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## The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges

Every criminal defendant in federal or state court who will be tried by a jury has the right to have that jury selected from a fair cross-section of the community. Every criminal defense attorney should be equipped to enforce that cross-section right when it is in the client's best interest to do so. Part I of this article explains the 16 things a defense attorney should know about fair cross-section challenges, and Part II provides a detailed analysis of two successful fair cross-section claims.<sup>1</sup>

A defendant's right to a jury selected from a fair cross-section of the community is rooted in both the Constitution and statutory authority:

- ❖ First, the Sixth Amendment provides all criminal defendants, in federal or state court, with the right to an "impartial jury."<sup>2</sup> The Supreme Court has held

that "an essential component" of that right is "the selection of a petit jury from a representative cross section of the community."<sup>3</sup> After all, the purpose of the jury is to ensure that the verdict reflects the voice of the community, and the jury cannot serve that purpose if distinctive groups in the community are left out of the jury pool.<sup>4</sup> All criminal defendants in federal or state court therefore have a *constitutional* right to be tried by a jury selected from a fair cross-section of the community.

- ❖ Second, all litigants in federal court additionally have a *federal statutory* right, under the Jury Selection and Service Act of 1968 (JSSA)<sup>5</sup> to "grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes."<sup>6</sup>
- ❖ Third, most litigants in state court have a similar *state statutory* fair cross-section right.<sup>7</sup>
- ❖ Finally, many *state constitutions* also protect a criminal defendant's fair cross-section right.<sup>8</sup>

There is a significant amount of data indicating that jury systems across the country underrepresent people of color, primarily African-Americans and Latinos.<sup>9</sup> Defense attorneys can challenge this underrepresentation by raising a fair cross-section claim under the Sixth Amendment, the JSSA, and parallel state constitutions and statutes.

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## I. The 16 Things a Defense Attorney Should Know About Fair Cross-Section Challenges

### 1. A defense attorney does not need to see the jury before raising a cross-section challenge; in fact, a client's jury is irrelevant to a cross-section claim.

A peculiar aspect of the right to a jury selected from a fair cross-section of the community is that it extends to all aspects of the jury selection process — *up until the point* that an individual petit jury is selected. The guarantee is not that the particular jury hearing the case reflect a cross-section of the community, but rather that “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.”<sup>10</sup>

This means that the composition of a client's petit jury has no bearing on the cross-section claim. Even if the client's particular jury includes African-Americans, for example, in proportion to the number of African-Americans in the community, the client's fair cross-section claim is still viable.<sup>11</sup> Similarly, the fact that the jury does *not* include a proportionate number of African-Americans is not sufficient to demonstrate a fair cross-section violation.<sup>12</sup>

Because one cannot tell by “looking” at a jury whether the cross-section right is being violated,<sup>13</sup> it is important for defense attorneys to request discovery about the jury selection system in advance of trial. The timing of cross-section challenges and the entitlement to discovery are discussed below.

### 2. The client does not need to be a member of the under-represented group.

There is no requirement that a defendant raising a fair cross-section claim must be a member of the group allegedly excluded from jury service.<sup>14</sup>

### 3. The client can make a fair cross-section challenge to the system that selected the petit jury, and/or the grand jury.

The fair cross-section requirement of the JSSA applies to both the grand and petit jury.<sup>15</sup> The constitutional fair cross-section requirement indisputably applies to the petit jury,<sup>16</sup> and some

courts have held that it applies to the grand jury as well.<sup>17</sup>

### 4. Courts analyze fair cross-section claims under the Sixth Amendment and the JSSA using the same standard.

Courts employ the same standard (discussed at Number 9 below) to evaluate fair cross-section claims under either the Sixth Amendment or the JSSA.<sup>18</sup> Courts typically use the same standard when evaluating claims that arise under state statutes and constitutions.<sup>19</sup>

### 5. A statutory violation may exist even where there is no constitutional cross-section violation.

In addition to giving a defendant the right to a jury selected from a fair cross-section, the JSSA and many state statutes also outline the manner in which jury selection systems must operate. Defendants are permitted to challenge the jury selection process to the extent that it substantially fails to operate in accordance with the federal and/or state statutes.

Specifically, a defendant can “move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury.”<sup>20</sup> A failure to comply with the requirements of the JSSA is “substantial” if it frustrates either of the JSSA's two basic goals: “(1) random selection of jurors, and (2) determination of juror disqualification, excuses, exemptions, and exclusions on the basis of objective criteria.”<sup>21</sup> Similarly, defendants can challenge jury selection systems that substantially fail to comply with state statutes.<sup>22</sup> Although this article focuses only on vindicating the cross-section right, it is important to note that a defendant may have a claim under the JSSA or comparable state statute even in the absence of a cross-section violation.<sup>23</sup>

### 6. There are strict timing requirements for statutory cross-section claims, but not for constitutional cross-section claims.

Under the JSSA, a criminal defendant's motion “to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title” must be made “before the voir dire examination begins, or within seven days after the defendant discovered or could have dis-

covered, by the exercise of diligence, the grounds therefor, *whichever is earlier.*”<sup>24</sup> The timing requirement of the JSSA has been interpreted very strictly.<sup>25</sup> State statutes often have similar timing requirements.<sup>26</sup>

Constitutional fair cross-section claims, however, are not required to meet the seven-day JSSA standard, or the timeliness requirements of state statutes.<sup>27</sup> Instead, courts generally require constitutional challenges to the selection of the petit jury to be raised *before trial*, pursuant to Federal Rule of Criminal Procedure 12(b) or state equivalent.<sup>28</sup> There are grounds to argue that the failure to raise a challenge to the petit jury pretrial should not constitute a waiver of the claim,<sup>29</sup> but they have largely been unsuccessful.<sup>30</sup> In any event, courts retain the ability to grant relief from the waiver for “good cause.”<sup>31</sup>

### 7. The defense does not need to allege or prove discrimination at any point in a fair cross-section claim; discrimination is irrelevant to a cross-section claim.

Courts sometimes make the mistake of insisting defendants show discrimination to establish a fair cross-section claim.<sup>32</sup> This is contrary to the Sixth Amendment and well-established Supreme Court doctrine.<sup>33</sup> Defendants can certainly assert a separate claim that the jury system has discriminated in the selection of jurors in violation of the Equal Protection Clause of the Fourteenth Amendment, but that is a completely independent claim for which the Supreme Court has established a different standard.<sup>34</sup> The Sixth Amendment fair cross-section claim is not concerned with discrimination; it is only concerned with whether the system has *produced* a representative jury pool, whether by accident or design.<sup>35</sup>

As a result, it is no defense to a cross-section-challenge for jury officials to assert that their policies are race neutral, or that the system was not designed to exclude, or that jury officials undertook affirmative efforts to make the jury pool representative, or that selection is done by a computer, which is incapable of discrimination.<sup>36</sup> Each of these arguments answers a question the Sixth Amendment does not ask — was there intentional discrimination in the jury selection process. In the context of a fair cross-section claim, inadvertent, unknown, or benign decisions can establish a constitutional violation.<sup>37</sup>



## 8. In general, a substantive fair cross-section claim must start with a request for discovery.

Because the defense cannot tell by looking at a jury whether the cross-section right is being violated, it is almost always necessary to request discovery about the jury selection system. The question in a cross-section claim is whether steps in the jury selection process *that precede the selection of petit jurors* fail to include representative numbers of groups in the community. Typically only the court and jury selection system have access to information about those preliminary stages of the selection process. Therefore, a defendant cannot substantiate a cross-section claim without data supplied through discovery.

The specific discovery requests that defense counsel may wish to make are discussed below (at Number 16), as they are linked to the substantive showing the court will demand from the defendant. It may also be important for a defense attorney to obtain or request funding for an expert.<sup>38</sup> In some cases, an expert in statistics, computer programming, or jury system operation will be necessary to analyze the jurisdiction's jury data.<sup>39</sup>

## 9. There is no threshold showing requirement to obtain discovery in federal court and most state courts.

The Supreme Court has made clear that a defendant has a right to discovery if preparing a motion to challenge the composition of the jury under the JSSA. No other affirmative showing is required. A similar standard applies to claims under many state statutes, as well as to Sixth Amendment claims.

### Discovery Under the JSSA

The JSSA states: "The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, *except* ... as may be necessary in the preparation or presentation of a motion" challenging the jury selection process.<sup>40</sup> The Act makes clear: "The parties in a case *shall* be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion."<sup>41</sup>

The Supreme Court has accordingly held that under the JSSA, "a litigant has essentially an unqualified right to inspect" jury selection records.<sup>42</sup> "This right is virtually absolute: the only limitation on this right of access is that the inspection must be done at 'reasonable

times.'"<sup>43</sup> Every federal circuit court to consider the issue — the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth — has likewise concluded that a litigant has an essentially unqualified right to inspect the records or papers used by the jury commission or clerk in connection with the jury selection process.<sup>44</sup> The federal case law makes clear that, "[t]o avail himself of the right of access to jury selection records, a litigant need only allege that he is *preparing a motion to challenge the jury selection process*."<sup>45</sup> The unqualified nature of a litigant's discovery right means that a "court may not premise the grant or denial of a motion to inspect upon a showing of probable success on the merits of a challenge to the jury selection provisions."<sup>46</sup> Neither may a court "require a defendant requesting access to jury selection records to submit with that request 'a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act].'"<sup>47</sup> "Since the appellants' right to inspection [i]s unqualified, whether or not the accompanying affidavit establishe[s] a prima facie case of defective jury selection process is of no import."<sup>48</sup> In short, a "court is not free to establish additional requirements that defendants must meet in order to gain access to jury selection records."<sup>49</sup>

### Discovery Under State Statutes

Many states have jury selection statutes that, similarly to the JSSA, require disclosure of records to defendants who are preparing a challenge to the jury selection system.<sup>50</sup> Pursuant to most of those state statutes — as is true under the JSSA — there is no threshold requirement that a defendant needs to satisfy before obtaining discovery.<sup>51</sup>

For example, the D.C. Jury Act provides for disclosure of "records or lists used in connection with the selection process ... in connection with the preparation or presentation of a motion" challenging the jury selection process.<sup>52</sup> In an en banc case before the D.C. Court of Appeals, the U.S. Attorney's Office had asserted that the statute required the defendant to make a threshold showing before getting access to that discovery.<sup>53</sup> The Court of Appeals, however, held it was "unwilling to import into the statute [a] threshold showing requirement that movants would have to satisfy before obtaining access to materials."<sup>54</sup> As the court explained, even a modest threshold showing requirement "forc[es] a litigant to put the proverbial cart before the horse" because it requires "the litigant to prove — or prove to a lesser degree — the

merits of his or her constitutional claims in order to garner access to the nonpublic and confidential information necessary to prove the merits of his or her claim."<sup>55</sup>

### Discovery Under the Federal And State Constitutions

Although there is little case law on point, there is also a right to discovery in the context of a constitutional claim — because the substantive fair cross-section right is meaningless without an entitlement to discovery. When the Supreme Court found an "essentially unqualified right" of discovery under the JSSA, the Court looked at the statute's *purpose* in addition to the text: "an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute's *overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.'*"<sup>56</sup> Because the Sixth Amendment shares the same purpose — to guarantee juries selected from a fair cross-section of the community — it follows a defendant raising a constitutional challenge is also entitled to discovery.

As the Supreme Court explained, "Without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge."<sup>57</sup> The right to challenge the jury is empty without an attendant right to discovery, because "[i]t would be virtually impossible for defendants who are endeavoring to ascertain if a successful attack on the grand [or petit] jury selection process can be advanced if the facts necessary to prove a defect in the selection process are withheld."<sup>58</sup> Only after such discovery is granted will defendants "be in a position to make informed decisions as to whether the jury selection process warrants challenge and as to whether they prefer trial by a representative jury or before the court."<sup>59</sup>

Just as the Supreme Court recognized that the cross-section purpose gives rise to a discovery right, so too have the few courts that have considered the question of discovery independent of the JSSA or similar state statute.<sup>60</sup> For example, the Supreme Court of Missouri granted a defendant's request for disclosure of jury list data on purely constitutional grounds.<sup>61</sup> After noting that "Missouri is not bound by [the JSSA] and has no such state legislation," the court concluded that it "is bound, however, by the United States Supreme Court's determination of a state court defendant's constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community."<sup>62</sup> Discovery was necessary



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because “[t]his cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right.”<sup>63</sup>

## 10. After obtaining discovery, the defense must establish a prima facie violation of the fair cross-section right under *Duren v. Missouri*.

The standard for a Sixth Amendment fair cross-section claim was established in *Duren v. Missouri*,<sup>64</sup> and reaffirmed in 2010 in *Berghuis v. Smith*.<sup>65</sup> Understanding the *Duren* test is critical to understanding what discovery to request: the information to which a defendant is entitled is directly linked to the substantive showing the defendant is required to make under *Duren*.

Under *Duren*, a criminal defendant alleging a cross-section violation must satisfy a three-prong prima facie test by showing that (1) “the group alleged to be excluded [from the jury system] 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 persons in the community,” and (3) “this underrepresentation is due to systematic exclusion of the

group in the jury-selection process.”<sup>66</sup> If the defendant establishes these three prongs, he or she has established a prima facie violation of the fair cross-section right, and the burden shifts to the government to show “attainment of a fair cross section to be incompatible with a significant state interest.”<sup>67</sup>

## 11. The first prong of the *Duren* test requires the defendant to identify a distinctive group.

The group that a defendant claims is not fairly represented in the jury pool must be a “distinctive” group in the community.<sup>68</sup> Courts routinely recognize that African-Americans, women, and Latinos are distinctive groups.<sup>69</sup>

Distinctiveness is an open-ended category that could arguably include any group where there is, as the Tenth Circuit described it, “(1) the presence of some quality or attribute which defines and limits the group (2) a cohesiveness of attitudes or ideas or experiences which distinguishes the group from the general social milieu, and (3) a community of interest which may not be represented by other segments of society.”<sup>70</sup> Accordingly, some courts have recognized that groups such as Native Americans, Jews, and Asians are distinctive groups.<sup>71</sup> In general,

however, courts have been reluctant to define groups other than African-Americans, Latinos, and women as distinctive.<sup>72</sup>

## 12. The second prong of the *Duren* test requires the defendant to demonstrate a disparity between the number of distinctive group members in the community and in the jury pool.

The essential claim in a fair cross-section challenge is that a distinctive group in the community, such as African-Americans, is not sufficiently represented in the jury pool. The second *Duren* prong requires the defendant to identify the amount of this disparity — just how big of a difference is there between African-Americans in the community as compared to African-Americans in the jury pool?

### Identifying the Number of Distinctive Group Members in the Community

The Supreme Court has relied on census data of the total population when determining the percentage of distinctive group members in the community.<sup>73</sup> Although some courts have concluded that it is not inconsistent

with Supreme Court case law to consider the 18-and-older population,<sup>74</sup> courts have generally recognized that the “community” is properly measured with total population data from the census,<sup>75</sup> as “the Supreme Court’s acceptance of comparisons using total population figures clearly indicates that a defendant is not required to gather data reflecting the age-eligible population of the distinctive group in question.”<sup>76</sup>

Even courts that have identified the 18 and older population as the correct comparison have explicitly rejected the suggestion that the numbers be further narrowed to exclude persons who would be ineligible for jury service for reasons other than age.<sup>77</sup> Courts have rejected the demand for jury-eligible population data because such data are difficult to obtain,<sup>78</sup> often unreliable,<sup>79</sup> and — most importantly — such a requirement is inconsistent with Supreme Court precedent.<sup>80</sup>

### Identifying the Number of Distinctive Group Members in the Jury Pool

There is no one single definition of the “jury pool” to which census data must be compared.

The Supreme Court has made clear that “*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.*”<sup>81</sup> In other words, a defendant can establish the second *Duren* prong by showing a disparity between the number of African-Americans in the community and the number on the *master list of all jurors*, or by showing a disparity between the number of African-Americans in the community and the number who *showed up to court for jury service and thereby became members of jury venires*, or between the number of African-Americans in the community and the number at any other stage of the jury process (other than the petit jury).

The limiting principle is that *Duren*’s second prong cannot be established by demonstrating the disparity between the number of African-Americans in the community and the number on a *single* venire or jury panel. The rationale is that a single venire or panel is such a small sample that its make-up could be the product of happenstance, rather than a reflection of the operation of the jury selection system.<sup>82</sup> As mentioned above (at Number 1), this limitation means that an attorney should not wait until seeing the venire at the start of trial to raise a fair cross-section claim. Race data from more

than one venire, however, can be sufficient to establish a disparity at *Duren*’s second prong.

### 13. There are multiple ways to measure disparity, and the Supreme Court has declined to decide which method must be used.

The Supreme Court held in 2010 that “[n]either *Duren* nor any other decision of this Court specifies the method or tests courts must use to measure the representativeness of distinct groups in jury pools.”<sup>83</sup> There are at least four possible methods or tests that could be used: absolute disparity, comparative disparity, standard deviation analysis, and probability analysis.<sup>84</sup> In practice, courts usually apply the absolute and comparative disparity tests.

#### Absolute Disparity

“Absolute disparity in the jury selection context is defined as the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire.”<sup>85</sup> In other words, if 80 percent of people in the district from which jurors are drawn are African-Americans and 20 percent of people on the jury venire are African-Americans, then the absolute disparity is 60 percent.

*Mathematically, absolute disparity is expressed as follows:*

If  $x$  is the population proportion and  $y$  is the proportion on the jury venire, both expressed in percent, then absolute disparity =  $x - y$  in percent.

Example: In *Berghuis v. Smith*, African-Americans made up 7.28 percent of the community population ( $x$ ) and 6 percent of the jury venire ( $y$ ), so the absolute disparity was 1.28 percent.

Most courts start by considering the absolute disparity figure, even where they also consider comparative disparity.<sup>86</sup> A few jurisdictions use only the absolute disparity test.<sup>87</sup> But as many courts have recognized, the absolute disparity measure is problematic when the relevant population is a small proportion of the total population<sup>88</sup> — “because the smaller the population, the less striking the numerical differences appear.”<sup>89</sup> For example, if Latinos make up five percent of the community population, the absolute disparity will never be higher than five percent — even if they are *never* summoned for jury service. In light of

the tendency of the absolute test to obscure critical disparities, many courts have declined to rely solely on the absolute disparity test.<sup>90</sup>

#### Comparative Disparity

The comparative disparity measure attempts to address the “small population” problem described above because it takes into account the proportion of the group in the community population. It is “calculated by dividing the absolute disparity by the population figure for a population group ... and measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service.”<sup>91</sup> Thus it is “more likely to register the underrepresentation of smaller groups.”<sup>92</sup> For example, if Latinos make up five percent of the community population, but only two percent of the jury pool, then the comparative disparity is 60 percent. In other words, Latinos are 60 percent “less likely, when compared to the overall jury-eligible population, to be on the jury-service list.”<sup>93</sup>

*Mathematically, comparative disparity is expressed as follows:*

$$\text{comparative disparity} = \frac{x - y}{x}$$

Comparative disparity figures have also been criticized because “they too are distorted by the small population of the different minority groups.”<sup>94</sup> While the absolute test can understate disparities, the comparative test can, in some cases, overstate them. The best approach for accommodating the imperfections in the tests is to consider the results of both methods.<sup>95</sup>

#### Standard Deviation Analysis And Probability Analysis

“Standard deviation analysis seeks to determine the probability that the disparity between a group’s jury-eligible population and the group’s percentage in the qualified jury pool is attributable to random chance.”<sup>96</sup> In other words, “the more standard deviations the lower the probability the result is a random one.”<sup>97</sup> The standard deviation method is closely related to a statistical significance test, which calculates the probability of the observed underrepresentation or greater underrepresentation if the protected group were represented in jury venires in accordance with its proportion of the population.<sup>98</sup> As a result, it depends on the sample size,  $n$ , of jurors in the venires whose race was determined.



Mathematically, standard deviation is expressed as follows:

$$\text{standard deviation} = \frac{(x - y)\sqrt{n}}{\sqrt{(x)(1 - x)}}$$

Example: Substituting the Berghuis numbers, (except for

$$1.28 \frac{\sqrt{n}}{\sqrt{(7.28)(92.72)}} = \frac{\sqrt{n}}{(20.3)} = .049\sqrt{n}.$$

Hence, for example, if  $n = 100$ , the standard deviations would be .49; if  $n$  were 1666, then the number of standard deviations would be

$$\sqrt{1666} \cdot (0.049) = 2.00.$$

A higher standard deviation (like 2.0) means that the racial disparity in a jury system is less likely to be random; it is more likely to be the result of the operation of the jury selection system. A lower standard deviation (like .49) suggests that any disparity in the sample is more likely the result of random chance. Although there is no official threshold, “[a]s a general rule ... if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.”<sup>99</sup>

Probability analysis is another method that is sometimes used to explain the impact of underrepresentation on small cognizable classes. Probability analysis calculates the probability of having at least one member of the class on a jury of size 12, both from a representative system and from the current system.

Example: Using the *Berghuis* data, the probability that a single jury-eligible person is not African-American is  $1 - .0728 = 0.9282$ . The probability that none of the 12 randomly selected members of a potential jury are African-American is then 0.9282 raised to the 12th power, which is 0.40, so the probability of at least one African-American on the jury is  $1 - 0.40 = .60$ . However, in the system as it exists, the probability of at least one African-American on the jury is 0.94 raised to the 12th power, which is 0.48. Consequently, the probability of at least one African-American on the jury is 0.52.

In other words, if the jury system were representative of the community, the probability that there would be an African-American on the jury is .60. But

the actual numbers reflect that the probability that an African-American will be on the jury is only .52. This means that the operation of the jury selection system may be reducing the probability of African-American representation on the jury.

Standard deviations are affected by the size of the sample. Because the standard deviation method is dependent on the sample size, when the sample is small, significance will not be found, while if the sample is large, significance will be found. Thus, in a sense what is being measured by the standard deviation measure has more to do with the sample size than with the degree to which the protected group is underrepresented in the jury venire. Similarly, the probability that at least one member of the protected group is on the jury can be a sensitive measure for small protected groups, but not for large ones. Since defendants do not have a right to have a protected group member on their jury, the legal relevance of this measure is unclear. Courts that have used either standard deviation or probability analysis have done so only in conjunction with other methods.<sup>100</sup>

#### 14. There is no official threshold for the amount of disparity that is ‘enough’ to satisfy *Duren’s* second prong.

The Supreme Court has never specified what degree of disparity is sufficient to establish *Duren’s* second prong. Courts have frequently borrowed the standard from equal protection cases that a disparity of less than 10 percent is not enough to establish a constitutional violation, but defense attorneys should not acquiesce to the adoption of the 10 percent measure for several reasons.

First, in 2010 the Supreme Court declined to address the government’s proposal that the Court adopt the 10 percent standard for fair cross-section cases.<sup>101</sup> Second, as the Supreme Court noted, using the 10 percent standard would mean there is “no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold.”<sup>102</sup> Finally, the 10 percent figure is borrowed from equal protection cases where the standard for the degree of disparity is arguably higher than in cross-section cases.<sup>103</sup>

Indeed, courts have held that *Duren’s* second prong is satisfied where the disparity was less than 10 percent.<sup>104</sup> That said, some courts have declined to hold that there was a sufficient disparity when the disparity was even more significant.<sup>105</sup>

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#### 15. The third prong of the *Duren* test requires the defendant to demonstrate that the disparity is due to systematic exclusion of the distinctive group.

The third prong of the *Duren* test requires the defendant to show that the underrepresentation is “due to systematic exclusion of the group in the jury-selection process,” by showing that “the cause of the underrepresentation was systematic — that is, inherent in the particular jury-selection process utilized.”<sup>106</sup> In *Duren*, the Court held that the fact that “a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systemic.”<sup>107</sup>

This language from *Duren* implies that the existence of a disparity over time is sufficient to show that a disparity is “systematic,” and some courts have interpreted it this way.<sup>108</sup> But other courts have required defendants to demonstrate with more specificity which stage of the jury system caused the disparity. And in 2010 the Supreme Court arguably departed from *Duren’s* emphasis on the duration of the disparity in *Berghuis v. Smith*.<sup>109</sup>

Although the *Berghuis* Court adopted the fair cross-section standard exactly as it was articulated in *Duren*,<sup>110</sup> the analysis suggests<sup>111</sup> that a more particularized showing of the cause of the disparity is required.<sup>112</sup>

As a result, defense attorneys should request discovery about each stage of the jury selection system, and not just demographic data about the venires.<sup>113</sup> Racial and ethnic disparities can result from accidental or benign actions of the jury selection office, such as the unintended results of computer programs,<sup>114</sup> the numeric increment used to randomly select jurors from the jury pool,<sup>115</sup> the use of telephones to summon jurors,<sup>116</sup> or benign efforts to send jurors to courthouses closer to their homes.<sup>117</sup> Jury offices also produce unrepresentative jury lists when they rely on voter registration lists that are themselves unrepresentative, but courts have generally rejected fair cross-section claims based on this factor.<sup>118</sup>

## 16. Discovery in cross-section claims includes all jury selection materials relevant to the claim.

“The right to inspection extends to all jury selection materials relevant to a complete determination of whether a grand or petit jury has in fact been selected at random from a fair cross-section of the community.”<sup>119</sup>

Pursuant to defendants’ broad discovery rights, courts routinely require jury selection systems to disclose a great deal of information and data.<sup>120</sup> Perhaps most obviously, jury systems are required to disclose demographic information regarding the distinctive groups at issue. Courts consistently order the release of race, ethnicity, and gender data for each stage of the jury selection process, for “without the demographic information” a defendant has “no way to prove the underrepresentation of identifiable groups.”<sup>121</sup>

Importantly, when a jury selection system has failed to collect the relevant demographic data, courts typically order the disclosure of information from which racial, ethnic, and gender data can be gleaned. For example, the critical importance of providing defendants with “reasonable access to accurate information concerning the race and ethnicity of prospective jurors” is illustrated by cases authorizing disclosure of completed juror questionnaires when those forms include race and ethnicity data.<sup>122</sup> Indeed, courts regularly allow defendants access to otherwise confidential jury questionnaires,<sup>123</sup> and have even permitted defense teams to contact jurors directly to collect race and

ethnicity information when that data was not otherwise available.<sup>124</sup>

Courts also routinely order the disclosure of the master jury wheels (lists or databases that include the total population of potential jurors),<sup>125</sup> and the qualified jury wheels (lists or databases of jurors to be summoned for a particular venire),<sup>126</sup> including the names on jury lists.<sup>127</sup> In many cases examination of these lists is required to determine whether duplicates are being properly eliminated “[b]ecause duplication of names affects the randomness of selection.”<sup>128</sup>

Courts additionally require the disclosure of data and documents related to excuses, deferrals, or disqualifications.<sup>129</sup> These aspects of a jury system introduce the opportunity for the exercise of discretion, which is at odds with the principle of random selection. “The continuing power to excuse prospective jurors on the grounds of suitability and undue hardship is highly discretionary in nature, and courts must be alert to prevent its abuse.”<sup>130</sup> Courts also typically order disclosure of data and documents related to the summoning process and responses to summons,<sup>131</sup> and of other types of jury selection records, such as information about proposed changes to the jury system.<sup>132</sup> Finally, courts frequently order jury system administrators to participate in depositions designed to improve the defendant’s understanding of the jury selection system.<sup>133</sup>

Many disclosures required by courts involve the release of jurors’ personal information, as the privacy interests of jurors do not outweigh the constitutional and statutory rights of defendants. Indeed, courts have granted access to a broad range of jury selection materials — concluding that while jury records “contain sensitive, personal information,”<sup>134</sup> “[t]he right to a trial before a jury representing a fair cross section of the community is a critical constitutional protection and should be scrupulously honored by providing defendants with reasonable access to accurate information concerning the race and ethnicity of prospective jurors.”<sup>135</sup> Instead of limiting the release of information, courts have concluded that respect for the privacy interests of jurors warrants the imposition of a protective order — the proper tool for managing discovery of sensitive information.<sup>136</sup> For although the privacy issues related to discovery are not immaterial, they cannot be wielded to deny a defendant “access to the very materials containing the information necessary to the filing of a motion” asserting a fair cross-section challenge.<sup>137</sup>

Finally, although not well publicized,<sup>138</sup> each federal district court is required to fill out and keep on file Form AO-12, which compares the gender, race, and ethnic status of persons who return questionnaires and are on the qualified wheel with the percentages of those groups in the community.<sup>139</sup> Because this is the information that would be needed for a jury challenge, a request for the AO-12 and its supporting documentation should be part of the initial discovery request in federal court.<sup>140</sup> Unfortunately, some courts fail to produce timely reports<sup>141</sup> and some courts’ AO-12 forms also have a large proportion of missing entries for race and ethnicity data.<sup>142</sup>

After obtaining this information, a defense attorney will be equipped to argue that the three elements of *Duren*’s prima facie test have been met. The burden will then shift to the government to attempt to prove that the disparity is justified because it “manifestly and primarily” advances “a significant state interest.”<sup>143</sup>

## II. Examples of Successful Fair Cross-Section Claims

### Example 1: *Anzania v. State of Indiana*<sup>144</sup>

Zolo Anzania (formerly Rufus Averhart) was convicted of killing a police officer, George Yaros, in the course of a bank robbery, and was sentenced to death.<sup>145</sup> This sentence was overturned on grounds unrelated to the jury,<sup>146</sup> and he was sentenced to death a second time in 1996.<sup>147</sup> Mr. Anzania made a timely fair cross-section challenge to the 1996 jury that imposed the death sentence.<sup>148</sup>

There had been speculation in the local press that there was something odd about the jury venires of Allen County, where Mr. Anzania’s trial took place. Some local defense attorneys speculated that perhaps certain areas in Wayne Township, one of the townships in Allen County, were being excluded. There were reports that computer programs had been fixed, but nothing had been made public.

Dr. Joseph Kadane, co-author of this article, was hired by the defense as their statistician. It turned out that the original computer programs had been written in COBOL, an old language rarely used for new programs. Dr. Kadane was given a COBOL expert with whom to work and the defense attorneys conducted extensive depositions of jury managers and computer personnel to understand the system as it existed in 1996.

The first clue that something was wrong with the jury selection process

was that the system always drew more potential jurors than requested. When asked for a list of 10,000, it produced 10,528, for example. When the COBOL program was examined, it turned out there was a systematic reason for this. The program divided the voter list (the sole source list used) by the number of jurors requested (say 10,000). This typically resulted in a number that is not an integer, say 15.37. In order to assure that enough jurors were being summoned, this number would be rounded down to 15, and the jurors would be divided into groups of 15, one of whom would be selected. Thus, if the integer were  $k$ , this program would produce a list of at least the number  $k$ , and as many as a factor of  $1/k$  more. The program also ordered the list alphabetically by township, and within township by street address, and sent the result to a second program. Because Wayne Township is last alphabetically, all its prospective jurors were at the bottom of this alphabetized list. Table 1 gives the number of jurors requested in the relevant years.

**Table 1. Jury Draws for Allen County, 1994 to 1996**

Year	Request	Size of draw	Excess
1994	10,000	10,528	528
1995	12,000	12,693	693
1996	14,000	14,365	365

It is estimated that Allen County had 150,000 voters in this period. If so, the values of  $k$  that result would be 15, 12 and 10, so the overage could have been as high as 666 in 1994, 1000 in 1995, and 1400 in 1996. The excesses in these years are less than these upper bounds. The second program had an input tape with a random permutation of 10,000 numbers on it. These numbers were used to control which persons were put in which quarterly draw. Only the top 10,000 on the alphabetized list of sampled voters would be assigned to quarterly draws. What impact might this have had on prospective jurors from Wayne Township? To give some background on this question, Table 2 gives data from the 1990 census about the population of Allen County, and 1995 registration data.

Thus Wayne Township had  $88,671/217,332 = 40.8\%$  of the over 18 population of Allen County, but only 34.9% of the registered voters. The choice not to supplement the voters list with other source lists, such as the list of drivers, results in a reduction in Wayne Township's participation in juries.

**Table 2. 1990 Census and 1995 Registration Data for Allen County, Indiana**

Area	1990	1995
	Population aged 18+	registered voters
Wayne Township	88,671	55,136
Rest of Allen County	128,661	102,778
Total Allen County	217,332	157,914

A random sample of size 14,365 of the voter's list in Allen County should result in approximately  $(14,365) \times (.349) = 5013$  from Wayne Township. Because all of these potential jurors would be at the bottom of the list, only  $5013 - 4365 = 648$  would actually be assigned to quarterly draws, and hence be in jury venires. Hence, Wayne Township's proportion of Allen County's juries is reduced to  $648/10,000 = 6.5\%$ . What implications might the underrepresentation of Wayne Township on jury venires have for Mr. Anzania's legal rights?

The most direct route might seem to be that the residents of Wayne Township constitute a cognizable class, but courts generally have not recognized residents of a particularly geographic area as "distinctive" groups. There were two more solid grounds to challenge this jury, however. The first was the statutory requirement that jury selection be proportional to the population in each Commissioner district. The 1990 census data for the three Commissioner districts in Allen County are given in Table 3. These numbers are the whole population, not the over 18 population, as this is the way the Indiana statute is worded. Then the districts would have representation given in the last column of Table 4. There is here a strong case that Commissioner District 3, which has 32.9% of the population of Allen County, but only 15.5% of the jury venire, is underrepresented, violating the Indiana statute.

**Table 3. 1990 Census Population of Commissioner Districts**

Commissioner District	Wayne Township	Non-Wayne	Total	Proportion
1	13,277	88,221	101,448	33.7%
2	28,969	71,576	100,545	33.4%
3	73,808	25,033	98,841	32.9%

**Table 4. Proportional Representation of Commissioner Districts on Juries**

Districts	Proportional Representation	Proportion
1	$13,227(.065) + 88,221(.935) = 83,346$	46.2%
2	$28,969(.065) + 71,576(.935) = 68,807$	38.2%
3	$73,808(.065) + 25,033(.935) = 28,203$	15.6%

The second ground on which to challenge Mr. Anzania's jury venire was that African-Americans were underrepresent-

ed in a manner that violated his right to a jury drawn from a cross-section of the community. According to the 1990 census, there were 13,937 African-Americans in Wayne Township 18 years of age or more, and 4,615 in other townships in Allen County, for a total of 18,552. Hence, among the African-Americans at least 18 years and older, 75.1% live in Wayne Township. If the Allen County jury system represented African-Americans in accordance with numbers among those 18 and older, the jury venires would have  $18,552/217,332 = 8.5\%$  African-Americans. Taking the data from 1996 and the jury system in place at the time, the proportion of African-Americans in the jury venire would be expected to be

$$(.065)\left(\frac{13,937}{88,671}\right) + (.935)\left(\frac{4615}{128,661}\right) = 4.4\%.$$

Applying the measures of unrepresentativeness, the absolute disparity is  $.085 - .044 = 4.1\%$ , and the relative disparity is  $.044/.085 = 48.2\%$ . Thus, an African-American has slightly over half of the probability of appearing on a jury venire that they would have in a random system. The probability that at least one African-American would be on a randomly chosen jury is

$$1 - (1 - .085)^{12} = .66 = 66\%,$$

while that probability given the system as it operated in 1996 is

$$1 - (1 - .044)^{12} = .417 = 41.7\%.^{149}$$

The test of significance makes no sense in this context in that we already know that the jury system does not produce a random sample of the population.

The hearing was held before a judge who had participated in the supervision of the jury system, and who declined to recuse himself.<sup>150</sup> This illustrates one of the difficulties of bringing a jury challenge. Often in such cases a judge is asked to rule on the legal adequacy of either his own work, as in this case, or the work of a friend and colleague.

The Indiana Supreme Court ultimately vacated the death sentence in a three to two decision. The majority opinion ignored the issue of underrepresentation in Commission districts,<sup>151</sup> but held the racial disparity violated the state statute.<sup>152</sup> The opinion made it clear that the decision rested in part on the "qualitative difference of death from all other punishments," which "requires a correspondingly greater degree of scrutiny of the capital sentencing determination."<sup>153</sup>



## Example 2: *State of New Jersey v. Long*<sup>154</sup>

The state charged Mr. Long with capital murder, armed robbery, and weapons offenses.<sup>155</sup> There had been puzzlement for some time among the defense bar because of the seeming ethnic homogeneity of venire: there would be a predominately Jewish venire, a mainly Italian one, etc. Mr. Long initiated a jury challenge.<sup>156</sup> The challenge, similarly to the claim in *Anzania v. Indiana*, concerned the use of systematic sampling interacting badly with the ordering of persons on the list.

The jury challenge in *Long* was upheld. What were the facts that led to a successful challenge? The jury system used both voter and driver lists as sources, which led to 180,000 names. However, the census found 130,000 people in Atlantic County between the ages of 18 and 74. Thus, at least 50,000 people were listed twice and this duplication was not identified by the merging program. Having been listed twice, these persons would have twice the chance of being selected by a random process, compared to persons listed only once. The resulting list is ordered alphabetically by last name.

The jury manager decides on the number of jurors required. The yield, i.e., the number of jurors that have to be summoned to yield a juror who actually serves, is believed to be four. The list length is divided by the number of jurors required, yielding an interval number  $k$ . Then every  $k^{\text{th}}$  juror in the alphabetized list is summoned, yielding one-fourth of the number that have to be summoned. Successive runs through the list are made by adding to  $k$  respectively 39, 41 and 43. The result of the proximity of the numbers 39, 41 and 43 and the alphabetical order of the list is that persons with the same last names are more likely to be summoned together than would be the case under a system in which jurors were chosen independently and equally likely.

After ineligibles are eliminated, and grand jurors selected out (again by systematic sampling), the names are reordered according to the fifth letter of the last name, the fourth character of the address and the second character of the driver's license. A judge or designee then names a number to be used as the interval for a systematic sample. Asked to choose a number between 1 and 99, 42 out of 54 times a number less than 10 was selected.

A small interval number causes persons close in the reorganized list to be chosen. Since persons in the same family have the same last name and address, they will tend to be selected to appear on the same panels. For example, out of a total of

4,366 qualified jurors, there were 146 pairs (i.e., 292 people) with another family member on the list. There were also two triples and one quadruple. The probability of such coincidences under a truly random selection is miniscule.

The appeals court found a statutory violation, and concluded, "It is vital that juries be selected in a manner wholly free from taint and suspicion. ... In capital cases this responsibility is of the deepest concern possible and may be said to be imbedded in the natural law."<sup>157</sup>

## Conclusion

Every criminal defendant who has the right to a jury has the right to have that jury selected from a fair cross-section of the community. In turn, defendants are entitled to information about the jury selection system so that they can determine whether their constitutional rights are being violated. As cross-section violations are often an invisible injury — one cannot "see" it by looking at an individual jury — it can only be exposed by the discovery requests of defense attorneys.

*The authors welcome any feedback from readers, including suggestions, questions, or updates on fair cross-section cases. The authors would also like to acknowledge the research assistance of Aisha Dennis, Samuel Litton, Vanessa Garcia, and Em Lawler.*

## Notes

1. For an extensive review of the law of jury challenges see NATL. JURY PROJECT LITIGATION CONSULTING, JURYWORK: SYSTEMATIC TECHNIQUES (2d ed., 2011-12).

2. U.S. CONST. AMEND. VI; see also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (Sixth Amendment applies to the states through incorporation via the Fourteenth Amendment).

3. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

4. See *Strauder v. State of West Virginia*, 100 U.S. 303, 308 (1879) ("The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.").

5. 28 U.S.C. §§ 1861-1878.

6. 28 U.S.C. § 1861.

7. See, e.g., ALA. CODE § 12-16-55; ARIZ. REV. STAT. ANN. § 21-302(D); CAL. CODE CIV. PROC. § 197(a); COLO. REV. STAT. § 13-71-104(2); D.C. CODE § 11-1901; DEL. CODE ANN. tit. 10, § 4501; HAW. REV. STAT. § 612-1; IDAHO CODE ANN. § 2-202; IND. CODE § 33-28-5-9(1); IOWA CODE § 607A.1; KAN. STAT. ANN. § 43-155; MD. CODE

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ANN. CTS. & JUD. PROC. § 8-104; MISS. CODE ANN. § 13-5-2; MO. REV. STAT. § 494.400; NEB. REV. STAT. § 25-1601.03(1); N.Y. JUD. LAW § 500; N.D. CENT. CODE § 27-09.1-01; OR. REV. STAT. § 10.215(1); S.D. CODIFIED LAWS § 16-13-10.1; UTAH CODE ANN. 1953 § 78B-1-103(1)(a); W.VA. CODE § 52-1-1; *State v. Ayer*, 834 A.2d 277, 295 (N.H. 2003) ("The legislative policy underlying the [state jury selection] statute is that all persons selected for jury service should be selected at random from a fair cross section of the population of the area served by the court.") (internal quotation and citation omitted); see also ME. REV. STAT. ANN. tit. 14 § 1201-A ("It is the policy of the state that all persons chosen for jury service be selected at random from the broadest feasible cross section of the population of the area served by the court. ..."); MINN. STAT. § 593.31 (same).

8. See, e.g., *State v. Fredericks*, 507 N.W.2d 61, 64-65 (N.D. 1993) ("[W]e ... read the Sixth Amendment's impartiality and fair-cross-section requirements into our state constitution."); see also *People v. Currie*, 87 Cal. App. 4th 225, 232 (Cal. App. 2001); *State v. Bowman*, 509 S.E.2d 428, 434 (N.C. 1998); *State v. Richie*, 960 P.2d 1227, 1248-49 (Haw. 1998); *State v. Williams*, 525 N.W.2d 538, 543 (Minn. 1994); *State v. Wiley*, 698 P.2d 1244, 1255 (Ariz. 1985), *overruled on other grounds* by *State v. Super. Ct.*, 760 P.2d 541, 544 (Ariz.

1988); *State v. Anaya*, 456 A.2d 1255, 1259 (Me. 1983); *Tugatuk v. State*, 626 P.2d 95, 99 (Alaska 1981); *State v. Porro*, 385 A.2d 1258, 1260 (N.J. Super. App. Div. 1978).

9. See, e.g., *The Nebraska Minority & Justice Task Force, Final Report*, at 17, State Justice Institute, (Jan. 2003) ("Federal and state courts throughout the country have found minority underrepresentation in jury composition, most notably in the makeup of the jury pool from which the jury is ultimately selected. In fact, many researchers have found that this is 'the rule' rather than the exception.").

10. *Taylor*, 419 U.S. at 538 (emphasis added); see also *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967) (Blackmun, J.) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn.") (as quoted in *Lockhart v. McCree*, 476 U.S. 162, 174 (1986)); *United States v. Savage*, No. 07-550-03, 2013 WL 797417, at \*5 (E.D. Pa. March 5, 2013) (recognizing that request for "venire panels ... is a request for the list of jurors that appeared at the courthouse to attend juror orientation").

11. *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012) ("The irrelevance of the composition of a single venire panel is underscored by the fact that a petitioner may bring a claim even if minorities are included in his panel."). This rule also reflects the absence of any requirement to show harm or prejudice in a fair cross-section claim. See, e.g., *United States v. Rodriguez-Lara*, 421 F.3d 932, 940-941 (9th Cir. 2005) ("The selection of a grand or petit jury in violation of ... the fair cross-section guarantee is structural error that entitles a defendant to relief without a demonstration of prejudice.") (citing *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (plurality and majority portions) and *Taylor*, 419 U.S. at 530 (describing the fair cross-section requirement as "fundamental to the jury trial guaranteed by the Sixth Amendment").

12. An unrepresentative petit jury may, of course, reflect the fact that the representation of African-Americans in the broader jury pool is not fair and reasonable, but it cannot alone establish a prime facie case of a fair cross-section violation. See *Ambrose*, 684 F.3d at 646 ("It may be true that a venire panel's composition may put a petitioner on notice of a procedural irregularity in some instances. ... However, where the minority population is comparatively small, the actual composition of the venire panel does not provide reasonable notice of the existence or nonexistence of a fair cross-section claim.").

13. See *id.* at 645 (Noting that "looking at the venire panel did not provide petitioners with notice of their claims" because "[a] petitioner raising this claim is challenging the pool from which the jury is drawn, and not

necessarily the venire panel directly before him. Accordingly, the composition of one panel does not indicate whether a fair cross-section claim exists.").

14. *Duren v. Missouri*, 439 U.S. 357, 359 n.1 (1979) ("A criminal defendant has standing to challenge exclusion resulting in a violation of the fair-cross-section requirement, whether or not he is a member of the excluded class."). The same is true for claims under the JSSA. *United States v. Musto*, 540 F. Supp. 346, 351 (D.N.J. 1982) ("Standing to assert irregularities under the Act does not depend on whether the defendant is a member of the excluded or underrepresented class.").

15. 28 U.S.C. § 1861 (right to "grand and petit juries selected at random from a fair cross-section of the community").

16. *Taylor*, 419 U.S. at 528 ("the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial").

17. See, e.g., *Murphy v. Johnson*, 205 F.3d 809, 818 (5th Cir. 2000) ("our precedent dictate[s] that the fair cross-section requirement of the Sixth Amendment applie[s] to the selection process for grand juries"); *Porro*, 385 A.2d at 1260 ("State constitutional principles require that grand jury selection be so designed as to insure that juries are impartially drawn from community cross-sections.") (internal quotation and citation omitted); *United States v. Osorio*, 801 F. Supp. 966, 974 (D. Conn. 1992) ("the Sixth Amendment's fair-cross-section requirement applies to grand juries"); but see *Henley v. Bell*, 487 F.3d 379, 387 (6th Cir. 2007) (right to challenge grand jury under Sixth Amendment not "clearly established"). The selection of the grand jury, is however, subject to equal protection claims under the Fourteenth Amendment in state courts, *Peters v. Kiff*, 407 U.S. 493, 502 (1972), and under the Fifth Amendment in federal courts, *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616 (1991) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

18. See, e.g., *United States v. Royal*, 174 F.3d 1, 6 (1st Cir. 1999); *United States v. Rodriguez*, 581 F.3d 775, 790 (8th Cir. 2009); *United States v. Shinault*, 147 F.3d 1266, 1270-71 (11th Cir. 1998).

19. See, e.g., *State v. Bowman*, 509 S.E.2d 428, 434 (N.C. 1998) (applying same standard to claim raised under state and federal constitution); *Stewart v. Carroll*, 154 P.3d 382, 384 (Ariz. App. Div. 2007) (same); *Ayer*, 834 A.2d at 294 (same); *Tugatuk*, 626 P.2d at 100 (same).

20. 28 U.S.C. § 1867(a).

21. *United States v. Savides*, 787 F.2d 751, 754 (1st Cir. 1986); see also *United States v. Carmichael*, 560 F.3d 1270, 1277 (11th Cir. 2009); *United States v. Ovalle*, 136 F.3d 1092, 1100 (6th Cir. 1998); *United States v.*

*Calabrese*, 942 F.2d 218, 227 (3d Cir. 1991).

22. See, e.g., COLO. REV. STAT. ANN. § 13-71-139(1) ("Any party to a civil or criminal action may challenge by written motion the composition of the juror pool for substantial failure to comply with the requirements of this article."); ALASKA STAT. § 09.20.040 (same); HAW. REV. STAT. § 612-23(a) (same); IDAHO CODE ANN. § 2-213(1) (same); IND. CODE § 33-28-5-21(a) (same); ME. REV. STAT. ANN. tit. 14 § 1214 (same); MD. CODE ANN. CTS. & JUD. PROC. § 8-409 (same); MICH. COMP. LAWS § 600.1354 (same); MINN. GEN. R. PRAC. 813(a) (same); N.D. CENT. CODE § 27-09.1-12(1) (same); OKLA. STAT. ANN. tit. 22 § 633A (same); UTAH CODE ANN. § 78B-1-113(2) (same); MO. REV. STAT. § 494.465(1) (same); OR. REV. STAT. § 136.005(1) (party can challenge "material departure"); S.D. CODIFIED LAWS § 23A-19-3 (same); W. VA. CODE § 52-1-15(a) (same).

23. See, e.g., *Calabrese*, 942 F.2d at 229 (substantial violation of the JSSA where excusal of a significant number of jurors based on knowledge of defendants was "not based on one of the Act's enumerated grounds"); *Hudson v. State*, 248 S.W.3d 56, 57, 60 (Mo. App. W.D. 2008) (reversing conviction because "jury selection process substantially failed to comply with [defendant's state] statutory right to a trial by randomly selected jury members" where the "process was intended to be random, but an error in the software caused venire panels to be seated in reverse chronological order with regard to age, or 'oldest-to-youngest'").

24. 28 U.S.C. § 1867(a) (emphasis added). The motion must contain "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the JSSA]." 28 U.S.C. § 1867(d). The defendant is also entitled to present any relevant evidence in support of the motion. *Id.*

25. See, e.g., *United States v. Bearden*, 659 F.2d 590, 595 (5th Cir. 1981) (The "timeliness requirement ... is to be strictly construed, and failure to comply precisely with its terms forecloses a challenge under the Act."). There is some suggestion that noncompliance with the timing requirement might be overlooked if "the [JSSA] and the jury selection procedures utilized by the district court effectively foreclosed the filing of appellants' motion at an earlier time." *United States v. DeFries*, 129 F.3d 1293, 1300 (D.C. Cir. 1997); see also *United States v. Brown*, 128 F. Supp. 2d 1034, 1039 (E.D. Mich. 2001) (interpreting JSSA timing requirement more leniently).

26. See, e.g., COLO. REV. STAT. § 13-71-139 ("The written motion shall be filed prior to the swearing in of the jury selected to try the case."); S.D. CODIFIED LAWS § 23A-19-4 (same); UTAH CODE ANN. § 78B-1-113(1) (same); DEL. CODE ANN. tit. 10 § 4512(a) (jury challenge must be filed "[w]ithin 7 days after the mov-

ing party discovers, or by the exercise of diligence could have discovered, the grounds therefor, and in any event before the jury is sworn to try the case"); MINN. GEN. R. PRAC. 813(a) (same); N.D. CENT. CODE § 27-09.1-12(1) (same); W. VA. CODE § 52-1-15(a) (same); 725 ILL. COMP. STAT. § 5/114-3(a) ("Any objection to the manner in which a jury panel has been selected or drawn shall be raised by a motion to discharge the jury panel prior to the voir dire examination."); OR. REV. STAT. § 136.005(2) (same); see also HAW. REV. STAT. § 612-23(a); IDAHO CODE ANN. § 2-213(1); IND. CODE § 33-28-5-21(a); ME. REV. STAT. ANN. tit. 14 § 1214; MD. CODE ANN. CTS. & JUD. PROC. § 8-409(b)(1) (challenge must be made "[b]efore examination begins in a criminal case or, for good cause shown, after a jury is sworn but before it receives evidence"); MO. REV. STAT. § 494.465(1) ("Such motion may be made at any time before the petit jury is sworn to try the case or within 14 days after the moving party discovers or by the exercise of reasonable diligence could have discovered the grounds therefor, whichever occurs later.").

27. See, e.g., *United States v. Young*, 822 F.2d 1234, 1239 (2d Cir. 1987) ("[D]efendants' failure to comply with the provisions of the Jury Selection Act does not preclude them from raising a constitutional challenge to the makeup of the venire, based on the Sixth Amendment."); see also *United States v. Grisham*, 63 F.3d 1074, 1077 (11th Cir. 1995); *United States v. Hawkins*, 566 F.2d 1006, 1014 (5th Cir. 1978); *United States v. Marrapese*, 610 F. Supp. 991, 997-98 (D.R.I. 1985); *United States v. Layton*, 519 F. Supp. 946, 952 (D. Cal. 1981); *United States v. Marciano*, 508 F. Supp. 462, 465 n.4 (D.P.R. 1980); *State v. Watkins*, 463 N.W.2d 411, 413 (Iowa 1990).

28. See, e.g., *United States v. Ovalle*, 136 F.3d 1092, 1108 (6th Cir. 1998) ("Objections to the seating of the grand or petit jury must be filed before trial under [Rule] 12(b)(2)."); *United States v. Avila*, 1992 WL 75236, at \*8 (9th Cir. Apr. 16, 1992) (Rule 12(b) "forecloses objections to the petit jury array that are not made prior to trial."); see also *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362 (1963) (not abuse of discretion to deny challenges to jury selection process raised for the first time more than four years after trial).

29. First, the pretrial requirement is based on the questionable conclusion that "challenges of the petit jury are treated the same as challenges of the grand jury." *United States v. Boulding*, 412 Fed. App'x 798, 804 (6th Cir. 2011) (internal quotation, citation, and modification omitted); see also, e.g., *United States v. Ballard*, 779 F.2d 287, 295 (5th Cir. 1986) (Rule 12(b) "requires that objections to such matters as the grand and petit jury arrays must be raised by motion before trial"). But challenges to the grand jury address a "defect in the indictment," a claim



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that must be brought pretrial under the language of Rule 12(b)(3). See Comm. Note to Rule 12(b)(1) and (2) [now (2) and (3)] ("Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury"); *Davis v. United States*, 411 U.S. 233, 238 (1973) ("Rule 12(b)(2) [now 12(b)(3)] precludes untimely challenges to grand jury arrays, even when such challenges are on constitutional grounds"). In contrast, challenges to the petit jury do not challenge the indictment and so arguably should not be required to be filed pretrial under the rule. As it is clear that grand jury challenges implicate the indictment, it is undisputed that they must be filed pretrial. Second, Federal Rule of Criminal Procedure 33 should arguably allow for a motion for a new trial based on newly discovered evidence about defects in the jury selection process. Courts, however, have been reluctant to grant such motions on the grounds that defendants could have discovered such errors before trial.

30. For exceptions to the general rule, see *Ambrose v. Booker*, 684 F.3d 638, 649 (6th Cir. 2012) ("In the ordinary case, fair cross-section claims should be raised at jury selection. However, where the underrepresentation is as obscure as the one in this case — due to a small minority population and a small absolute disparity — a failure to object

must be excused."); *United States v. Greene*, 971 F. Supp. 1117, 1137 (E.D. Mich. 1997) ("[T]he plain language of Rule 12(b) clearly does not require that constitutional challenges to the jury selection process must be made prior to trial.>").

31. FED. R. CRIM. P. 12(e).

32. See Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Imposing Equal Protection Standards*, 64 HASTINGS L. J. 141 (Dec. 2012).

33. *Test v. United States*, 420 U.S. 28, 30 (1975).

34. The standard for equal protection violations was established in *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) and the standard for fair cross-section violations (described at Number 9 herein) was established in *Duren v. Missouri*, 439 U.S. 357 (1979).

35. See *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) ("While the equal protection clause of the Fourteenth Amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination, [t]he Sixth Amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of ... motive." (alterations in original) (citation and internal quotation marks omitted)).

36. See, e.g., *Rodriguez-Lara*, 421 F.3d at



940; see generally Chernoff, *supra* note 32.

37. See, e.g., *Gelb*, 881 F.2d at 1161; see generally Chernoff, *supra* note 32.

38. *Isaacs v. State*, 386 S.E.2d 316, 324, 325 (Ga. 1989) (noting that defendant “obtained the services of an expert to assist him with his challenges to the jury array and with the selection of the jury” and holding that “in an appropriate case, based upon a sufficient showing of need, the denial of funds for expert assistance might violate due process”).

39. Courts often comment on the qualifications of experts in fair cross-section challenges and on the quality of the evidence they present. Defense attorneys may therefore want to familiarize themselves with the judicial assessment of potential experts before obtaining expert services.

40. 28 U.S.C. § 1867(f) (emphasis added).

41. *Id.* (emphasis added).

42. *Test*, 420 U.S. at 30.

43. *Layton*, 519 F. Supp. at 958 (quoting 28 U.S.C. § 1867(f)).

44. See *United States v. Orlando-Figueroa*, 229 F.3d 33, 41 (1st Cir. 2000) (“criminal defendants have an absolute right to inspect jury selection records”); *United States v. Miller*, 116 F.3d 641, 658 (2d Cir. 1997) (“a defendant plainly has a right to discovery”); *United States v. Curry*, 993 F.2d 43, 44 (4th Cir. 1993) (defendant “entitled to inspect, reproduce, and copy the master jury list to support a motion for a new trial based upon a substantial failure to comply with the provisions of [the JSSA] in selecting the grand or petit jury”); *Gov’t of Canal Zone v. Davis*, 592 F.2d 887, 889 (5th Cir. 1979) (“The Supreme Court’s decision in [*Test*] is dispositive of the issue.”); *United States v. McLernon*, 746 F.2d 1098, 1123 (6th Cir. 1984) (“The right to inspection extends to all jury selection materials relevant to a complete determination of whether a grand or petit jury has in fact been selected ‘at random from a fair cross-section of the community.’” (quoting *Test*, 420 U.S. at 30)); *United States v. Kolibioski*, 732 F.2d 1328, 1331 (7th Cir. 1984) (“Criminal defendants have the unqualified right to inspect jury lists.”); *United States v. Stanko*, 528 F.3d 581, 587 (8th Cir. 2008) (“a litigant has essentially an unqualified right to inspect jury lists”) (quoting *Test*, 420 U.S. at 30); *United States v. Studley*, 783 F.2d 934, 938 (9th Cir. 1986) (“The right to inspect jury lists is essentially unqualified.”); *United States v. Lawson*, 670 F.2d 923, 926 (10th Cir. 1982) (“The Supreme Court characterizes a litigant’s right to inspect jury lists as essentially unqualified.”); see also *United States v. Pritt*, 458 Fed. App’x 795, 800, 2012 WL 265927, at \*3 (11th Cir. 2012) (acknowledging defendant’s right to be “given the requisite material to ascertain the facts that, under our precedent, are essential to his jury composi-

tion claims”); *United States v. Hsia*, 2000 WL 194982, \*1 (D.D.C. Feb. 2, 2000) (“defendant therefore is entitled to inspect, reproduce and copy records or papers related to the selection of the grand jury, as authorized by 28 U.S.C. § 1867(f)”).

45. *United States v. Royal*, 100 F.3d 1019, 1025 (1st Cir. 1996) (emphasis added).

46. *Id.* at 1025.

47. *Id.* (quoting 28 U.S.C. § 1867(d)); see, e.g., *Stanko*, 528 F.3d at 587 (“A defendant may not be denied this unqualified right even when he fails to allege facts which show a ‘probability of merit in the proposed jury challenge, because grounds for challenges to the jury selection process may only become apparent after an examination of the records.”) (internal citation, quotation, and modification omitted); *Layton*, 519 F. Supp. at 958 (“No probability of merit need be shown. To avail himself of this right of access to otherwise nonpublic jury selection records, a litigant need only allege that he is preparing a motion challenging the jury selection procedures. There is no doubt on this point whatsoever.”) (citation omitted); see also *United States v. Marciano-Garcia*, 622 F.2d 12, 18 (1st Cir. 1980); *Curry*, 993 F.2d 44; *Alden*, 776 F.2d at 773, 774.

48. *Canal Zone*, 592 F.2d at 889.

49. *Alden*, 776 F.2d at 775.

50. See, e.g., DEL. CODE tit. 10 § 4513(b) (“Records used in the selection process shall not be disclosed, except ... as necessary in the preparation or presentation of a motion challenging compliance with this chapter.”); HAW. REV. STAT. § 612-23(d) (“The contents of any records or papers used by the clerk in connection with the selection process shall not be disclosed, except ... connection with the preparation or presentation of a motion [challenging the jury selection process]. ... The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion [challenging the jury selection process].”); IDAHO CODE ANN. § 2-213(4) (same); IND. CODE § 33-28-5-21(e) (same); N.D. CENT. CODE § 27-09.1-12(4) (same); ME. REV. STAT. ANN. tit. 14 § 1214 (party challenging jury selection entitled to present “the testimony of the jury commissioners or the clerk, any relevant records and papers not public or otherwise available used by the jury commissioners or the clerk and any other relevant evidence”); MD. CODE ANN. CTS. & JUD. PROC. § 8-409(d) (same); MINN. GEN. R. PRAC. 813(b) (same); MO. REV. STAT. § 494.465(2) (same); UTAH CODE ANN. § 78B-1-113(2) (same); W. VA. CODE § 52-1-15(b) (same); *Roddy v. Super. Ct.*, 60 Cal. Rptr. 3d 307, 322 (Cal. Ct. App. 2007) (“In investigating whether a claim of an underrepresentative jury selection process may exist, a defendant has certain rights to discovery.”).

51. See, e.g., MD. CODE ANN. CTS. & JUD. PROC.

§ 8-409(c) (“On a showing that a party needs access to a record to prepare for a hearing on a motion pending under this section, a trial judge may allow the party to inspect and copy a record as needed to prepare.”); *Lewis v. State*, 632 A.2d 1175, 1178 (Md. 1993) (recognizing entitlement to discovery under state statute); OR. REV. STAT. § 10.275 (1) (“A person challenging a jury panel ... must include a request for access to the confidential records in the motion challenging the jury panel. ... The request must: (a) Specify the purpose for which the jury records are sought; and (b) Identify with particularity the relevant jury records sought to be released including the type and time period of the records. (2) The court may order release of the jury records if the court finds that: (a) The jury records sought are likely to produce evidence relevant to the motion; and (b) Production of the jury records is not unduly burdensome.”); *State v. Rogers*, 55 P.3d 488, 493 (Or. 2002) (“ORS 136.005(1) requires only that relator allege facts that, if true, constitute a material departure from the requirements of law. The trial court impermissibly required relator to prove that his motion would succeed to trigger the statutory provisions governing release of the jury records that may support the motion.”).

California represents an exception to the general rule, as it imposes a “reasonable belief” threshold showing requirement. See *People v. Jackson*, 920 P.2d 1254, 1268 (Cal. 1996) (“[U]pon a particularized showing supporting a reasonable belief that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion, the court must make a reasonable effort to accommodate the defendant’s relevant requests for information designed to verify the existence of such underrepresentation and document its nature and extent.”); *Roddy*, 60 Cal. Rptr. 3d at 322 (“A reasonable belief is simply a conviction of mind arising by way of inference, a belief begotten by attendant circumstances, fairly creating it, and honestly entertained.”) (internal quotations, citations, and modifications omitted).

52. D.C. CODE § 11-1914(b).

53. *Gause v. United States*, 6 A.3d 1247 (D.C. 2010).

54. *Id.* at 1255.

55. *Id.* at 1256.

56. *Test*, 420 U.S. at 30 (quoting 28 U.S.C. § 1861) (emphasis added).

57. *Id.*

58. *State v. Ciba-Geigy Corp.*, 573 A.2d 944, 950 (N.J. Super. A.D. 1990); see, e.g., *Royal*, 100 F.3d at 1025 (unqualified right to discovery because “without such access, a litigant will be unable to determine whether he has a meritorious claim”); *Marciano-Garcia*, 622 F.2d at 18 (court erred when denied “motion

to inspect the court's jury selection records, and thus prevented [appellants] from establishing a factual basis for their motion to strike the jury"); *Alden*, 776 F.2d at 775 ("Grounds for challenges to the jury selection process may only become apparent after an examination of the records," thus "[e]ven if the defendant's anticipated challenges to the jury selection process, as articulated at the time of his motion for inspection, are without merit, the defendant may still inspect the jury records.").

59. *Canal Zone*, 592 F.2d at 890.

60. See *Ciba-Geigy Corp.*, 573 A.2d at 959 (noting that in *Test*, the "Court did not rest its holding solely on § 1867(f)," but also on the statute's purpose).

61. *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980).

62. *Id.*

63. *Id.*; see also *Ciba-Geigy Corp.*, 573 A.2d at 946, 947, 950 (affirming grant of a discovery request to defendants who claimed a right to information "upon both federal and state constitutional precepts" and "reject[ing] the state's contention that defendants are entitled to the discovery they seek only if they meet the good cause standard," as "[i]t would be virtually impossible for defendants who are endeavoring to ascertain if a successful attack on the grand jury selection process can be advanced if the facts necessary to prove a defect in the selection process are withheld"); *Mobley v. United States*, 379 F.2d 768, 772 (5th Cir. 1967) (granting right to discovery pursuant to constitutional claim in case that arose prior to the enactment of the JSSA).

64. 439 U.S. 357 (1979).

65. 559 U.S. 314, 319 (2010).

66. *Duren*, 439 U.S. at 364; see also *Berghuis*, 559 U.S. at 319.

67. *Id.* at 368.

68. *Id.* at 365.

69. See *Taylor*, 419 U.S. 522 (women); *Berghuis*, 559 U.S. at 320 (applying fair cross-section analysis to alleged underrepresentation of African-Americans); *United States v. Hernandez-Estrada*, 704 F.3d 1015, 1022 (9th Cir. 2012) (Hispanics).

70. *United States v. Test*, 550 F.2d 577, 591 (10th Cir. 1976) (internal quotation and citation omitted); see also *Ford v. Seabold*, 841 F.2d 677, 681-82 (6th Cir. 1988); *Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983).

71. *United States v. Yazzie*, 660 F.2d 422, 426 (10th Cir. 1981) (Native Americans); *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (Jews); *United States v. Canady*, 54 F.3d 544, 547 (9th Cir. 1995) ("This court and the Supreme Court have repeatedly recognized [African-Americans, Hispanics, and Asians] to be 'distinctive groups in the community,'" (quoting *Duren*, 439 U.S. at 364); see also *People v. Garcia*, 92 Cal. Rptr. 2d 339,

347 (Cal. App. 4 Dist. 2000) (gays and lesbians constitute cognizable group for purposes of equal protection claim).

72. See Sanjay K. Chhablani, *Re-Framing the 'Fair Cross-Section' Requirement*, 13 U. PA. J. CONST. L. 931, 947 (2011).

73. *Teague v. Lane*, 489 U.S. 288, 301 n.1 (1989) ("The second prong of *Duren* is met by demonstrating that the group is underrepresented in proportion to its position in the community as documented by census figures."); see *Duren*, 439 U.S. at 365 (upholding the use of six-year-old census data in fair cross-section challenge). The Supreme Court has likewise relied on census data in deciding equal protection challenges to the jury selection process. See, e.g., *Castaneda*, 430 U.S. at 494 (considering "the proportion of the group in the total population") (emphasis added); *Turner*, 396 U.S. at 359 (evaluating the percentage of African-Americans in "the general [county] population").

When evaluating census data, attorneys should bear in mind that the census "undercounts" racial and ethnic minorities. As the Supreme Court has recognized, "the [Census] Bureau has always failed to reach — and has thus failed to count — a portion of the population. This shortfall has been labeled the census 'undercount.'" *Dep't of Comm. v. U.S. House of Representatives*, 525 U.S. 316, 322, 322-23 (1999) (plurality). The undercount has more severe implications for racial and ethnic minorities that "have historically had substantially higher undercount rates than the population as a whole." *Id.*; see also *Virginia v. Reno*, 117 F. Supp. 2d 46, 48 (D.D.C. 2000) ("Studies by the Census Bureau demonstrate that each census has produced a net undercount of the population and shown a higher 'differential undercount' for ethnic and racial minorities. ..."); *Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084 (9th Cir. 2002) ("It is generally accepted that the decennial census results in a net undercount of the population, particularly with respect to minority and disadvantaged groups.") (footnote omitted); *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001) ("is widely acknowledged that the Census fails to count everyone, and that the undercount is greatest in certain subgroups of the population, particularly Hispanics and African-Americans"). Courts can consider the undercount when determining the degree of disparity. See, e.g., *United States v. Duran De Amesquita*, 582 F. Supp. 1326, 1330 n.5 (D.C. Fla. 1984) (relying on the "general population figure ... derived from the 1980 U.S. Census, adjusted for the generally recognized population undercount").

74. See, e.g., *Rodriguez-Lara*, 421 F.3d at 942 (but "where the record contains population data broken down by age, the representativeness of the jury pool is to be compared

to this refined set of data for the purpose of the defendant's prima facie case under *Duren*"); *United States v. Rioux*, 97 F.3d 648, 657 (2d Cir. 1996).

75. See, e.g., *Azania v. State*, 778 N.E.2d 1253, 1259 (Ind. 2002) ("Both the United States Supreme Court and the lower federal courts have repeatedly upheld the use of census figures in constitutional assaults on jury selection procedures.").

76. *Rodriguez-Lara*, 421 F.3d at 942.

77. See, e.g., *Rioux*, 97 F.3d at 657 ("We conclude that the appropriate measure in this case is the 18 and older subset of the population, regardless of other qualifications for jury service."); *United States v. Facchiano*, 500 F. Supp. 896, 897 (D.C. Fla. 1980) ("Census data was used to determine the number of whites and blacks aged 18-69 in the county's population. It is judicially noticed that within this population are a number of individuals who are not qualified to be jurors. ..."); *Lovell v. State*, 702 A.2d 261, 280 n.8 (Md. 1997) (relying on 18 and older subset of the population that includes noncitizens, persons who do not speak English, and institutionalized persons); see also notes 77-79 *infra*.

The Ninth Circuit's opinion in *Rodriguez-Lara* represents one side of an "intra-circuit conflict" in the Ninth Circuit "as to whether a defendant who presents only evidence that includes nonjury-eligible segments of the population may ever satisfy a prima facie case." *United States v. Torres-Hernandez*, 447 F.3d 699, 704 (9th Cir. 2006). Without resolving the conflict, subsequent Ninth Circuit panels have held only that a court must use jury-eligible data *if and when* it is presented. See *id.* (declining to resolve conflict and applying the principle that "when presented with various types of data to determine whether Hispanics are underrepresented on grand jury venires, a court must rely on the statistical data that best approximates the percentage of jury-eligible Hispanics in the district"); *United States v. Martinez-Orosco*, 215 Fed. App'x 693, 695 (33, 1 (9th Cir. 2006) ("Our case law supports the use of jury-eligible data *when it is available and presented to the court*. We have not endorsed community data in these circumstances.") (emphasis added). See generally, Stephen E. Reil, Comment: *Who Gets Counted? Jury List Representativeness for Hispanics in Areas With Growing Hispanic Populations Under Duren v. Missouri*, 2007 B.Y.U.L. Rev. 201 (2007).

78. See, e.g., *Rodriguez-Lara*, 421 F.3d at 943 n.9 (quoting 28 U.S.C. § 1865(b)) "[w]hereas census data are readily accessible, jury-eligible population data will often be quite hard for fair-cross-section claimants to obtain, given the difficulty of sorting out from the general population figures the

number of individuals who (for example) are not citizens, who are not fluent in English, or who are 'incapable, by reason of mental or physical infirmity, to render satisfactory jury service.'"); *United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998) (relying on census data and noting "there is apparently no reliable measurement of that subset of the general population" ["the portion of the general population that is eligible to serve"]); *United States v. Osorio*, 801 F.Supp. 966, 978 (D. Conn. 1992) ("data as to the population eligible for jury service are rarely available"); *United States v. Butera*, 420 F.2d 564, 570 n.13 (1st Cir. 1970) ("It may be so difficult to obtain full and accurate figures for 'jury eligibles' that to require such figures would — at least in some cases — place an insuperable burden on defendant."), *overruled on other grounds*, *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985); *State v. Lopez*, 692 P.2d 370, 377 (Idaho App. 1984) ("Because of the difficulty in obtaining more accurate figures for jury eligibility, the defendant can present a prima facie case by showing through the use of total population figures a significant underrepresentation of a cognizable class.") (internal quotation, citation, and modification omitted).

79. See, e.g., *United States v. Purdy*, 946 F. Supp. 1094, 1100 (D. Conn. 1996) ("[A] measure of community population which is based [on] ... the qualified voting age population ... relies upon speculative estimates regarding the proportion and makeup of the population which satisfies the qualifications for jury service."); *United States v. Reyes*, 934 F. Supp. 553, 565 (S.D.N.Y. 1996) (The speculative nature of the data is due in part to the fact that "[w]hile some juror qualifications are embodied in bright-line rules ... others require the exercise of judgment," and "whether someone has been convicted of a felony ... is virtually impossible to track."); *Osorio*, 801 F. Supp. at 978 ("[T]he Court rejects the alternative use of registered voters as an appropriate benchmark. Simply put, the government's evidence does not reliably establish that this alternative benchmark would be a better estimate of the jury-eligible population than the voter-age population would be.").

80. As the Ninth Circuit observed, "The Supreme Court has subsequently reiterated that '[t]he second prong of *Duren* is met by demonstrating that the [distinctive] group is underrepresented in proportion to its position in the community as documented by census figures.'" *Rodriguez-Lara*, 421 F.3d at 941 (quoting *Teague*, 489 U.S. at 301 n.1 (emphasis added); see also *id.* at 943 n.9 ("none of the Supreme Court's cases has ... rejected a prima facie showing of underrepresentation because of a failure to provide statistics reflecting the distinctive group's proportion in the jury-eligible — as opposed to the general or age-eligible

— population."); *Shinault*, 147 F.3d at 1272 (noting "defendant derived his population data from the most recent census, a practice that the Supreme Court has found adequate in the past"); *Ford v. Seabold*, 841 F.2d 677 (6th Cir. 1988) (rejecting government's argument that analysis was flawed where it failed to compare "women in the jury pools to ... those eligible for jury service," because "[i]n *Duren*, the Court explicitly rejected this argument"); *U.S. ex rel. Barksdale v. Blackburn*, 610 F.2d 253, 262 (5th Cir. 1980) ("The Court made it clear that the burden of reducing general population statistics to more meaningful statistics rests on the State. ...") (citing *Castaneda*, 430 U.S. at 488-89 n.8; *Lopez*, 692 P.2d at 377 ("the United States Supreme Court knowingly has refrained from compelling criminal defendants to compile jury-eligible data in order to show prima facie violations of the fair cross-section requirement.")).

81. *Taylor*, 419 U.S. at 538 (emphasis added).

82. See *United States v. Green*, 389 F. Supp. 2d 29, 56 n.53 (D. Mass. 2005), *overruled on other grounds by In re United States*, 426 F.3d 1 (1st Cir. 2005) ("[T]he question is whether the underrepresentation [is] 'inherent in the system used, rather than a product of random factors on one particular jury venire.'" (quoting Cynthia A. Williams, Note, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N.Y.U. L. REV. 590, 617 (1990))).

83. *Berghuis*, 559 U.S. at 329.

84. See Kairys, Kadane & Lehoczy, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CALIF. L. REV. 776, 793-94 (1977).

85. *Ramseur v. Beyer*, 983 F.2d 1215, 1231 (3d Cir. 1992); see also *United States v. Yanez*, 136 F.3d 1329, 1998 WL 44544, at \*2 (5th Cir. Jan. 26, 1998) ("Absolute disparity measures the difference between the proportion of the distinctive groups in the population from which the jurors are drawn and the proportion of the groups on the jury list.").

86. See, e.g., *United States v. Shinault*, 147 F.3d 1266, 1273 (10th Cir. 1998) ("In this circuit, absolute disparity is the starting place for all other modes of comparison.") (internal quotation, citation, and modification omitted).

87. See *United States v. Royal*, 174 F.3d 1, 8, 7 n.3 (1st Cir. 1999) (citing "[t]his court's choice of absolute disparity over comparative disparity" but noting that "our endorsement of one should not be taken as a statement that it is the best of all possible methodologies"); *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989) ("we have consistently favored an absolute disparity analysis and have rejected a comparative disparity analysis").

88. See, e.g., *United States v. Chanthadara*, 230 F.3d 1237, 1256 (10th Cir. 2000)

("absolute disparities are of a limited value when considering small populations"); *United States v. Rogers*, 73 F.3d 774, 776-77 (8th Cir. 1996) ("Although utilizing the absolute disparity calculation may seem intuitive, its result understates the systematic representative deficiencies; the percentage disparity can never exceed the percentage of African-Americans in the community."); *United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) ("the absolute numbers approach is of questionable validity when applied to an underrepresented group that is a small percentage of the total population"); see also *Berghuis*, 559 U.S. at 330 n.4 (declining the government's invitation to adopt the absolute disparity test for cross-section cases); *Rodriguez-Lara*, 421 F.3d at 944 n.10.

89. *Ramseur*, 524 A.2d at 219.

90. See, e.g., *United States v. Weaver*, 267 F.3d 231, 243 (3d Cir. 2001) ("Because we think that figures from both methods inform the degree of underrepresentation, we will examine and consider the results of both."); *United States v. Chanthadara*, 230 F.3d 1237, 1257 (10th Cir. 2000) ("We must consider both absolute and comparative disparities to determine whether a violation has occurred."); *United States v. Yanez*, 136 F.3d 1329, 1998 WL 44544, at \*2 (5th Cir. Jan. 26, 1998) ("Although absolute disparity is an appropriate method for dealing with jury challenges, it is not the sole means that may be used to establish unlawful jury discrimination."); *United States v. Rodriguez*, 776 F.2d 1509, 1511 n.4 (11th Cir. 1985) ("the absolute disparity method is not the sole means of establishing unlawful jury discrimination"); *Washington v. People*, 186 P.3d 594, 605 (Colo. 2008) ("We hold that no specific statistical measure should be excluded in a court's analysis of a constitutional fair cross-section claim, and that a court should evaluate all the statistical evidence presented to determine whether the underrepresentation is unfair and unreasonable in violation of the defendant's Sixth Amendment right to a jury selected from a fair cross-section of the community."); *State v. Williams*, 525 N.W.2d 538, 543 (Minn. 1994) ("We are unwilling to rely solely upon the 'absolute disparity' approach in interpreting the fair cross-section requirement. ... Rather, courts should be free to use all the statistical tools available, including the absolute disparity figure, the comparative disparity figure, standard deviations, and any other such tools."); *State v. Ramseur*, 524 A.2d 188, 222 (N.J. 1987) ("We will not, in this case, choose one test over the others as the best method for assessing the significance of statistical evidence.").

91. *Ramseur*, 983 F.2d at 1231-32.

92. *Ramseur*, 524 A.2d at 236.

93. *Berghuis*, 559 U.S. at 323.

94. *Shinault*, 147 F.3d at 1273.



95. See note 90 *supra*.

96. *Berghuis*, 559 U.S. at 324 n.1.

97. *Waisome v. Port Auth. of New York and New Jersey*, 948 F.2d 1370, 1376 (2d Cir. 1991). Note that these efforts by courts to describe standard deviation analysis are a bit misleading, as standard deviation analysis does not compute the probability that the cognizable class is proportionately represented, but rather the probability, if it were proportionately represented, that the observed discrepancy would be as large or larger than that observed.

98. See *Ramseur*, 983 F.2d at 1232.

99. *Castaneda v. Partida*, 430 U.S. 482, 486 (1977).

100. See, e.g., *People v. Bryant*, 822 N.W.2d 124, 142 (Mich. 2012) ("no court in the country has accepted [a standard-deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems.") (internal quotation and citation omitted).

101. *Berghuis*, 559 U.S. at 330 n.4.

102. *Id.* (quoting Brief for Respondent 35).

103. See *Green*, 389 F. Supp. 2d at 55 n.52 ("[T]he 10% rule adopted by some courts is a contrivance, and one based on faulty precedent."); *Waller v. Butkovich*, 593 F. Supp. 942, 954 (M.D.N.C. 1984) (declining to adopt the 10% rule because "[w]hether a fair cross section exists is entirely different from whether intentional discrimination occurred"); *Washington*, 186 P.3d at 602 n.6 ("the burden of proof for establishing that the underrepresentation is unfair and unreasonable in an equal protection challenge is higher than it is in a fair cross-section challenge.>").

104. See, e.g., *United States v. Osorio*, 801 F. Supp. 966, 974 (D. Conn. 1992) (Representation was not fair and reasonable where absolute disparity was "3.26% for blacks (6.34% - 3.08%) and 4.30% for Hispanics (5.07% - 0.77%).").

105. See, e.g., *United States ex rel. Barksdale v. Blackburn*, 639 F.2d 1115, 1126-27 (5th Cir. 1981) (representation on grand jury fair and reasonable when absolute disparity for African-Americans was 11.5%).

106. *Duren*, 439 U.S. at 364.

107. *Id.* at 366.

108. See, e.g., *State v. Lopez*, 692 P.2d 370, 377 (Idaho App. 1984) (holding that underrepresentation was "systematic" where there was evidence of disparity and it was undisputed that lists at each stage of jury selection "were constructed in accordance with procedures routinely followed by the county's jury commissioners," because "[t]he only reasonable inference from this evidence is that the underrepresentation of Hispanics was inherent in those procedures").

109. 559 U.S. 314 (2010).

110. *Id.* at 319.

111. *Berghuis* involved the application of the limited standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which restricted the Court's analysis to the question of whether the Michigan Supreme Court's decision "involved an unreasonable application of[] clearly established federal law." *Id.* at 320 (quoting 28 U.S.C. § 2254 (2012)).

112. See *id.* at 332 ("No 'clearly established' precedent of this Court supports Smith's claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation."). In making this demand for specificity, the 2010 Court seemed to be more impressed with Duren's evidence than the 1979 Court had been. For although Duren "established when in the selection process the systematic exclusion [of women] took place," he was not able to do so with particularity. *Duren*, 439 U.S. at 366. Instead, Duren narrowed the possibilities down to two stages of the selection process. *Id.* at 366-67 (demonstrating with "statistics and other evidence" that the disparity occurred either when people were summoned for service or when people showed up in court at the "final, venire, stage"). The Court recognized that Duren had not established which policy was producing the disparity. *Duren*, 439 U.S. at 367 (explaining the disparity was due to either "the automatic exemption for women or other statutory exemptions"); *id.* at 369 ("The other possible cause of the disproportionate exclusion of women on Jackson County jury venires is, of course, the automatic exemption for women."). Nonetheless, the Court concluded the underrepresentation of women "was quite obviously due to the system by which juries were selected..." *Id.* at 367.

113. For a detailed description of the stages of jury selection, see NATL. JURY PROJECT LITIGATION CONSULTING, *JURYWORK: SYSTEMATIC TECHNIQUES* (2d ed., West 2011-12).

114. See, e.g., *People v. Ramirez*, 139 P.3d 64, 94 (Cal. 2006); *Azania v. State*, 778 N.E.2d 1253, 1257-59 (Ind. 2002); *People v. Bryant*, No. 241442, 2004 WL 513664, at \*4 (Mich. Ct. App. Mar. 16, 2004); *United States v. Powell*, DAILY WASH. L. RPTR., Oct. 3, 2008, at 2149 (D.C. Sup. Ct. Crim. June 17, 2008); *State v. Long*, 499 A.2d 264, 268 (N.J. Sup. Ct. Law Div. 1985).

115. *State v. Hester*, 324 S.W.3d 1, 44 (Tenn. 2010) ("[T]he increment used to draw names from the driver's license list changes when a new venire is selected. These changes have a significant effect on the drawing of names from the list. ... [A]ssuming [the county's] Hispanic population generally is at the end of the list because Hispanics disproportionately have higher driver's license numbers ... decreasing the increment will have a tendency to increase

the possibility that Hispanics will not be considered for jury service.").

116. See *State v. LaMere*, 2 P.3d 204, 221 (Mont. 2000) (noting that the use of the telephone to summon jurors resulted in an underrepresentative pool when 29% of Native American households in one county have no phone service, while "[i]n stark contrast ... only 5% [of Anglo-American households in the same county] are without phone service"); see also *United States v. Nakai*, 413 F.3d 1019, 1022 (9th Cir. 2005).

117. See, e.g., *People v. Jenkins*, 997 P.2d 1044, 1100 (Cal. 2000); *Spencer v. State*, 545 So. 2d 1352, 1353-54 (Fla. 1989); *Alvarado v. State*, 486 P.2d 891, 895 (Ala. 1971); *People v. Henderson*, 490 N.Y.S.2d 94, 96-97 (Buffalo City Ct. 1985).

118. See, e.g., *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir. 1988) (recognizing that "the use of the voter registration lists [has] been uniformly approved by the court of appeals as the basic source for the jury selection process" and citing cases); but see *United States v. Weaver*, 267 F.3d 231, 244-45 (3d Cir. 2001) ("if the use of voter registration lists over time did have the effect of sizably underrepresenting a particular class or group on the jury venire, then under some circumstances, this would violate the Sixth Amendment"); *Bryant v. Wainwright*, 686 F.2d 1373, 1378 n.4 (11th Cir. 1982) ("[I]f the use of voter registration lists as the origin for jury venires were to result in a sizeable underrepresentation of a particular class or group on the jury venires, then this could constitute a violation of a defendant's 'fair cross-section' rights under the Sixth Amendment."); see also *United States v. Ruiz-Castro*, 92 F.3d 1519, 1527 (10th Cir. 1996) *overruled on other grounds by United States v. Flowers*, 464 F.3d 1127 (10th Cir. 2006); *United States v. Armsbury*, 408 F. Supp. 1130, 1139 (D. Or. 1976). The cases rejecting claims based on the use of voter lists as source lists are often based on the erroneous importation of the discrimination requirement of equal protection claims. See Chernoff, *supra* note 32; Williams, *supra* note 82, at 629.

119. *United States v. McLernon*, 746 F.2d 1098, 1123 (6th Cir. 1984).

120. The cases cited in this article are primarily published opinions, but as many orders granting discovery requests are unpublished, defense attorneys will need to examine unpublished orders in their jurisdiction for the most up to date legal support. Unpublished decisions can be cited for persuasive value, see FED. R. APP. P. 32(1)(a), and current federal practice calls for lawyers to acknowledge and address unpublished as well as published opinions. See, e.g., Patrick J. Schiltz, *The Citation of Unpublished Opinions in the Federal Court of Appeals*, 74 FORDHAM L. REV. 23, 43 (Oct. 2005) ("Lawyers, district court

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judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing so.” (citation, quotation, and modification omitted).

121. *Saitz*, 594 S.W.2d at 608. *See United States v. Savage*, No. 07-550-03, 2013 WL 797417, at \*4 (E.D. Pa. March 5, 2013) (granting access to “[s]preadsheets with statistical breakdowns by race and ethnicity” for jurors on the master wheel, qualified wheel, who were summoned, and who served); *see also United States v. Patel*, No. 11-CR-20468, 2012 WL 1959563, at \*5 (E.D. Mich. May 30, 2012); *McLernon*, 746 F.2d at 1123; *United States v. Holy Land Found. for Relief and Dev.*, 2007 WL 1452489, at \*1-2 (N.D. Tex. May 15, 2007); *United States v. Diaz*, 236 F.R.D. 470, 477 (N.D. Cal. 2006); *United States v. Montini*, 2003 WL 22283892, \* at 1 (E.D. Mich. Sept. 3, 2003); *State v. Matthews*, 724 So. 2d 1140, 1143 (Ala. Crim. App. 1998).

122. *Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1268 (Mass. 2003).

123. *See, e.g., Miller*, 116 F.3d at 658; *United States v. Percival*, 756 F.2d 600, 614 (7th Cir. 1985); *Test*, 550 F.2d at 581; *Savage*, 2013 WL 797417, at \*5; *United States v. Friel*, 2006 WL 2061395, at \*2 (D. Me. July 21, 2006); *Montini*, 2003 WL 22283892, at \*3; *United States v. Jones*, 1998 WL 160857, at \*3 (D. Kan. Feb. 27, 1998); *United States v. Ailsworth*, 1994 WL 539347, at \*24 (D. Kan. 1994); *United States v. Van Pelt*, 1993 WL 23730, at \*9 (D. Kan. Jan. 13, 1993); *United States v. Carlock*, 606 F. Supp. 491, 493 (W.D. La. 1985); *Bailey v.*

*State*, 493 A.2d 396, 400 (Md. App. 1985).

124. *See, e.g., Ramseur v. Beyer*, 983 F.2d 1215, 1230 (3d Cir. 1992); *Commonwealth v. Aponte*, 462 N.E.2d 284, 287 (Mass. 1984); *Ciba-Geigy Corp.*, 573 A.2d at 945.

125. *See, e.g., Test*, 420 U.S. at 29; *Curry*, 993 F.2d at 44; *McLernon*, 746 F.2d at 1123; *Test*, 550 F.2d at 581; *Thomas v. Borg*, 159 F.3d 1147, 1149 (9th Cir. 1998); *Savage*, 2013 WL 797417, at \*5; *Patel*, 2012 WL 1959563, at \*5; *United States v. Rice*, 489 F. Supp. 2d 1312, 1318 (S.D. Ala. 2007); *Diaz*, 236 F.R.D. at 481; *United States v. Gotti*, 2004 WL 2274712, at \*6 (S.D.N.Y. Oct. 7, 2004); *United States v. Causey*, 2004 WL 1243912, at \*13 (S.D. Tex. May 25, 2004); *Jones*, 1998 WL 160857, at \*3; *Ailsworth*, 1994 WL 539347, at \*24; *Van Pelt*, 1993 WL 23730, at \*9; *Carlock*, 606 F. Supp. at 493; *United States v. Fieger*, No. 07-20414, 2008 WL 1902054, at \*7 (E.D. Mich., Apr. 29, 2008).

126. *See, e.g., Savage*, 2013 WL 797417, at \*5; *Test*, 550 F.2d at 581; *Rice*, 489 F. Supp. 2d at 1318; *Diaz*, 236 F.R.D. at 481; *Causey*, 2004 WL 1243912, at \*13; *Jones*, 1998 WL 160857, at \*3; *Ailsworth*, 1994 WL 539347, at \*24; *Van Pelt*, 1993 WL 23730, at \*9; *Carlock*, 606 F. Supp. at 493; *Thomas*, 159 F.3d at 1149.

127. *See, e.g., Rice*, 489 F. Supp. 2d at 1318; *Holy Land*, 2007 WL 1452489, at \*1-2; *United States v. Shapiro*, 994 F. Supp. 146, 147 (E.D.N.Y. 1998).

128. *People v. Taylor*, 191 Misc. 2d 672, 677 (N.Y. Sup. 2002); *see also State v. Russo*, 516 A.2d 1161, 1165 (N.J. Super. L. 1986).

129. *See, e.g., Savage*, 2013 WL 797417, at \*5; *Holy Land*, 2007 WL 1452489, at \*1-2; *Causey*, 2004 WL 1243912, at \*16.

130. *People v. Buford*, 132 Cal. App. 3d 288, 299 (Cal. App. 1. Dist. 1982); *see also United States v. Calabrese*, 942 F.2d 218 (3d Cir. 1991).

131. *See, e.g., Savage*, 2013 WL 797417, at \*5; *Holy Land*, 2007 WL 1452489, at \*1-2; *Diaz*, 236 F.R.D. at 481; *Montini*, 2003 WL 22283892, at \*3; *United States v. Hsia*, 2000 WL 194982, at \*1 (D.D.C. 2000).

132. *See, e.g., United States v. Williams*, 2007 WL 1223449, at \*6 (D. Haw. April 23, 2007); *Holy Land*, 2007 WL 1452489, at \*1; *Carlock*, 606 F. Supp. at 494.

133. *See, e.g. Miller*, 116 F.3d at 658; *United States v. Harvey*, 756 F.2d 636, 643 (8th Cir. 1985); *Mobley*, 379 F.2d at 773; *Thomas*, 159 F.3d at 1149; *United States v. Scrushy*, 2007 WL 1296000, at \*1 n.4 (M.D. Ala. 2007); *United States v. Royal*, 7 F. Supp. 2d 96, 99 (D. Mass. 1998).

134. *Causey*, 2004 WL 1243912, at \*15.

135. *Arriaga*, 781 N.E.2d at 1268.

136. *See Rice*, 489 F. Supp. 2d at 1324.

Courts can require the defendant’s expert to provide an affidavit of confidentiality before accessing confidential juror information. *Savage*, 2013 WL 797417, at \*5. Courts also often circumscribe the use of disclosed information without executing a formal protective order. *See, e.g., Causey*, 2004 WL 1243912, at \*15.

137. *Canal Zone*, 592 F.2d at 889; *see also United States v. McLernon*, 746 F.2d 1098,

1123 (6th Cir. 1984) ("We can certainly envision a situation in which a defendant must be afforded access to the names, addresses, and demographics of those jurors who returned the indictment in order to vindicate the "unqualified" right to inspection and to insure that the jury actually represented a wide spectrum of the community."); *Ciba-Geigy Corp.*, 573 A.2d at 945 (affirming order "which authorizes the mailing of a questionnaire on the court's stationery to each of the 575 members of State Grand Juries 171-195, requesting recipients to identify their race and ethnic background").

138. AO-12 is not listed in the website of the Administrative Office of the Courts. Available at <http://www.uscourts.gov/FormsAndFees/Forms/CourtForms.aspx> (last visited May 22, 2012).

139. 28 U.S.C. § 1863(a) ("Each district court shall submit a report on the jury selection process within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify.") "According to instructions provided by the Administrative Office on the form, the AO-12 form 'is required to be completed upon ... [t]he periodic refilling of the master wheel. ...'" *United States v. Hernandez-Estrada*, No. 10cr0558 BTM, 2011 WL 1119063, at \*11 (S.D. Cal. March 25, 2011) (quoting Form AO-12: Jury Representativeness Statistics, Data Collection Instructions, General). A blank copy of this form can be found in Appendix A of N. Chernoff & J.B. Kadane, *Preempting Jury Challenges: Strategies for Courts and Administrators*, 33 JUST. SYS. J. 47 (2011).

140. *United States v. Fieger*, No. 07-20414, 2008 WL 1902054, at \*7 (E.D. Mich., Apr. 29, 2008) (ordering that "Defendant will be provided the information contemplated under Administrative Order No. 00-AO-060 — juror number, race, and Hispanic ethnicity — for (i) the entire pool of 250 potential jurors to whom summonses were issued in this case), and (ii) the last 15 venires drawn by the Clerk of the Court for the Detroit division"); *Hernandez-Estrada*, 2012 WL 6054775, at \*3 (defendant "had access to all AO-12s dating back to 1999, including the AO-12 for the 2009 wheel, from which his grand and petit juries were selected").

141. See, e.g., *United States v. Hernandez-Estrada*, 704 F.3d 1015, 1022 (9th Cir. 2012) (recognizing that the district "has been derelict in completing the AO-12s on time").

142. See, e.g., *Hernandez-Estrada*, 704 F.3d at 1024 (The "percentages of those in the qualified wheel who did not answer the race and ethnicity questions — 11.56% and 33.81% respectively — are significant."). One reason for the missing data may be the guidance given by the Administrative Office of the U.S. Courts. According to L. Downey, Chief

Deputy Clerk of the U.S. District Court of the Eastern District of Washington, "A missing or incomplete answer to either Question 10a (Race), Question 10b (Ethnicity) or Question 11 (Sex) is not sufficient reason to return the form" and that instead, "if sampled names include some jurors who did not answer the race question, they would be counted in the AO-12 report in the 'Unknown' column." Email correspondence with authors, June 18, 2013. (This guidance was confirmed by telephone with Ed Juel of the Administrative Office of the U.S. Courts.) In this respect, the Administrative Office's guidance is inconsistent with the JSSA, which requires that where "it appears that there is an omission, ambiguity, or error in a form, the clerk or jury commission shall return the form with instructions to the person to make such additions or corrections as may be necessary and to return the form to the clerk or jury commission within 10 days." 28 U.S.C. § 1864(a). The Ninth Circuit has suggested that if the number of unknowns continues to be as significant, it could "affect the legality" of the jury selection system. *Hernandez-Estrada*, 704 F.3d at 1024-25.

143. *Duren*, 439 U.S. at 367.

144. 778 N.E.2d 1253 (Ind. 2002); see also J.B. Kadane, (2002) *Anatomy of a Jury Challenge*, *Chance*, 15, 2:10-13, reprinted in *STATISTICS IN THE LAW*, J.B. Kadane, ed., (2008).

145. 778 N.E.2d at 1255.

146. *Id.*

147. *Id.*

148. *Id.* at 1260.

149. A somewhat similar issue arose in *United States v. Osorio*, 801 F. Supp. 966 (D. Conn. 1992), in which computer errors resulted in the exclusion of all potential jurors from Hartford and New Britain. The two largest cities in the division, they contained 62.93% of the voting age Black population and 68.09% of the voting age Hispanics. See also *United States v. Jackman*, 42 F.3d 1240 (2d Cir. 1995).

150. 778 N.E.2d at 1261. The judge ruled against the recusal motion and the Indiana Supreme Court held the ruling was not clearly erroneous. *Id.*

151. Dr. Joseph Kadane thought this was the stronger ground.

152. *Id.*

153. *Id.* at 1262 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)).

154. 499 A.2d 264 (N.J. Sup. Ct. Law. Div. 1985). This was another case in which Dr. Joseph Kadane, co-author of this article, was hired as an expert statistician.

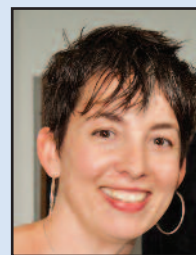
155. *Id.* at 265.

156. For more information, see *PHILADELPHIA FREEDOM* by David Kairys (2008).

157. *Id.* at 271. An interesting procedural issue developed in this case when the trial judge consolidated similar pending motions

from other trials. 499 A.2d at 265. The Appellate Division supported the consolidation, but ruled that prosecutors could oppose jury challenges in other cases on the ground of timeliness. *Id.* When the jury challenge was upheld, the issue arose regarding whether it applied retroactively to all cases, perhaps all capital cases, that had been heard in Atlantic County using what had then been ruled an unlawful jury system. Finding that a retrospective ruling would "create chaos, wreak havoc and cause pandemonium in the criminal justice system," the Superior Court, Law Division (Criminal) decided that the opinion would be applied only prospectively. *Id.* at 273. This experience suggests that when a jury challenge is led in a jurisdiction, it would be wise for all other defendants to make a timely motion, asking for consolidation. Thus, a favorable decision, if one comes, would apply to all such cases. This also puts pressure on the court hearing the evidence to move swiftly, and may increase the chance of a successful challenge. ■

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