27% of the questionnaires were not returned in 2005, and 19% in 2006.

II. ISSUES

There are three main issues before the court. They are:

- (1) Is the Pennsylvania Department of Public Welfare an indispensable party in a mandamus action where two criminal defendants in two separate homicide cases are seeking to have the Lycoming County Jury Commissioners request from the Pennsylvania Department of Public Welfare rolls of participants in its programs so that the master jury list may be supplemented with those rolls?
- (2) Does the Petition for Writ of Mandamus/Prohibition allege a cause of action in mandamus which would allow a court to issue an order directing the Lycoming County Jury Commissioners to supplement the master jury list with rolls of participants in Department of Public Welfare programs and to summon those individuals who fail to complete and return the juror qualification questionnaire?
 - (a) Does Section 4521 of the Judiciary Act impose an official duty upon the Lycoming County Jury Commissioners to supplement the master jury list with rolls of participants in Department of Public Welfare programs and to summon those individuals who fail to complete and return the juror qualification questionnaire?

(b) Does the Petition for Writ of Mandamus/Prohibition allege sufficient facts to establish a *prima facie* case of discrimination in the jury selection process such that the Lycoming County Jury Commissioners have an official duty to supplement the master jury list with rolls of participants in Department of Public Welfare programs and to summon those individuals who fail to complete and return the juror qualification questionnaire?

(3) Does the Petition for Writ of Mandamus/Prohibition allege a cause of action in mandamus which would allow a court to issue an order requiring the Lycoming County Court Administrator to compile statistics as to the racial composition of Lycoming County juries?

III. DISCUSSION

The discussion section of this opinion will be divided into two main parts. The first part will address the indispensable party preliminary objection. The second main part will address the demurrers to Mitchell and Ball's mandamus cause of action as would relate to the Lycoming County Jury Commissioners and the Lycoming County Court Administrator.

A. The Department of Public Welfare is not an Indispensable Party

The failure to join an indispensable party renders any decree or order in the matter void for lack of jurisdiction. *Hubert v. Greenwald*, 743 A.2d 977, 980 (Pa. Super. 1999); *Barren v. Dubas*, 441 A.2d 1315, 1316 (Pa. Super. 1982). "An indispensable party is one whose rights or interests are so pervasively connected with the claims of the litigants that no relief can be granted without infringing on those rights or interests." *Hubert*, 743 A.2d at 979. The basic question that is asked when trying to determine whether a party is indispensable is whether justice can be done in his absence *Id.*, at 980. In making the determination, a court should consider the following factors:

- (1) Do absent parties have a right or interest related to the claim?
- (2) If so, what is the nature of that right or interest?
- (3) Is that right or interest essential to the merits of the issue?
- (4) Can justice be afforded without violating the due process rights of absent parties?

Mechanicsburg Area Sch. Dist. v. Kline, 431 A.2d 953, 956 (Pa. 1981). In determining whether a party is indispensable, the court should focus on the nature of the claim asserted and the relief sought. *Hubert*, 743 A.2d at 980.

The Department of Public Welfare is not an indispensable party to Mitchell and Ball's mandamus action. The Petition for Writ of Mandamus/Prohibition does not seek to compel the Department of Public Welfare to do anything. Instead, the Petition seeks to compel the Lycoming County Jury Commissioners to act. The Petition seeks to compel the Lycoming County Jury Commissioners to request from the Department of Public Welfare the names of individuals participating in its programs, so that those names may be used to supplement the master jury list. If this court issued an order directing such action, the Department of Public Welfare would not be compelled to act pursuant to it since the order would be directed at the Lycoming County Jury Commissioners. The Department of Public Welfare could comply with or refuse the Lycoming County Jury Commissioners' request. As such, Mitchell and Ball's mandamus action does not infringe upon the Department of Public Welfare's rights or interests. Accordingly, the Department of Public Welfare is not an indispensable party to Mitchell and Ball's mandamus action; therefore, that preliminary objection is denied.

The Lycoming County Jury Commissioners have expressed a willingness to request from the Department of Public Welfare the names of individuals participating in its programs.

In fact, the Lycoming County Jury Commissioners have represented that they have made such a request in the past and the Department of Public Welfare denied it. The court now suggests that the Lycoming County Jury Commissioners again make such a request of the Department of Public Welfare. Unfortunately, the court notes that this is likely to be denied because of various federal and state laws relating to confidentiality of such records. This road block to making more names available for the Jury Commissioners to add to the master list will hopefully soon be removed.

Senate Bill 798 of the 2005-2006 session of the Pennsylvania General Assembly provided for the creation of a statewide jury information system through the Office of the Court Administrator of Pennsylvania. The bill required the Department of Public Welfare to provide to the Court Administrator a list of every Pennsylvania resident who received cash assistance or food stamps pursuant to a federal or state program through the Department of Public Welfare to be included in a master list of potential jurors. The Department of Transportation, Department of Revenue and Department of State would have similarly been required to provide names from their records. Senate Bill 798 then provided a process for the Court Administrator to create a statewide jury pool and still maintain the confidentiality of the identity of those individuals who were receiving welfare and other private information. Counties could then request names from the statewide jury pool to supplement their master jury lists without there being any indication as to whether those individuals were or were not on public welfare. The court believes that legislation was well thought out and well intended. On November 22, 2005 the State Senate unanimously passed this bill (47-0). Unfortunately, the legislation did not pass the State House

chamber during the prior legislative session. This legislation has been re-introduced (on February 9, 2007) as Senate Bill 116, Session of 2007.

This court urges the General Assembly to move promptly to enact such legislation and further wages prompt approval by the Governor in order that, to the greatest extent possible, the jury pools in every county would contain as broad a cross section of its population as possible.

This court's request of the Lycoming County Jury Commissioners and its suggestion that clients of the Department of Public Welfare should be included in the jury master list does not mean to imply that including names of participants in Department of Public Welfare programs would necessarily increase the number of minorities on Lycoming County juries. In fact, there has been no evidence presented that would support such a conclusion. Rather, we accept Mitchell and Ball's general contention that the names of many county residents who are participating in such programs do not appear upon any other list currently available to the Lycoming County Jury Commissioners. The addition of these names would mean the jury master list would be a more comprehensive representation of our county's population.

B. The Petition for Writ of Mandamus/Prohibition does not Set Forth a Mandamus Cause of Action

Mitchell and Ball have failed to plead a mandamus action that would entitle them to the relief they seek. Specifically, Mitchell and Ball have failed to establish that the Lycoming County Jury Commissioners have an official duty to supplement the master jury list with names of individuals participating in the Department of Public Welfare programs and to summon individuals who fail to complete and return the juror questionnaire. Chapter 45 of the Judiciary Act imposes no such duties nor have Mitchell and Ball established that the jury selection process chosen and used by the Lycoming County Jury Commissioners violates their duty to

ensure that a fair cross section of the community is represented in the jury selection process. Further, the Lycoming County Court Administrator does not have a duty to compile statistics regarding the racial composition of Lycoming County juries.

1. Demurrer General Rules and Principles

A preliminary objection in the form of a demurrer tests the legal sufficiency of a pleading. *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 860 A.2d 1038, 1041 (Pa. Super. 2004). A demurrer will be granted where the challenged pleading is legally insufficient. *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 883 (Pa. Super. 2000). That is, a demurrer will be granted when it is clear from the facts that the party has failed to state a claim upon which relief may be granted. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1185, 1191 (Pa. 2001).

The demurrer must be resolved solely on the basis of the pleading; no testimony or evidence outside of the pleading may be considered. *Williams*, 750 A.2d at 883. Furthermore, the court may not address the merits of the matter presented in the pleading. *In re S.P.T.*, 783 A.2d 779, 781 (Pa. Super. 2001). All material facts set forth in the pleading as well as all inferences reasonably deducible there from shall be admitted as true for purposes of deciding the demurrer. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997); *Ins. Adjustment Bureau*, 860 A.2d at 1041. ““The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the demurrer.”” *Ins. Adjustment Bureau*, 860 A.2d at 1041 (quoting *Vulcan v. United of Omaha Life Ins. Co.*, 715 A.2d 1169, 1172 (Pa. Super. 1998)).

2. Mandamus General Rules and Principles

A writ of mandamus is an extraordinary remedy that compels the official performance of a ministerial act or a mandatory duty. *Council of the City of Philadelphia v. Streat*, 856 A.2d 893, 896 (Pa. Cmwlth. 2004), *app. denied*, 876 A.2d 397 (Pa. 2005); *Iseley v. Beard*, 841 A.2d 168, 171 n.7 (Pa. Cmwlth. 2004), *app. denied*, 863 A.2d 1150 (Pa. 2004). “The purpose of mandamus is not to establish legal rights, but to enforce those rights which are already established.” *Iseley*, 841 A.2d at 171 n.7. A court may issue a writ of mandamus if a petitioner can demonstrate: (1) that he has a clear legal right to enforce the performance of the act; (2) that the official has a corresponding duty to perform the act; and (3) he has no other adequate or appropriate remedy. *Garber v. Dep’t of Corrections*, 851 A.2d 222, 225 (Pa. Cmwlth. 2004); *Saunders v. Dep’t of Corrections*, 749 A.2d 553, 556 (Pa. Cmwlth. 2000). “A ministerial act is defined as ‘one which a public officer is required to perform upon a given set of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed.’” *Streat*, 856 A.2d at 896 (quoting *Flaherty v. City of Pittsburgh*, 515 A.2d 91, 92 (Pa. Cmwlth. 1986)).

Generally, writs of mandamus will not be issued to interfere with a public official’s exercise of discretion. *Chadwick v. Dauphin County Coroner*, 905 A.2d 600, 603 (Pa. Cmwlth. 2006), *app. denied*, 2007 Pa. LEXIS 96 (1/11/07). A writ of mandamus may be used to compel a public official to exercise his discretion when he refuses. *Ibid*. However, a writ of mandamus will not be issued to force a public official to exercise his discretion in a particular manner or toward a particular result. *Id.* at 604. Nor may a writ of mandamus be issued to

compel a revision of the decision resulting from the exercise of the public official's discretion. *Ibid.*; *Bright v. Pennsylvania Bd. of Probation and Parole*, 831 A.2d 775, 777 (Pa. Cmwlth. 2003).

3. The Lycoming County Jury Commissioners do not have a Statutory Duty to Use Department of Public Welfare Program Participation Rolls or Summon Individuals who Failed to Complete and Return the Juror Qualification Questionnaire

Chapter 45 of the Judiciary Act sets forth the obligations of jury commissioners with respect to the selection of juries.¹ Under that law, the Lycoming County Jury Commissioners

¹Chapter 45 of the Judiciary Act provides in relevant part as follows:

§ 4521. Selection of prospective jurors

(a) **Preparation of master list of prospective juror.** – At least annually the jury selection commission shall prepare a master list of prospective jurors. The list shall contain all voter registration lists for the county, which lists may be incorporated by reference, or names from such other lists which in the opinion of the commission will provide a number of names of prospective jurors which is equal to or greater than the number of names contained in the voter registration list. The commission may, but will not be required to supplement the master list of prospective jurors to include, without being limited to, persons in any of the following categories:

- (1) Persons listed in telephone, city, municipal directories and similar directories.
- (2) Persons who pay taxes or are assessed for taxes imposed by any political subdivisions.
- (3) Persons in the county participating in any State, county or local program authorized by law and, to the extent such names are available, persons participating in any Federal program authorized by law.
- (4) Persons who are on school census lists.
- (5) Any other person whose name does not appear in the master list of prospective jurors and who meets the qualifications for jurors set forth in this chapter and who makes application to the commission to be listed on the master list of prospective jurors.

(b) **Maintenance of and access to master list of prospective jurors.** - The group of names compiled as set forth in subsection (a) shall constitute the

master list of prospective jurors. The list shall be open to the public for inspection.

(c) **Selection of names for jury service.** - At least once each year the commission shall select at random from the master list of prospective jurors the number of names designated by the president judge pursuant to court orders issued under section 4531 (relating to issuance of court orders for jurors).

(d) **Juror qualification form.** -

(1) The commission may mail to each person whose name has been selected in the manner set forth in subsection (c) a juror qualification form devised by the commission in such manner that the commission may determine from the answers to the questions on the form whether or not the prospective juror is qualified. The questions asked in such juror qualification form shall be limited to matters reasonably calculated to permit a determination of the person's qualifications to serve as a juror.

(2) The juror qualification form shall be executed by the prospective juror and shall plainly and conspicuously state thereon that its execution is subject to the penalty for perjury. If the person is unable to fill out the form, another person may fill it out for him, indicate that he has done so, and the reason therefore. The prospective juror shall mail or deliver the completed form to the commission.

(3) Any person who fails to return the juror qualification form as directed may be summoned by the commission to appear at the offices of the commission to fill out a juror qualification form or to resolve any ambiguity contained therein.

§ 4522. List of qualified jurors

After receipt of the juror qualification forms as provided in section 4521(d) (relating to selection of prospective jurors), the jury selection commission shall determine whether or not those individuals returning the forms are qualified for jury service, as provided in section 4502 (relating to qualifications of jurors). The names of qualified persons compiled as set forth in this section shall constitute the list of persons who are qualified to serve as jurors and shall be open for public inspection.

§ 4524. Selection of jurors for service

Except as otherwise provided in section 4525 (relating to equipment used for selection of jurors), the jury selection commission shall maintain a master list or jury wheel and shall place therein the names of persons included on the list of qualified jurors. Upon receipt of a court order pursuant to 4531 (relating to issuance of court orders for jurors), the commission shall publicly

do not have a statutory duty to use Department of Public Welfare program participation rolls to supplement the master jury list or to summon individuals who have failed to fill out and return the juror qualification questionnaire.

A. Section 4521 of the Judiciary Act does not impose a statutory duty upon the Lycoming County Jury Commissioners to use names from Department of Public Welfare program participation lists in order to establish or supplement the master jury list.

Section 4521 requires that the master list of prospective jurors “... shall contain all voter registration lists for the county ... or names from such other lists which in the opinion of the commission will provide a number of names of prospective jurors which is equal to or greater than the number of names contained in the voter registration list.” 42 Pa.C.S.A. § 4521(a) (emphasis added). The only mandatory source from which the Lycoming County Jury Commissioners must draw upon to establish the master jury list pursuant to Section 4521 is the Lycoming County voter registration list or a list that will provide comparable numbers.

The “or names from such other lists” language of Section 4521 does not impose a statutory duty upon the Lycoming County Jury Commissioners to use Department of Public Welfare program participation lists to establish the master jury list. Section 4521 gives the Lycoming County Jury Commissioners two mandatory options from which it must choose to prepare the master jury list. Those two options are the county voter registration list and a list that will provide comparable numbers. If the Lycoming County Jury Commissioners choose to

select at random from the master list or jury wheel such number of names of persons as may be required to be summoned for assignment to jury arrays. A separate list of names and addresses of persons assigned to each jury array shall be prepared and made available for public inspection at the offices of the commission no later than 30 days prior to the first date on which the array is to serve.

42 Pa.C.S.A. § 4521(a), (b), (c), (d); 42 Pa.C.S.A. § 4522; 42 Pa.C.S.A. § 4524.

use the Lycoming County voter registration list to establish the master jury list, then they have complied with the mandate of Section 4521 and fulfilled their statutory duty. It is only if the Lycoming County Jury Commissioners choose not to use the voter registration list that a different list must be utilized to establish the master jury list. Here, the Lycoming County Jury Commissioners have chosen to use the Lycoming County voter registration list to establish the master jury list. As such, they have complied with their statutory duty imposed by Section 4521 and their failure to use Department of Public Welfare program participation lists to establish the master jury list violates no statutory duty.

The use of Department of Public Welfare program participation lists would fail under the Lycoming County Jury Commissioners discretion as to how to supplement the master jury list. Section 4521 states that the jury commissioners:

... may, but will not be required to supplement the master list of prospective jurors to include, without being limited to, persons in any of the following categories :

(3) Persons in the county participating in any State, county or local program authorized by law and, to the extent such names are available, persons participating in any Federal program authorized by law.

42 Pa.C.S.A. § 4521(a)(3) (emphasis added). The language of Section 4521 states that jury commissioners may use the lists of individuals participating in Department of Public Welfare programs to supplement the master list of prospective jurors, but they are not required to by the statute.

Thus, Section 4521 imposes no official duty upon the Lycoming County Jury Commissioners to use the lists of individuals participating in Department of Public Welfare programs. The Lycoming County Jury Commissioners have fulfilled their duty imposed by Section 4521 and have chosen to use the voter registration list of Lycoming County to prepare the master list of prospective jurors. The Lycoming County Jury Commissioners have also exercised their discretion and have supplemented the master list of prospective jurors by utilizing driver's license lists from the Pennsylvania Department of Transportation, the old occupation tax record, and a list of names of parents who have children enrolled in various school districts within the county. Concerning the preparation of the master list, the Lycoming County Jury Commissioners have fulfilled their duties imposed by Section 4521.

B. Section 4521 of the Judiciary Act does not impose a statutory duty upon the Lycoming County Jury Commissioners to further summon or compel response from individuals who fail to complete and return the jury questionnaire.

Section 4521 of the Judiciary Act gives the jury commissioners discretion as to whether to choose to summon those individuals. It provides that:

Any person who fails to return the juror qualification form as directed *may* be summoned by the commission to appear at the offices of the commission to fill out a juror qualification form or to resolve any ambiguity contained therein.

42 Pa.C.S.A. § 4521(d)(3) (emphasis added). Section 4521 does not mandate that jury commissions summon individuals who fail to complete and return the jury questionnaire. It gives them the authority to summon those individuals and it also gives them the discretion to exercise that authority. As such, Section 4521 does not impose an official duty upon the Lycoming County Jury Commissioners to summon individuals who fail to complete and return the jury questionnaire.

Obviously a significant concern arises when 20 to 25% of our county's citizens do not return the questionnaire which inquires of their ability to serve as jurors. This document is not merely some survey that may nonchalantly be disregarded but one which the law requires be answered truthfully and returned. Certainly we agree that those who fail to respond should be held responsible for shirking of this primary civic responsibility. The practical problem facing the Jury Commissioners is how to do this.

The Jury Commissioners could pursue sending the Sheriff to hand serve these individuals with another summons and upon a continued failure to respond could theoretically bring them before the court for a contempt proceeding and impose upon them a fine or imprisonment. Practically speaking, however, the available personnel, time and budgets do not make this a realistic possibility.

We must also note, that even if this Herculean task were undertaken and accomplished there is absolutely no evidence that doing so would increase the number or percentage of minorities available as jurors on the jury master list.

While we have determined that the summoning of individuals who fail to complete and return the jury questionnaire is a discretionary action within the purview of the Lycoming County Jury Commissioners, it by no means diminishes the concern the court has over the failure of individuals to complete and return the questionnaire. We believe very strongly that the jury system is the backbone of our justice system and an essential pillar of our society. As such, we believe that the civic duty of jury service to be of the highest order, and consequently, are deeply troubled when individuals ignore this basic obligation of citizenship by failing to

complete and return the jury questionnaire. Since compulsory attendance and punishment is not a practical remedy all concerned must do all we can to encourage voluntary compliance.

To some individuals fear of serving on juries may be a reason for not returning the questionnaire. For others, it may be they do have a medical or other legitimate reason for not responding. Still others may believe they can't perform the function of being a juror. For these reasons the courts and other civic minded entities, including the news media, must do a better job of encouraging and educating the public, emphasizing the important roles jurors perform in our criminal justice system and why trial by jury is the best way that humankind has devised to assure justice to all – even at sometime to them or their family members – whether as an accused or a victim of crime. This educational effort should include renewed efforts in our schools where already many school districts have excellent programs aimed at raising the consciousnesses of students as to the importance of jury service.

Jurors must also be given comfortable and appropriate physical accommodations suitable for their convenience. Most counties, Lycoming included, provide suitable parking, food and other pleasant amenities for jurors. What we do not provide is suitable compensation.

Unjustified criticism of the jury process and outcome of jury trials must also be countered and the benefits of justice being meted out by responsible jurors reemphasized.

Jurors must also be assured of their personal and family security, that appropriate measures are taken to maintain their safety and well being and further that rarely, if at all, have any jurors been subjected to retaliation or other adverse consequences from service. This would also include that employers take no adverse action against any employee who serves as a juror. Which leads to our final point in this regard.

Economical impediments to jury service need to be removed. The court is mindful of the practical hardship that jury service creates. Serving as a juror is a hardship as it imposes a severe interference on the usual daily routine and duties forced by any potential juries. This practical hardship is compounded by the financial hardship caused by jury service and coupled with the meager compensation provided jurors. The reason this court most often hears in conversation as to why jurors cannot, do want to, or refuse to serve – including by failing to return their questionnaires – is that they cannot afford to serve as a juror.

Currently, a juror is to receive \$9 a day for the first three days in any calendar year that he/she reports for jury service and \$25 a day thereafter for jury service during that same calendar year. 42 Pa.C.S.A. § 4561(a). A juror is also to be paid a travel allowance at the rate of 20¢ per mile. *Ibid.* This compensation is not sufficient to permit a juror to continue to pay his/her basic living expenses or even meet the expenses incurred because of juror service, such as child care for a day.

The current rate of juror compensation was set in 1959. At that time, the federal minimum wage was \$1.00 per hour. The first state minimum wage was enacted in 1968 and set the minimum hourly rate at \$1.15. Since these dates the federal minimum wage has increased by more than 500 percent and the state, as of July 1, 2007, more than 600 percent. Juror pay has not increased since 1959 but should have been increased by at least the same percentage as has the minimum wage.²

² We are aware that some legislative attempts to do so have been under taken. See, e.g., Senate Bills 397 and 398 of 1979 which would have paid jurors a per diem wage equivalent to the minimum wage rate multiplied by six hours.

Certainly, those called to jury duty are performing a unique civil service, as well as, performing an obligation of citizenship. In so doing, it may reasonably be expected that they will be required to make some personal sacrifices, which by the interruption of their normal daily lives they do. We must, however, alleviate some of the financial hardship imposed by jury service. This court would strongly urge the General Assembly to increase the compensations of jurors to a rate more in line with the valuable service they provide. This court firmly believes that, at a minimum, jurors should be compensated at not less than the state minimum wage on an hourly basis for time served, not less than four hours on any day they report, and that such compensation should be tax free. Consideration should also be given to inducing employers to maintain a jurors regular compensation while they serve as jurors through the tax credits and other incentives.

4. Mitchell and Ball have Failed to Plead a Prima Facie Case of Discrimination in the Jury Selection Process

Mitchell and Ball have failed to plead a *prima facie* case of discrimination in the jury selection process which would then impose a duty upon the Lycoming County Jury Commissioners to address the discrimination. A criminal defendant has a constitutional right to a trial before an impartial jury. U.S. Const. Amend. 6; Pa. Const. Art I, § 9; *Commonwealth v. Chimel*, 889 A.2d 505, 519 (Pa. 2005), *cert. denied*, 2006 Pa. LEXIS 6616 (10/2/06). This right mandates the presence of a fair cross section of the community on venires, panels, or lists from which petit juries are chosen. *Commonwealth v. Jones*, 350 A.2d 862 (Pa. 1976). However, criminal “[d]efendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably

representative thereof.” *Commonwealth v. Craver*, 688 A.2d 691, 696 (Pa. 1997), *cert. denied*, 522 U.S. 834 (1997) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)).

A defendant bears the initial burden of establishing *prima facie* evidence of discrimination in the jury selection process. *Commonwealth v. Johnson*, 838 A.2d 663, 682 (Pa. 2003), *cert. denied*, 543 U.S. 1008 (2004). In order to establish a *prima facie* violation of the requirement that the jury array fairly represent a cross section of the community, a party must show:

- (1) the group allegedly excluded is a distinctive group in the community;
- (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such people in the community; and
- (3) this under-representation is due to systematic exclusion of the group in the jury selection process.

Commonwealth v. Robinson, 864 A.2d 460, 487 (Pa. 2004), *cert. denied*, 126 S. Ct. 559 (U.S. 2005); *Johnson*, 838 A.2d at 682. For purposes of this analysis, “systematic” means caused by or inherent in the system by which juries are selected. *Robinson*, 864 A.2d at 487; *Johnson*, 838 A.2d at 682. “Proof is required of an actual discriminatory practice in the jury selection process, not merely under-representation of one particular group.” *Johnson*, 838 A.2d at 682; *see also, Commonwealth v. Estes*, 851 A.2d 933, 936 (Pa. Super. 2004) (“The mere showing of underrepresentation, absent an actual discriminatory practice in the jury selection process, causes Appellant’s constitutional claim to fail.”).

Mitchell and Ball have failed to plead a *prima facie* case that the Lycoming County Jury Commissions have systematically excluded minorities from the jury selection process and

thereby failed to fulfill their duty to provide a fair cross section of the community on jury arrays. Mitchell and Ball have alleged that minorities have been underrepresented on Lycoming County juries. However, Mitchell and Ball have failed to allege an actual discriminatory practice that results in the systematic exclusion of minorities from Lycoming County juries.

First, the methods by which Lycoming County juries are chosen are not inherently discriminatory. Pennsylvania courts have approved of the use of voter registration lists and drivers's license lists to compile jury arrays. Pennsylvania courts have found that there is nothing inherently discriminatory about voter registration lists or drivers's license lists. *See, Commonwealth v. Bridges*, 757 A.2d 859 (Pa. 2000), *cert. denied*, 535 U.S. 1102 (2002) (the Pennsylvania Supreme Court has repeatedly rejected the argument that a jury pool chosen from voter registration does not represent a fair cross section of the community and a criminal defendant may not attack the racial composition of jury panels drawn from voter registration lists on the theory that African Americans are underrepresented in voter lists); *Commonwealth v. Edwards*, 426 A.2d 550 (Pa. 1981) (use of voter registration lists in jury selection process permissible, unless list reflects discriminatory practice); *Commonwealth v. Jones*, 350 A.2d 862 (Pa. 1976)(use of voter registration list permissible so long as list itself does not reflect discriminatory practices); *Robinson*, 864 A.2d 460 (Pa. 2004) (use of drivers's license lists in jury selection process is permissible); *Commonwealth v. Johnson*, 838 A.2d 663, 682 (Pa. 2003), *cert. denied*, 543 U.S. 1008 (2004) (use of drivers's license list is permissible so long as the list itself does not reflect discriminatory practices). As such, the use of voter registration

lists and drivers's license lists does not result in the systematic exclusion of minorities from Lycoming County juries.

Second, Mitchell and Ball have not alleged that the Lycoming County Jury Commissioners are actively engaging in a practice that discriminates against minorities in the jury selection process. Mitchell and Ball have not alleged sufficient facts that could establish that the Lycoming County Jury Commissioners are using the voter registration lists or the drivers's license lists in a discriminatory manner or are engaged in any other practice that purposefully excludes minorities from jury service. Simply, Mitchell and Ball have not alleged any fact which would infer purposeful discrimination by the Lycoming County Jury Commissioners against minorities in the jury selection process.

As such, Mitchell and Ball have failed to plead sufficient facts that could establish that the underrepresentation of minorities on Lycoming County juries is due to a systematic exclusion, and thereby, have failed to establish a *prima facie* case of discrimination in the jury selection process, which would have imposed a duty upon the Lycoming County Jury Commissioners to take corrective action to address the discrimination.

Accordingly, the demurrer to Mitchell and Ball's mandamus action is granted.

5. The Lycoming County Court Administrator does not have a Duty to Compile Statistics Regarding Racial Composition of Juries

Mitchell and Ball have not pleaded a mandamus action entitling them to an order compelling the Lycoming County Court Administrator to compile statistics regarding the racial composition of juries within the county. Mitchell and Ball have cited no authority and the court has not found any that imposes such an official duty upon the Lycoming County Court

Administrator. As such, Mitchell and Ball's mandamus action in this regard must fail. Accordingly, the demurrer will be granted in this regard.

IV. CONCLUSION

The mandamus action must be dismissed. The dismissal does not prejudice Mitchell and Ball's right to have their criminal charges heard by a fair and impartial jury. They can assure this right through the actual jury selection process, *voir dire*, as established under the Pennsylvania Rules of Criminal Procedure and applicable law. Mitchell and Ball can also assure this right under these rules and applicable law by raising a challenge to the actual jury array which will be created for their respective case.

Finally, this court must note that despite assertions in Mitchell and Ball's Petition it has been this court's observations that:

- (1) We are impressed with the quality of work done by the jurors who have served in the cases tried in front of us.
- (2) The Lycoming County Jury Commissioners and the Lycoming County Court Administrator have always sought to procure jury panels which are representative of a valid cross-section of our county's population and have always been responsive to any procedure which would facilitate this end.
- (3) Lycoming County jury panels do include a representative number of minorities, and that in recent years, the number of minority jurors appearing seems to have increased to the point where those who actually appear in response to their summons, approximates a percentage close to the percentage of minorities in our county's population.

Hopefully, all citizens of our county will, regardless of race or status, respond willingly to their call to jury service. If they do, our panels will continue to be the source of fair and impartial justice in our court system – a goal all citizens should share.

ORDER

It is hereby ORDERED that the Preliminary Objections of Defendants the Lycoming County Jury Commissioners and the Lycoming County Court Administrator filed October 30, 2006 to Plaintiff Jonathan Mitchell and Kyion Ball's Petition for Writ of Mandamus/Prohibition are DENIED IN PART and GRANTED IN PART.

The Preliminary Objections are DENIED IN PART in that the Pennsylvania Department of Public Welfare is not an indispensable party to Plaintiffs Jonathan Mitchell and Kyion Ball's mandamus action and their failure to join the Department as a party does not deprive the court of jurisdiction over the matter.

The Preliminary Objections are GRANTED IN PART in that the demurrer to Plaintiffs Jonathan Mitchell and Kyion Ball's mandamus cause of action is GRANTED and the action is DISMISSED.

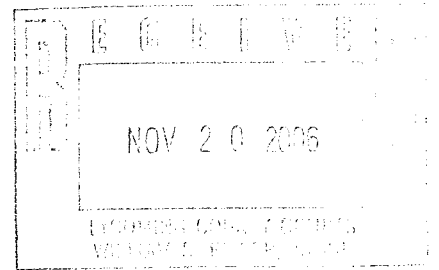
BY THE COURT:

William S. Kieser, Judge

cc: William J. Miele, Esquire
Benjamin E. Landon, Esquire
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

Appendix 1 (p 1/2)

Samuel R. Hoff, Jury Commissioner
Lycoming County Courthouse
48 West Third Street
Williamsport, PA 17701
570-327-2346



November 20, 2006

Date: November 20, 2006
To: Court Administrator
From: Jury Commissioners -Samuel R. Hoff & James W. Myers
Reference: 17,000 Questionnaires Mailed for Jury Selection 2007

As of this date the following are the stats of the above mailing:

Available for Use	6,681	=	40%
Excused	2,259	=	13%
Returned by Post Office	4,666	=	27%
Never Returned 11-17-06	3,394	=	20%
Total	<u>17,000</u>		<u>100 %</u>

RECEIVED

NOV 20 2006

LYCOMING COUNTY COURTHOUSE
ADMINISTRATIVE SERVICES

2005-

1st mailing 8000 - Nov 18, 2004

Available for use - 3164 - 39.5%

Excused 859 - 11%

Returned by Po 1954 - 24%

*Not answered 2024 - 25.5%

Average

37.3%

12.5%

23%

27.25%

2nd mailing - 7000 - Feb 22, 2005

Available for use - 2466 - 35%

Excused 967 - 14%

Returned by Po 1567 - 22%

*Not returned 200 - 29%

2006

1st mailing - 15,000 - Nov 19, 2005

Available for use 5670 = 37.8% 37.4%

Excused 2306 15.8% 14.9%

Returned by Po 4313 28.7% 28.3%

*Not returned 2651 17.17% 19%

2nd mailing - 2000 - Jan 31, 2006

Available for use - 745 - 37%

Excused 284 14%

Returned by Po 559 28%

*Not returned 412 21%

Mailing - 17,000 - Dec 11-13-06

Available for use - 6343 37.3% 37.3%

Excused 2105 12.5% 13.3%

Returned by Po 4433 26.4% 26%

*Not returned 4123 24.3% 23.4%