Chapter 6
Composition of the Grand Jury and Trial Jury

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6.1 Scope of Chapter

This chapter discusses the mix of constitutional and statutory requirements governing the composition of the jury pool from which grand jurors and trial (petit) jurors are ultimately selected. (Jury selection is addressed in Chapter 7 of this manual.) The fair cross-section requirement—grounded in the Sixth Amendment and article I, sections 24 and 26 of the North Carolina Constitution—requires that juries reflect the demographic composition of the surrounding communities. State and federal constitutional guarantees of equal protection protect against the race-based exclusion of people from jury service and selection as grand jury forepersons. This chapter describes the evidence required to establish those claims, reviews studies analyzing jury composition issues, and discusses the role of expert assistance in analyzing data. The chapter also discusses statutory requirements for the creation of a jury pool. Section 6.7 includes a glossary of terms used in North Carolina jury formation, as well as a flowchart illustrating the stages of the jury formation process.

Whatever the basis of a jury composition challenge, the starting place for exploring the viability of a potential claim is a request for discovery and a factual investigation of the policies, practices, and outcomes of the jury composition process in your county and judicial district. Because of the evidence necessary to litigate and sustain a fair cross-section, equal protection, or statutory challenge in the jury composition context, your factual investigation must begin well before the potential jurors enter the courtroom on your client's trial date. The types of information that you will need to support the claims discussed in this chapter include, among other things, procedures used to assemble the master jury list and to summon jurors; standards used to rule on hardship excusals; and the demographics of previous jury panels in your county. *See infra* § 6.5B, Mechanics of Challenging Jury Formation.

6.2 Overview

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room

> qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. Kiff, 407 U.S. 493, 503–04 (1972).

Although the right to be judged by a fair and impartial jury of one's peers is a bedrock principle of the American criminal justice system, jury pools from which jurors are selected do not necessarily reflect the racial and ethnic composition of the communities from which they are drawn. Courts "throughout the country have found minority underrepresentation in jury composition, most notably in the makeup of the jury pool from which the jury ultimately is selected." *See* NEBRASKA MINORITY AND JUSTICE TASK FORCE, FINAL REPORT 17 (2003) (noting that "many researchers have found that this is 'the rule' rather than the exception"); FLORIDA SUPREME COURT RACIAL & ETHNIC BIAS COMM'N, "WHERE THE INJURED FLY FOR JUSTICE": REFORMING PRACTICES WHICH IMPEDE THE DISPENSATION OF JUSTICE TO MINORITIES IN FLORIDA 13 (Deborah Hardin Wagner ed., 1991) ("The present system of selecting jurors . . . does not result in juries which are racial and ethnic composites of the community."); *see also* MINNESOTA SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYSTEM, FINAL REPORT 32 (1993) ("[J]ury pools rarely, if ever, are representative of the racial composition of our communities.").

A. Benefits of Representative Juries

Legitimacy of the criminal justice system. The right to trial by jury is protected by both the federal and North Carolina constitutions, and North Carolina citizens have a corresponding right to serve as jurors. Criminal defendants and potential jurors share an interest in a non-discriminatory jury formation process; the courts have therefore held that it is "necessary and appropriate for the defendant to raise the rights of the juror[s]" prevented from participating in jury service on account of their race. *Powers v. Ohio*, 499 U.S. 400, 414 (1991).

Juries play an important role in upholding democratic values by vesting decision-making authority in ordinary citizens. *See id*. at 406 ("The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system."); *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922) ("The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."). Reliance on juries "validates the justice system through community participation, provides a check against governmental abuses of power, educates citizens and promotes civic engagement, and promotes integration and mutual understanding across social groups." *State v. Saintcalle*, 309 P.3d 326, 368 (Wash. 2013) (Gonzalez, J., concurring). Exclusion or underrepresentation of racial

minorities on juries undermines these democratizing effects. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 38 (2010).

Juries and jury pools that underrepresent racial minorities also may create a perception of unfairness, a problem that is distinct from the actual fairness of decisions rendered by such juries. *Id.* (noting that "[c]ommunities of color across the country have rejected and continue to reject criminal verdicts handed down by all- or predominantly-white juries"). Juries are often faced with difficult, complicated questions, and the right answers may not always be popular. In such cases, the absence of diversity may make a questionable jury verdict difficult to accept. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1048 (2003) (observers may be less likely to conclude that a trial is fair when an all-White jury finds a defendant guilty).

Jury deliberations. The racial composition of juries may affect jury deliberations. Some studies have concluded that racial diversity improves the deliberative processes of the jury. *See, e.g.*, NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 74 (2007) (concluding that research on heterogeneous decision-making groups supports claim that diversity on juries improves fact-finding); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285–95 (2000) (considering the influence of race on jury deliberations and observing that jurors of color may be more likely to raise the subject of race, thereby broadening the jury's discussion of relevant issues). In one study, researchers observed that mock juries that were racially diverse deliberated longer, considered a wider range of information, perceived evidence more accurately, were more likely to correct factual errors, and perceived themselves as more legitimate than all-White, homogeneous mock juror groups. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition in Jury Deliberation*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006). Researchers conducting the study concluded that "diverse groups were also more open-minded in that they were less resistant to discussions of controversial race-related topics." *Id.* at 608.

Some researchers have found that the risk of racial bias is higher when issues of race are not "salient"—in other words, when they are present but not discussed. *See supra* § 1.3, Potential Factors Relevant to Racial Disparities in the Criminal Justice System; *see also* Sammuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2001). Diverse juries may be more likely to make the subject of race salient by openly discussing race. One researcher concluded that jurors on racially diverse juries are more likely to acknowledge the influence of race on their own perceptions and the perceptions of other jurors. William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1532 (2004). Another study suggests that diverse juries may be more likely to discuss sensitive issues of race, including racial profiling. Samuel R. Sommers, *Determinants and Consequences of Jury Racial*

Diversity: Empirical Findings, Implications and Directions for Future Research, 2 SOC. ISSUES & POL'Y REV. 65, 86 (2008); *see also* Ellen S. Cohn et al., *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCHOL. 1953 (2009).

Case outcomes. Some researchers have concluded that the racial composition of jury pools may influence case outcomes. For example, one recent study conducted by Duke University researchers found that when there are no potential Black jurors in the pool, Black defendants are more likely than Whites to be convicted of at least one crime (81% chance for Black defendants versus 66% chance for White defendants). *See* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. ECON. 1017, 1021, 1032 (2012) (concluding that "defendants of each race do relatively better when the jury pool contains more members of their own race"). The authors found this effect regardless of whether potential Black jurors are actually seated on a trial jury. This study found, for example, that juries formed from all-White jury pools convict Black defendants of drug crimes at a 25% higher rate than they convict White defendants. *Id*. at 1038. When at least one Black potential juror is added to the pool, conviction rates of White defendants rise and Black defendants fall. *Id.*

Other studies have concluded that the race of seated jurors influences case outcomes. *See, e.g.*, Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 82–99 (1993); Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 633 (2005) (finding small but statistically significant influence of juror race on verdicts).

Sentencing. The racial composition of the seated jury also may make a difference in jury sentencing. In one study, researchers found that the racial composition of the jury affected sentencing in non-capital felony cases. *See* Howard C. Daudistel et al., *Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases*, 29 J. APPLIED SOC. PSYCHOL., 317 (1999). The study found that the higher the composition of Latinos in the jury, the longer the sentences received by white defendants. *Id.* Although North Carolina jurors in non-capital cases play a limited role in sentencing determinations, they make certain consequential determinations, such as assessing disputed aggravating factors and determining habitual felon status. G.S. 15A-1340.16(a3); G.S. 14-7.5.

B. Possible Causes of Unrepresentative Jury Pools

Underrepresentation on jury pools may result from a variety of practices and methods used to identify, qualify, and excuse potential jurors. Section 6.5 of this chapter explains in greater detail the methods used to form juries in North Carolina, along with strategies for addressing racial disparities that may arise at various stages of the jury formation process. Some examples of jury composition methods that may result in underrepresentation include:

- Exclusive reliance on voter registration lists. Voter registration lists are the most common source of juror names, and these lists tend to underrepresent Black and Latino citizens who are eligible to serve as jurors. *See* Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993); *see also United States v. Weaver*, 267 F.3d 231, 244–45 (3d Cir. 2001) ("[I]f 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 could [violate the Sixth Amendment]." (quotation omitted)).
- Reliance on a limited number of source lists that do not reflect the diversity of the jury-eligible community. *See* Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 779–82 (2011). Even in jurisdictions where voter lists are supplemented with driver lists, as is the case in North Carolina, some studies have shown that exclusive reliance on these two lists underrepresents racial minorities. *See* ELIZABETH M. NEELEY, NEBRASKA MINORITY JUSTICE COMMITTEE, REPRESENTATIVE JURIES: EXAMINING THE INITIAL AND ELIGIBLE POOLS OF JURORS (2008).
- Insufficient renewal of master jury lists. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 782–83 (2011). When lists are "not updated frequently . . . people who move often, such as renters, are often omitted." Samuel R. Sommers, *On the Obstacles to Jury Diversity*, THE JURY EXPERT (American Society of Trial Consultants), Jan. 2009, at 1 (last visited Aug. 28, 2014).
- Jury composition methods that rely on the return of jury questionnaires and do not provide for subsequent steps to follow up on undelivered jury summonses. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 783–85 (2011). "[U]ndeliverable, disqualification, excusal and failure-to-appear rates tend to disproportionately decrease minority representation due to socio-economic factors such as mobility rates, criminal records, and financial hardship for lower-income individuals." National Center for State Courts, *Jury Managers Toolbox: A Primer on Fair Cross Section Jurisprudence*, NCSC CENTER FOR JURY STUDIES (2010); *see also* NEW YORK STATE UNIFIED COURT SYSTEM OFFICE OF COURT RESEARCH, JURY REPRESENTATIVENESS: A DEMOGRAPHIC STUDY OF JUROR QUALIFICATION AND SUMMONING IN MONROE COUNTY, NEW YORK (2011) (finding higher undeliverable rates, rates of non-response to qualification questionnaires, and excusals for service among Black people in Monroe County, New York).
- Glitches in automated jury composition systems. In some cases, computing errors have resulted in the unintended underrepresentation of racial minorities. For example, during a routine upgrade to the computerized voter system in Kent County, Michigan, the software was accidentally programmed to choose names from the first 125,000 names entered on the master jury list instead of from the entire list of 500,000 names. Since the list was sorted alphabetically by zip code and the greatest proportion of

Black people in Kent County lived in sequentially higher zip codes, the error suppressed Black representation on Kent County jury panels. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 770 (2011)

- Qualification methods that erroneously exclude racial minorities from jury service. For example, in North Carolina, persons convicted of a felony are eligible to serve as jurors once their citizenship rights have been restored. G.S. 9-3. However, unless this point is explained clearly in the juror summons, potential jurors may erroneously conclude that they are permanently disqualified as a result of a felony conviction.
- Jury composition systems that permanently remove names upon disqualification where the disqualification should have been categorized as temporary. For example, if a juror is disqualified because he or she does not speak English, is not a citizen, or has a felony conviction, his or her disqualification is temporary, and procedures should ensure that the juror's name is not permanently excluded from future juror lists. *See* NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 10 (5th ed. 2013) (instructing that "if any persons were disqualified for reasons that are not permanent, then the commission must be sure that the reason for the disqualification remains if they are to be removed," and that "the jury commission should review the computer's list of persons previously found to be ineligible to be jurors regardless of the reason before any . . . names are deleted from the new jury list").
- Jury composition practices that do not address barriers to jury service for low-income individuals. These barriers include lengthy terms of jury service, low compensation, risk of job loss, and hardships related to transportation, homelessness or insecure housing, or childcare costs. Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 785–88 (2011). Such barriers may produce racially disparate rates of hardship excusals, which may be granted before the potential juror enters the courthouse.

6.3 Fair Cross-Section Challenges

The Sixth Amendment guarantees criminal defendants an impartial jury, and "an essential component" of that guarantee is "the selection of a petit [trial] jury from a representative cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). This right also may apply to grand juries. *See infra* "Application to grand jury" in subsection A., below.

Fair cross-section challenges to the composition of the grand and trial jury may be the most promising avenues of relief for defendants challenging racial disparities in jury formation. This is because, in contrast to equal protection claims, defendants raising fair cross-section challenges do not have to prove discrimination. *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 15 ("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."). As one court explained,

> An Equal Protection challenge concerns the *process* of selecting jurors, or the allegation that selection decisions were made with discriminatory intent. The Sixth Amendment, on the other hand, is concerned with *impact*, or the systematic exclusion of a cognizable group regardless of how benevolent the reasons. It looks to discriminatory *effects*, while the Equal Protection clause looks to discriminatory *purposes.* Even practices that are race-neutral but have a disparate impact on the representation of a cognizable class in the jury venire fit within the Sixth Amendment's protections, while they would not be cognizable under the Equal Protection clause.

United States v. Green, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (emphasis in original) (internal citations omitted), *rev'd on other grounds*, 426 F.3d 1 (1st Cir. 2005); *see also United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (observing that the Sixth Amendment is stricter than the Equal Protection Clause because it is unconcerned with motive).

A. Applicability and Standing

Application to trial jury. The Sixth Amendment to the United States Constitution provides that a jury must be drawn from a "representative cross-section" of the community and that no identifiable group may be systematically excluded from jury service. *See Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975). The Supreme Court has explained that "[t]rial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." *Taylor*, 419 U.S. 522, 530–31 (quotation omitted). The North Carolina Supreme Court has held that this right to a jury representing a fair cross section of the community derives not only from the Sixth Amendment to the U.S. Constitution, but also from article I, sections 24 and 26 of the North Carolina Constitution. *See State v. Bowman*, 349 N.C. 459, 467 (1998). North Carolina courts apply the same standards when evaluating claims raised under the state and federal constitutions. *Id.* at 467–68.

Application to grand jury. The United States Supreme Court has not determined whether the Sixth Amendment "fair cross-section" right applies to the selection of grand juries in state court. *See Campbell v. Louisiana*, 523 U.S. 392 (1998) (declining to reach issue). However, a strong argument can be made that where a state chooses to use a grand jury to formally charge defendants, then the grand jury it uses must be fair and representative. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719 (1992) (where a state chooses to rely on jury sentencing, the sentencing jury must be fair and impartial). Courts in some

jurisdictions have held that the Sixth Amendment's fair cross-section requirement applies to grand juries. *See, e.g.*, *Murphy v. Johnson*, 205 F.3d 809, 818 (5th Cir. 2000) (noting court's precedent on the issue); *O'Neal v. Delo*, 44 F.3d 655, 662 (8th Cir.1995); *United States v. Osorio*, 801 F. Supp. 966, 974 (D. Conn. 1992); *State v. Porro*, 385 A.2d 1258, 1260 (N.J. Super. Ct. App. Div. 1978). *But see Henley v. Bell*, 487 F.3d 379, 387 (6th Cir. 2007) (application of Sixth Amendment to grand jury not a "clearly established" right).

Standing. A defendant does not have to be a member of the excluded group to have standing to raise a Sixth Amendment fair cross-section challenge. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (male defendant could challenge systematic exclusion of female jurors); *Holland v. Illinois*, 493 U.S. 474 (1990) (White defendant had standing to challenge exclusion of Black jurors).

B. Overview of the Elements of a Fair Cross-Section Claim

To make out a prima facie fair cross-section challenge, a defendant must show "[1] that the group alleged to be excluded is a 'distinctive' group in the community; [2] that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and [3] that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process." *State v. Williams*, 355 N.C. 501 (2002) (quoting *Duren v. Missouri*, 439 U.S. 357 (1979)). The three prongs of this prima facie showing are discussed in the following sections.

C. Burden Shifting

The burden is on the defendant raising a fair cross-section claim to make out a prima facie case of "an infringement of his constitutional right to a jury drawn from a fair cross section of the community." *Duren*, 439 U.S. 357, 368. If a defendant succeeds in making out a prima facie fair cross-section violation, the burden shifts to the State to prove "that a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." *Id.* at 367–68. On its face, this burden would appear to be difficult for the State to meet. Few cases have addressed it.

D. First Prong of a Fair Cross-Section Claim: Distinctive Group

The first prong of the *Duren* test is satisfied if the defendant alleges that Black jurors, Latino jurors, or female jurors are underrepresented in the jury formation process. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *see State v. Golphin*, 352 N.C. 364, 393 (2000) (noting that "[t]here is no question . . . that defendants satisfied the first prong . . . because African-Americans are unquestionably a 'distinct' group for purposes of [this] analysis"); *see also* Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 763 (2011) ("It is fairly well-settled that the first

prong of *Duren* refers to gender, race, and ethnicity, or in rare circumstances, religious affiliation and national origin." (footnotes omitted)). The North Carolina Supreme Court has rejected a defendant's claim that young people between the ages of 18 and 29 constitute a distinctive group for purposes of fair cross-section claims. *See State v. Price*, 301 N.C. 437, 446 (1980).

Courts have varied somewhat in their treatment of other groups. *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION , Dec. 2013, at 14, 17 (noting that some courts have recognized Native Americans, Jews, Asians, and gay people as distinctive groups, and collecting cases); *see also Thiel v. Southern Pacific Co.*, 328 U.S. 217, 222 (1946) (treating daily wage earners as a distinctive group). The North Carolina Supreme Court has explained that:

> In determining whether a group is distinctive or cognizable for the purposes of a challenge to a jury selection plan, three factors must be weighed as being pertinent to the decision. First, there must be some quality or attribute in existence which defines or limits the membership of the alleged group; second, there must be a cohesiveness of attitudes, ideas, or experiences which serves to distinguish the purported group from the general social milieu; and third, a community of interest must be present within the alleged group which may not be represented by other segments of the populace.

Price, 301 N.C. 437, 445–46.

E. Second Prong of a Fair Cross-Section Claim: Underrepresentation

Generally. The second prong of a fair cross-section claim requires that a claimant show that a distinctive group is not fairly represented in the pool of individuals from which jurors are selected. "[T]he jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups within the community *and thereby fail to be reasonably representative thereof*." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (emphasis added). In analyzing the second prong of a fair cross-section claim, courts focus on the representativeness of the sources from which grand and trial juries are selected. *See Berghuis v. Smith*, 559 U.S. 314, 319 (2010) (fair cross-section right involves guarantee of a "jury drawn from *sources* reflecting a cross section of the community" (emphasis added)).

While fair cross-section claims often involve challenges to the representativeness of the groups of potential jurors summoned or arriving at the courthouse for jury service, "the right to a jury selected from a fair cross-section of the community . . . extends to all aspects of the jury selection process . . . *up until the point* that an individual petit jury is selected." Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 15; *see, e.g.*, *Duren*, 439 U.S. 357, 367 (violation of fair cross-section guarantee

demonstrated with evidence of "disproportionate and consistent exclusion of women from the [Jackson County] jury wheel and at the venire stage"). In other words, underrepresentation may be shown by demonstrating that the master jury list from which potential jurors' names are selected for summoning purposes underrepresents a distinctive group, that the potential jurors sent into a courtroom for voir dire examination underrepresent a distinctive group, or that any stage between these two steps introduces the underrepresentation of a distinctive group into the jury formation process. Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION , Dec. 2013, at 14, (the number of the distinctive group members in the community can be compared to "the number on the master list of all jurors, or . . . the number who showed up to court for jury service and thereby became members of jury venires, or . . . the number at any other stage of the jury process" before the selection of the jury"); *see also infra* § 6.5, Challenges to North Carolina Procedures for Jury Formation. Determining the representation of the distinctive group in one or more of those stages of the jury pool formation process will require some combination of discovery, factual investigation, and expert analysis. *See infra* "Discovery" and "Type of information to seek in discovery" *in* § 6.5B, Mechanics of Challenging Jury Formation.

North Carolina courts typically evaluate the second prong of a fair-cross section claim by reviewing evidence from the defendant's case. Courts disagree as to whether underrepresentation must occur over a period of time to satisfy the second prong, or whether evidence of underrepresentation from the defendant's individual case is sufficient. *See, e.g.*, *People v. Bryant*, 822 N.W.2d 124, 156 (Mich. 2012) (Marilyn Kelly, J., dissenting) (arguing that majority erred in concluding that *Duren* demands evidence of underrepresentation over time to satisfy second prong of a fair cross-section claim).

North Carolina appellate courts generally have indicated that evidence of underrepresentation from the jury pool or venire in a defendant's individual case may be sufficient to satisfy the second prong of a fair cross-section claim. In North Carolina, the obligation to demonstrate underrepresentation extending beyond the venire in the defendant's individual case appears to be treated as a component of the third, rather than the second, prong of the defendant's prima facie case. For example, in *State v. McNeill*, 326 N.C. 712, 717 (1990), the N.C. Supreme Court reviewed a fair cross-section claim in which the alleged disparity between African Americans in Harnett County and African Americans on the defendant's jury pool was 18%. The State conceded that the disparity in the defendant's jury pool constituted sufficient evidence of underrepresentation to meet the second prong of the *Duren* test. Focusing on the third prong of the *Duren* test, however, the court found that a disparity in the composition of a single jury pool did not establish the systematic exclusion required to satisfy the third prong of the *Duren* test. *Id.* at 718. *See also State v. Blakeney*, 352 N.C. 287, 297 (2000) ("The second prong of the *Duren* test requires us to determine whether the representation of African–Americans in the [defendant's] venire was fair and reasonable."); *State v. Bowman*, 349 N.C. 459, 469 (1998) ("statistics concerning one jury pool, standing alone, are insufficient to meet the *third prong* of *Duren*" (emphasis added)); *State v. Jackson*, 215 N.C. App. 339, 343–44

(2011) (noting that the *Duren* court considered composition of venires over time in analysis of third prong). *See also infra* § 6.3F, Third Prong of a Fair Cross-Section Claim: Systematic Exclusion.

Elsewhere, courts have held that the second prong of the prima facie case will not be satisfied by showing that a distinctive group is underrepresented among the jury venire in the defendant's individual case. As the Sixth Circuit explained, a "petitioner raising [a fair cross-section] 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." *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." *Ambrose*, 684 F.3d 638, 645.

Underrepresentation claims must be supported by evidence. It is not sufficient for the defendant merely to assert that the percentage of the distinctive group is larger in the county than in the jury pool or venire without providing supporting evidence. *See State v. Hardy*, 293 N.C. 105, 114 (1977) (where defendant offered no evidence of the percentage of women in Burke county in support of Equal Protection claim, court could not take judicial notice "of the fact that women make up at least 50% of our population"); *State v. Jackson*, 215 N.C. App. 399, 342 (2011) (evidence that only three out of sixty potential Orange County jurors were African Americans was insufficient alone to support second and third prongs of *Duren* test; defense counsel's statement that the African American population in the county was "certainly greater than . . . five percent" was insufficient where no demographic data was presented to show racial composition of county); *State v. Durant*, 154 N.C. App. 521 (2002) (unpublished) (rejecting claim unsupported by statistical evidence where defendant alleged that eight members of jury pool were African American and Columbus County's population was forty percent African American).

Determining the representation of the distinctive group in the community. To satisfy the second prong, the defendant will need to present evidence comparing the number of distinctive group members in the community and the number of distinctive group members at some stage of the jury formation process. *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 17–18.

The number of distinctive group members in the community usually may be demonstrated with census data reflecting the total population and need not identify the jury-eligible population. *Teague v. Lane*, 489 U.S. 288, 301 n.1 (1989); *Duren*, 439 U.S. 357, 365; *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977) (equal protection case in which the Supreme Court relied on total population figures in reviewing a challenge to grand jury composition); *U.S. v. Rodriguez-Lara*, 421 F.3d 932, 942 (9th Cir. 2005) ("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"), *overruled on other grounds, United States v. Hernandez-Estrada*, 749 F.3d 1154 (9th Cir. 2014); *Azania v. State*, 778

N.E.2d 1253, 1259 (Ind. 2002) (noting that courts generally uphold the use of census figures in challenges to jury procedures). If voting-age population data is available courts may consider it, but courts generally do not require such precision. *See Rodriguez-Lara*, 421 F.3d 932, 942, 943 n.9 (9th Cir. 2005) ("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. Butera*, 420 F.2d 564, 569 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); *U.S. v. Osorio*, 801 F. Supp. 966, 979 (D. Conn. 1992) ("Data as to the population eligible for jury service are rarely available, however, and federal courts typically rely on voting-age population, a figure readily available in census data, as a proxy."). *But see Smith v. State*, 571 S.E.2d 740, 746–47 (Ga. 2002) (general population is not always an adequate proxy for jury eligible population).

When presenting courts with census data, defense attorneys may also consider presenting evidence that the census generally undercounts racial and ethnic minorities. *See State v. Price*, 301 N.C. 437, 444, (1980) (accepting expert demographer's analysis of underrepresention in the Wayne County jury pool, including expert's adjustment of census data "for an undercount of 2 percent for whites and 8 percent for blacks"); *see also* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 17 n.73 (citing *Dep't of Comm. v. U.S. House of Representatives*, 525 U.S. 316 (1999), as an example of the Supreme Court recognizing the failure of the Census Bureau to capture a portion of the population); *United States v. Duran De Amesquita*, 582 F. Supp. 1326, 1330 n.5 (S.D. Fla. 1984) (adjusting population figures based on "generally recognized population undercount").

Defining underrepresentation. There is no set percentage of underrepresentation required to satisfy the second prong of the *Duren* test, nor is there a clear methodology for measuring underrepresentation. *See infra* "Practice note: calculating underrepresentation" in this subsection E (noting that, recently, the U.S. Supreme Court declined to adopt a 10% absolute disparity threshold for calculating underrepresentation in fair cross-section claims; also discussing the difference between the concepts of absolute and comparative disparities). The question of unfair and unreasonable representation is answered on a case-by-case basis. Since, unlike in equal protection claims, the disparity calculation in a fair cross-section claim is "not being used as evidence of discrimination, it does not need to be substantial enough to indicate discrimination—it simply has to fail to be 'fairly representative of the local population otherwise eligible for jury service.'" Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 159 (2012) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975)).

To the extent that courts have focused on a particular disparity threshold in fair cross-section claims, such a focus may have resulted from a blurring of the elements of equal protection and fair cross-section claims. *See id.* at 160 n.90 (arguing that it is not appropriate to apply a 10% absolute disparity threshold developed in equal protection jurisprudence to fair cross-section claims; citing as support *Waller v. Butkovich*, 593 F. Supp. 942, 954 (M.D.N.C. 1984) where the court declined to adopt the 10% rule because "[w]hether a fair cross section exists is entirely different from whether intentional discrimination occurred"); *see also* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 19 (noting that defense attorneys should resist adoption of a 10% absolute disparity threshold because (1) the U.S. Supreme Court declined to adopt it; (2) it would leave groups comprising less than 10% of the community without a remedy for underrepresentation; and (3) it has been mistakenly imported from the equal protection context).

Generally, North Carolina courts considering fair cross-section claims have evaluated evidence of the difference between the distinctive group's representation in the total population and the group's representation in the jury pool (the "absolute disparity"). For example, if Black people comprised 50% of the total population and 30% of the jury pool, the absolute disparity would be 20%. However, North Carolina courts may consider other measurements of underrepresentation in future cases since, in *Berghuis v. Smith*, 559 U.S. 314, 329 (2010), the U.S. Supreme Court stated that there is no perfect test for underrepresentation, and quoted with approval the Michigan Supreme Court's holding that, "[p]rovided . . . the parties proffer sufficient evidence . . . the results of all of the tests [of underrepresentation, including absolute disparity, comparative disparity, and standard deviation,] should be considered." *Id.* (internal quotations omitted). *See also* Paula Hannaford-Agor, *The fair cross section requirement in the wake of Berghuis v. Smith*, THE COURT MANAGER, Summer 2010, at 66, 68 ("Certainly the law has changed [after *Berghuis v. Smith*] for courts located in states . . . that previously adopted absolute disparity as the only valid measure of representational disparity.").

Of the fair cross-section cases that relied on absolute disparity evidence in North Carolina, decisions have found that defendants did not meet the second part of the *Duren* test with absolute disparities of between 6.3% (*State v. Taylor*, 304 N.C. 249 (1981)) and 16.17% (*State v. Bowman*, 349 N.C. 459 (1998)). *See State v. Williams*, 355 N.C. 501 (2002); *State v. Blakeney*, 352 N.C. 287 (2000); *State v. Golphin*, 352 N.C. 364 (2000). In some of the cases in which absolute disparities did not satisfy the *Duren* test, North Carolina appellate courts rejected the fair cross-section claim at least in part because the defendant failed to present evidence of disparities beyond the jury pool in the defendant's own case and therefore failed to satisfy the third prong of the *Duren* test. *See, e.g.*, *Bowman*, 349 N.C. 459, 469 ("[d]efendant's only evidence in the instant case consisted of the statistical makeup of this particular jury venire"; court found that evidence failed to show systemic exclusion under third prong of *Duren* test). If the defendants had presented evidence of such disparities beyond their individual cases, the outcomes may have been different.

Successful fair cross-section challenges include *Duren* in which women made up 54% of the jury-eligible population but accounted for less than 15% of jury venires, and *U.S. v. Osorio*, 801 F. Supp. 966, 979 (D. Conn. 1992), in which the "exclusion of approximately two-thirds of blacks and Hispanics in the Division as a source of names for jury selection," despite the fact that the absolute disparities were only 3.26% and 4.3%, respectively, was sufficient evidence of underrepresentation. In that case, the court found the comparative disparity more significant than the absolute disparity, given the low numbers of Blacks and Latinos in the total population. *See infra* "Practice note: calculating underrepresentation," in this subsection E. Additionally, defendants in two U.S. Supreme Court cases decided before *Duren* succeeded with evidence of a 23% absolute disparity (*see Turner v. Fouche*, 396 U.S. 346 (1970)) and a 15% absolute disparity (*see Jones v. Georgia*, 389 U.S. 24 (1967)). *See also Azania v. State*, 778 N.E.2d 1253 (Ind. 2002) (vacating death sentence on the basis of the defendant's fair cross-section claim where absolute disparity between African American population and presence in jury pools was 4.1%, and comparative disparity was 48.2%). In reviewing fair cross-section cases analyzing the significance of underrepresentation data, the Georgia Supreme Court observed that

> Generally speaking . . . an absolute disparity between the percentage of a group in the population and its percentage in the jury pool of less than 5% is almost always constitutional; an absolute disparity between 5% and 10% is usually constitutional; and an absolute disparity of over 10% is probably unconstitutional.

Smith v. State, 571 S.E.2d 740, 745 (Ga. 2002) (quotation omitted).

Practice note: Calculating underrepresentation. As noted above, North Carolina appellate courts generally have required defendants to substantiate claims of underrepresentation with evidence of absolute disparities. An absolute disparity reflects the difference between the representation of the distinctive group in the total population and the representation of the group in the jury pool. Another way to measure underrepresentation is by calculating the comparative disparity, which measures "the percentage by which the number of distinctive group members in the jury pool falls short of their number in the community." Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 768 (2011). Measuring comparative disparity involves dividing the absolute disparity by the percentage of the distinctive group in the community. "The comparative disparity in *Duren* was 73%, indicating the percentage of women in the jury pool was 73% less than would ordinarily be expected for the female population of Jackson County, Missouri, in 1976." *Id.* (footnote omitted). Two final methods for calculating disparity are standard deviation analysis and probability analysis. *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 18 (explaining these methods).

Some scholars, practitioners, and judges have observed that comparative disparity can be a useful tool for highlighting underrepresentation of groups that comprise a fairly small portion of the community. *See United States v. Rogers*, 73 F.3d 774, 776 (8th Cir. 1996) ("Although utilizing the absolute disparity calculation may seem intuitive, its result understates the systematic representative deficiencies . . . ."); *United States v. Levasseur*, 704 F. Supp. 1158, 1162–63 (D. Mass. 1989) (holding that "only a comparative disparity analysis will afford sufficient protection to defendants' right to be tried by a fair cross-section of the community"); *see also* Brief for Social Scientists, Statisticians, and Law Professors, Jeffrey Fagan, et al., as Amici Curiae Supporting Respondent, *Berghuis v. Smith*, 559 U.S. 314 (2010) (No. 08-1402). For example, since absolute disparities measuring less than 10% generally have not been found sufficient to demonstrate underrepresentation, a distinctive group comprising 9% of the total population probably would not be able to demonstrate underrepresentation using absolute disparity figures, even if the group's representation in the jury pool was 0%. When the U.S. Supreme Court declined to rule on the government's argument for a 10% absolute disparity requirement, the Court observed that acceptance of the argument would result in no remedy for a group's complete exclusion if it comprised less than 10% of the community. *Berghuis v. Smith*, 559 U.S. 314, 330 n.4 (2010). In such cases, a calculation of comparative disparity may highlight the underrepresentation:

> [I]f African-Americans represented 10% of a jury-eligible community, but only 4% of the jury pool, the absolute disparity would be 6% and the comparative disparity would be 60%. . . . Like absolute disparity, few courts have articulated the degree of underrepresentation that reflects a constitutional violation using this measure. Most courts that have discussed this issue cite values of 50% comparative disparity or higher to establish a fair cross section claim."

Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 768–69 (2011). For these reasons, defense attorneys should consider presenting evidence of comparative disparities in fair cross-section cases.

F. Third Prong of a Fair Cross-Section Claim: Systematic Exclusion

To meet the third prong of a fair cross-section claim, defendants must show that the jury formation method produces the systematic exclusion of the distinctive group. Underrepresentation is "systematic" if it was an "inherent" product of the jury selection mechanism that was used or if it resulted from a rule or practice over which the state actor had control. *Duren v. Missouri*, 439 U.S. 357, 366 (1979).

Examples of systematic exclusion. Examples of systematic exclusion have involved automated computer processes that inadvertently generate underrepresentative jury pools, *see, e.g.*, *State v. Long*, 499 A.2d 264 (N.J. Super. Ct. Law. Div. 1985); a summoning process reliant on telephonic communication with potential jurors, *see, e.g.*, *State v. LaMere*, 2 P.3d 204, 221 (Mont. 2000); and initiatives intended to lessen the burden of

jury service by assigning jurors to courthouses close to their homes, *see, e.g.*, *Spencer v. State*, 545 So.2d 1352, 1353–54 (Fla. 1989). For example, in *United States v. Osorio*, 801 F. Supp. 966, 972–73 (D. Conn. 1992), registered voters from the cities of Hartford and New Britain, Connecticut were accidentally left out of a computer-generated master jury list. These two cities included the largest concentration of Black and Latino residents in the state of Connecticut. *See also* Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 769–71 (2011) (listing additional examples of systematic exclusion related to jury formation).

Underrepresentation over time constitutes evidence of systematic exclusion. North Carolina courts generally consider evidence of underrepresentation over time as a component of the third prong of a fair cross-section claim. *Compare supra* "North Carolina courts typically evaluate the second prong of a fair cross-section claim by reviewing evidence from the defendant's case" in § 6.3E, Second Prong of a Fair Cross-Section Claim: Underrepresentation. There is no clear answer as to how extensive the evidence of underrepresentation must be, but the period of review must be long enough to show that the jury selection process produces disparities. North Carolina courts have cited with approval the *Duren* court's consideration of disparities between the representation of women in the community and in the venire that "occurred not just occasionally, but in every weekly venire for a period of nearly a year." *State v. Jackson*, 215 N.C. App. 339, 344 (2011) (quoting *Duren*). The U.S. Supreme Court recently reviewed a case in which the underrepresentation alleged by the defendant was based on the representation of African Americans in the jury pool in the six months leading up to the defendant's trial. *Berghuis v. Smith*, 559 U.S. 314, 323 (2010) (defendant also submitted evidence that the comparative disparity dropped in the 11 months after the policy allegedly responsible for the underrepresentation was modified). Shorter periods may be sufficient if they show a pattern of underrepresentation.

Does persistent underrepresentation alone constitute systematic exclusion? *Duren* suggests that evidence of consistent underrepresentation of a distinctive group may constitute sufficient evidence of systematic exclusion, regardless of whether the defendant can pinpoint the cause of the underrepresentation. *Duren*, 439 U.S. 357, 366 (defendant's demonstration 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 systematic"). In *Duren*, the Court noted that, while the defendant had not proven which of two identified policies was responsible for the underrepresentation of women, the underrepresentation of women "was quite obviously due to the *system* by which juries were selected. . . . Women were therefore systematically underrepresented . . . ." *Duren*, 439 U.S. 357, 367 (emphasis in original); *see* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 163 (2012).

In applying *Duren*, North Carolina courts have suggested that a showing of underrepresentation in jury pools over a sufficient time period would be sufficient to

satisfy the systematic exclusion prong of the defendant's prima facie case. *See, e.g.*, *State v. Bowman*, 349 N.C. 459 (1998) (holding that statistics concerning one jury pool, standing alone, were insufficient to show a systematic exclusion of a distinctive group, and implying that statistics concerning multiple jury pools may be sufficient to show systematic exclusion); *State v. McNeill*, 326 N.C. 712, 718 (1990) (underrepresentation was not systematic for purposes of third prong because the defendant failed to show either a flaw in the system producing the racial disparities "*or that there is a history of relatively few blacks serving on Harnett County juries*" (emphasis added)); *State v. Jackson*, 215 N.C. App. 339, 344 (2011) (rejecting fair cross-section claim based on composition of a single jury panel and noting in *Duren*, the "large discrepancy [between the number of women in the jury venire and the number of women in the community] occurred not just occasionally, but in every weekly venire for a period of nearly a year," and explaining that such evidence "manifestly indicate[d] that the cause of the underrepresentation was systematic" (quoting *Duren*)).

Courts in other jurisdictions have interpreted *Duren* in this manner as well. "Under *Duren*, 'systematic exclusion' can be shown by a large discrepancy repeated over time such that the system must be said to bring about the underrepresentation." *United States v. Weaver*, 267 F.3d 231, 244 (3d Cir. 2001); *see also United States v. Biaggi*, 680 F. Supp. 641, 653 (S.D.N.Y. 1988) ("*Duren* permits the defendant to focus solely on the composition of the venires over time, not on the intent of the registrars, in endeavoring to assemble that proof."), *aff'd in part, rev'd in part on other grounds*, 909 F.2d 662 (2d Cir. 1990). *But cf. United States v. Rioux*, 97 F.3d 648, 658 (2d Cir. 1996) (court observed that it was "unclear whether statistics alone can prove systematic exclusion," but held that defendant had not demonstrated systematic exclusion where the evidence revealed "statistically insignificant" absolute disparities of 1.58% and 2.14%).

The U.S. Supreme Court's opinion in *Berghuis v. Smith* affirmed the *Duren* standard and clarified that, while it is not necessary to identify the degree to which various systematic factors produced the underrepresentation, defendants must show that systematic factors were the cause of the underrepresentation. *Berghuis*, 559 U.S. 314, 332 (2010) ("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." (emphasis in original)). In *Duren*, the Court held that a nearly year-long pattern of underrepresentation of women "manifestly indicate[d] that the cause of the representation was systematic." *Duren*, 439 U.S. 357, 366., The *Berghuis* Court explained that the finding of systematic exclusion in *Duren* was based on the defendant's showing that the underrepresentation was: (1) persistent, occurring in every weekly venire for almost a year; (2) produced at two stages of the jury formation process, each of which exacerbated the underrepresentation; and (3) stark in comparison to federal district court jury pools (women comprised 14.5% of the jury venires in defendant's courthouse vs. 40% of the jury venires in federal district court serving the same area). *Berghuis*, 559 U.S. 314, 328. According to the *Berghuis* court, it was the combined significance of this evidence in *Duren* that demonstrated that the underrepresentation "was quite obviously due to the *system* by which juries were selected," rather than some other reason. *Id.* (quoting *Duren*, 439 U.S. 357, 367)

(emphasis in original). The Court held that the defendant in *Berghuis* failed to satisfy the systematic exclusion prong because he failed to show that the underrepresentation was a result of the juror assignment system complained of, rather than other, non-systemic factors. *Berghuis*, 559 U.S. 314, 330–31. The Court suggested that the defendant may have been able to demonstrate systematic exclusion by comparing the alleged underrepresentation in his circuit to the representation of African Americans in local district court venires or federal district court venires for the same region, or offering evidence that ruled out alternative, non-systematic explanations for the underrepresentation. *Id.* at 331.

Even though *Duren* and *Berghuis* require a showing that the jury formation system caused the underrepresentation, they do not appear to require the defendant to identify the exact stage of the process responsible for the underrepresentation. Thus, in *Duren* itself, cited with approval in *Berghuis*, the defendant did not demonstrate with specificity where in the process the underrepresentation was produced. *See* Nina W. Chernoff and Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 20 n.112 (*Duren* Court recognized that the defendant had merely "narrowed the possibilities down to two stages of the selection process" without proving which of the two was responsible for the underrepresentation).

In order to identify systematic factors affecting one or more stages of the jury formation process, "defense attorneys should request discovery about each stage of the jury selection system, and not just demographic data about the venires." Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 20; *see also infra* "Discovery" and "Type of information to seek in discovery" in § 6.5B, Mechanics of Challenging Jury Formation. Additionally, attorneys may want to gather data from federal courts covering the same area for comparative purposes, as suggested in *Berghuis*, 559 U.S. 314, 331.

Unanswered questions about socioeconomic factors and systemic exclusion following *Berghuis v. Smith*. Courts have reached divergent conclusions about whether underrepresentation caused by socioeconomic factors, such as racially disparate non-response or excusal rates related to poverty and mobility or disparate rates of voter registration, may satisfy the "systematic exclusion" prong of a fair cross-section claim. Most courts that have considered such questions have held that, because these factors are not caused by the court's jury procedures, they cannot. *See, e.g.*, Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 772–77 (2011) (explaining that courts generally rule that underrepresentation due to socioeconomic factors does not constitute systematic exclusion); *United States v. Bates*, 2009 WL 5033928, at *19 (E.D. Mich. Dec. 15, 2009) (unpublished) ("The consensus among courts is that, like nonresponses, [socioeconomic] factors are usually not inherent to the jury-selection plans. Therefore, [even if they] substantially reduce the presence of

minorities in jury pools, this does not amount to systematic exclusion."), *aff'd*, 473 Fed. Appx. 446 (6th Cir. 2012) (unpublished).

However, in *Smith v. Berghuis*, 543 F.3d 326, 341–42 (6th Cir. 2008), *rev'd*, 559 U.S. 314 (2010), where the defendant presented evidence that the underrepresentation of Black jurors was partially caused by a juror excusal policy that routinely granted requests for hardships relating to lost income and difficulties arranging for transportation or childcare, the Sixth Circuit Court of Appeals held that because the "particular jury selection process employed . . . made social or economic factors relevant to whether a[] . . . juror would be excused from service; and because . . . [such] factors disproportionately impact African Americans," the process employed constituted systematic exclusion sufficient to satisfy the third prong of the fair cross-section test. The court explained that "the Sixth Amendment is concerned with social or economic factors when the particular *system* of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service." *Id.* at 341 (emphasis in original). When the U.S. Supreme Court reversed the Sixth Circuit's ruling, holding that the defendant's fair cross-section claim did not constitute a violation of clearly established federal law, the Court declined to decide whether socioeconomic factors could constitute systematic exclusion.

In arguing that underrepresentation produced by socioeconomic factors should be considered systematic exclusion for purposes of fair cross-section claims, the following sources may be of use:

- Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761 (2011);
- *People v. Harris*, 679 P.2d 433, 446 (Cal. 1984) (exclusive reliance on voter registration lists underrepresenting African Americans and Latinos constituted systematic exclusion that was no longer justifiable, given the relative ease of merging different source lists);
- *United States v. Green*, 389 F. Supp. 2d 29, 40, 75–76 (D. Mass. 2005) (court expressed "grave concerns" about data reflecting underrepresentation of black people on death-qualified juries), *overruled*, 426 F.3d 1 (1st Cir. 2005).

Practice note: The North Carolina courts have sometimes conflated the third prong of the fair cross-section test with the third prong of the equal protection test. In *State v. Avery*, 299 N.C. 126 (1980), in analyzing the defendant's equal protection claim, the court relied on the holding in *Washington v. Davis*, 426 U.S. 229 (1976), that "[t]he fact that a particular jury or series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the [Equal Protection] clause." However, in subsequent North Carolina appellate cases, courts have relied on this language when reviewing fair cross-section claims and implied that a showing of intentional discrimination is required to prevail on such a claim. *See, e.g.*, *State v. Golphin*, 353 N.C. 364, 394–95 (2000) (quoting *Avery* and suggesting that fair cross-section claim requires showing of discrimination); *State v. Bowman*, 349 N.C.

459, 469 (1998) (same); *State v. Johnson*, 317 N.C. 343, 381 (1986) (rejecting third prong of the defendant's fair cross-section claim because "[t]here [was] no evidence that . . . the Commission *intended* systematically to exclude blacks from the jury list") (emphasis added). As discussed above, the *Duren* test does not require defendants to demonstrate discrimination. For more information about courts confusing equal protection and fair cross-section standards, see Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141 (2012).

Case study: Litigating fair cross-section claims. Below are the reflections of Russ Hollers, appointed defense counsel from Orange County, on litigating a fair cross-section claim:

The week before my client's armed robbery trial, I checked the list of prospective jurors in the clerk's office to see if I knew anyone. I noticed that many members of the panel had been excused or deferred by the clerk due to their advanced age or prior plans. The list did not contain any demographic information, such as race.

The next week, in came the panel. Based on my visual observation, of the sixty prospective jurors, there were three African American women and zero African American men. It definitely did not look like Orange County.

My client and his fraternal twin, who was also on trial, were African American, and the prosecuting witness was White. Counsel for the co-defendant made an oral motion to strike the panel as not being representative of the county's population. I joined in the motion and said to the judge that the African American proportion of the population of Orange County was greater than 5%, and that the proportion of African American men in our county's population was certainly greater than 0%. I also gave the judge a copy of the clerk's marked-up panel roster to demonstrate that there was no way to tell from the list the race of the excused jurors. The motions were denied. We moved for mistrials based on the flawed panel, but those motions were also denied.

I didn't make a written motion before trial because I wasn't aware of any way to learn the demographics of the panel until I laid eyes on them. I have since learned that it is possible to discover the race of registered voters, so counsel may be able to learn the race of at least some members of the panel in advance by comparing the names on the list in the clerk's office to voter registration data. In smaller counties, counsel might recognize more names on the list.

Also, if I had known the law better, I would have asked for some time to gather demographic information on Orange County's African American population using census data that is easily accessed online, and submitted that as evidence. I also would have sought information from the court on the demographics of the master jury pool and the jury formation process. Although I think the judge could have taken judicial notice that Orange County contained African American men who had driver's licenses and were registered to vote, I would have been in a far stronger position if I had specific data to present.

In making my motion, I was basically reacting to what struck me as a single bad panel. My motion would have been much stronger if I had been able to put on evidence that Orange County panels showed a pattern of minority underrepresentation over time. I could have moved for discovery to try

to learn about the racial makeup of past panels, but I don't think there has been a culture of attorneys asking for that information to be made part of the record, so the State may not have been able to provide it. With a little foresight that this issue may crop up, defense attorneys can request that judges have all panel members report their race in every case, and that would generate some data that everyone practicing in the area could use to support fair cross-section motions going forward. I may have been able to learn about how my particular panel ended up looking so White by asking for things through discovery like the master list, a list of every person who was taken off the list and the reason why, and information about the summonses that went out. Even if statutes on jury pool formation have been followed to the letter, I could still prevail on constitutional grounds by showing that, over time, the procedures have nevertheless resulted in pools that don't look like Orange County.

6.4 Equal Protection Challenges

A. Overview

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees a defendant the right to have the charges against him considered by a jury selected free of race-based inclusions or exclusions. *See Cassel v. Texas*, 339 U.S. 282, 286 (1950) (Constitution requires a "fair jury selected without regard to race"). The Supreme Court has held that for both grand and trial juries, "[a] person's race 'simply is unrelated to his fitness as a juror.'" *See Batson v. Kentucky*, 476 U.S. 79, 84 n.3, 87 (1986) (citation omitted). Equal protection challenges based on the Fourteenth Amendment may be raised in response to discrimination in the composition of the grand jury, trial jury pool, and selection of the grand jury foreperson (as well as in the selection of the jury, discussed in Chapter 7). Generally, the standard for demonstrating an equal protection violation in the jury formation context is more demanding than the standard applicable to fair cross-section claims, because defendants must show both intentional discrimination and substantial underrepresentation as opposed to showing "underrepresentation" in fair cross-section cases. *Compare Castaneda v. Partida*, 430 U.S. 482 (1977), *with Duren v. Missouri*, 439 U.S. 357 (1979). However, in light of North Carolina's adoption of and emphasis on constitutional protection against race-based exclusions from jury service, defendants' equal protection rights in this context should not be ignored.

Article I, sections 19 and 26 of the North Carolina Constitution prohibit jury procedures that deny equal protection, discriminate, or exclude people from jury service on account of race, sex, color, religion, or national origin. The North Carolina Supreme Court has long held that racial discrimination in the grand jury, grand jury foreperson, and trial jury selection processes "violates not only the federal constitution, but the equal protection guarantees of our state constitution as well." *State v. Cofield*, 320 N.C. 297 (1987) (citing *State v. Covington*, 258 N.C. 495 (1963)); *State v. Perry*, 248 N.C. 334 (1958). The importance of this right was emphasized in 1970, when North Carolina voters amended the North Carolina Constitution to provide that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin." Our Supreme Court

underscored the significance of the vote to add article I, section 26 to our State's constitution:

> The people of North Carolina have declared in this provision that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction.

Cofield, 320 N.C. 297, 302. In adopting N.C. Constitution article I, section 26, "[t]he people of North Carolina . . . guaranteed *unto themselves* a judicial system free of both the appearance and reality of racism." *Id*. at 311 (Mitchell, J., concurring) (emphasis in original).

B. Standing

The defendant does not have to be a member of the distinctive group that is discriminated against to raise an equal protection claim. The U.S. Supreme Court has permitted non-members of the excluded group to raise equal protection challenges to race-based peremptory strikes. *See Powers v. Ohio*, 499 U.S. 400 (1991). Likewise, the U.S. Supreme Court has held that a non-member of the group has standing to challenge the composition of the grand jury on equal protection grounds. *See Campbell v. Louisiana*, 523 U.S. 392 (1998). The Court explained that, regardless of his or her race, the accused suffers when the composition of the grand jury is tainted by racial discrimination, as such exclusion "strikes at the fundamental values of [the] judicial system." *Id.* at 398 (quotation omitted).

C. Required Showing

The Supreme Court set out the showing necessary to sustain an equal protection challenge to the composition of the jury in *Castaneda v. Partida*, 430 U.S. 482 (1977). To establish a prima facie equal protection violation, the defendant must first show that a recognizable, distinct class or group has been discriminated against and singled out for different treatment under the laws as written or applied. The defendant must then show that the procedures employed for the selection of jurors has resulted in substantial underrepresentation of the race or identifiable group for a significant period of time. Last, the defendant must show that the selection procedure is susceptible of abuse or is not racially neutral. *Id.* Once the defendant has established a prima facie case, the burden shifts to the State to rebut the prima facie case by showing a race-neutral reason for the disparity. *Id.* The North Carolina Supreme Court has held that the guarantee of equal protection in the Fourteenth Amendment is "coextensive with" the equal protection guarantee in article I, sections 19 and 26 of the North Carolina Constitution. *State v. Cofield*, 320 N.C. 297, 308 (1987). In other words, state and federal equal protection claims require the same showing.

D. First Prong of an Equal Protection Claim: Recognizable and Distinct Group

To satisfy the first prong of the *Castaneda* equal protection test, the defendant must show that the jury exclusion operates on a "recognizable, distinct class or group which has been purposely discriminated against and singled out for different treatment under the laws, as written or as applied." *State v. Hough*, 299 N.C. 245, 250 (1980) (citing *Castaneda*, 430 U.S. 482). African Americans and Latinos have been considered recognizable groups for purposes of equal protection challenges to jury formation. *See Washington v. Davis*, 426 U.S. 229, 241 (1976); *Hernandez v. Texas*, 347 U.S. 475 (1954); *State v. Hough*, 299 N.C. 245 (1980).

E. Second Prong of an Equal Protection Claim: Substantial Underrepresentation

To satisfy the second prong of the *Castaneda* test, the defendant must demonstrate that the procedures employed for the selection of jurors resulted in a substantial underrepresentation of the identifiable group over a significant period of time. *See State v. Hardy*, 293 N.C. 105 (1977). The substantial underrepresentation must be proven by comparing the proportion of the group in the total population to the proportion of the group at some stage of the jury formation process over a significant period of time. *Id.* In *Castaneda v. Partida*, 430 U.S. 482 (1977), evidence reflecting eleven years of jury pools was sufficient, and in *Cofield*, 320 N.C. 297, 309 (1987), data from an 18-year period constituted evidence over a significant period of time. However, it is not necessary to present evidence of substantial underrepresentation over several years to establish the second prong of the *Castaneda* test. In *Alexander v. Louisiana*, 405 U.S. 625, 629–32 (1972), evidence that pertained only to the grand jury formation process in the defendant's individual case constituted sufficient evidence to make out a prima facie equal protection claim.

When evaluating claims of underrepresentation, North Carolina appellate courts have examined absolute disparity figures, which have been considered on a case-by-case basis. This means that the courts have compared the percentage of the group in the jury pool to the percentage of eligible members of the group in the county. *See State v. Hough*, 299 N.C. 245, 252 (1980). For example, if African Americans comprise 40% of the population but only 10% of the jury pool, the absolute disparity would be 30%. For a further discussion of various measures of disparities, see *supra* "Practice note: calculating underrepresentation" in § 6.3E, Second Prong of a Fair Cross-Section Claim: Underrepresentation. North Carolina courts have not found violations with absolute disparities of:

- 9.6 percent, *see State v. Avery*, 315 N.C. 1 (1985)
- 6.4 percent, *see State v. Hough*, 299 N.C. 245 (1980)
- 9 percent, *see State v. Avery*, 299 N.C. 126 (1980)
- 11 percent, *see State v. Brower*, 289 N.C. 644 (1976)
- 10 percent, *see State v. Cornell*, 281 N.C. 20 (1972)

Equal protection claims of exclusion from jury service generally will not succeed where the defendant does not present statistical analysis in support of his or her claim of underrepresentation. *See State v. King*, 299 N.C. 707, 710 (1980) (holding there was "no constitutional violation since defendant has not shown any significant underrepresentation of his race on the jury list or jury venire from which to infer there was intentional discrimination"); *State v. Hardy*, 293 N.C. 105, 114 (1977) (claim defeated where defendants presented evidence that 22% of grand jurors were women, but failed to present evidence substantiating the percentage of women in the total county population, and therefore "failed to show any under-representation of women on grand juries in Burke County"). Cases in which defendants have demonstrated substantial underrepresentation and achieved success on the merits of equal protection challenges to jury composition include:

- *State v. Cofield*, 320 N.C. 297 (1987) (defendants made out a prima facie case of discrimination where the evidence showed that, while 61% of the county's population was Black, only one of 33 grand jury forepersons appointed over an 18-year period was Black).
- *Castaneda v. Partida*, 430 U.S. 482 (1977) (40% disparity between Mexican-Americans in the county versus Mexican-Americans summoned for grand jury service over an eleven-year period found constitutionally impermissible).
- *Turner v. Fouche*, 396 U.S. 346 (1970) (23% absolute disparity between total population of Black citizens and number of Black people on a single jury list violated Equal Protection Clause).
- *Whitus v. Georgia*, 385 U.S. 545 (1967) (18% absolute disparity between Black people on the annual tax lists (used as a source of names in jury formation) and Black people on defendant's grand jury and 19.3% absolute disparity between Black people on the annual tax lists and Black people on defendant's trial jury venire held impermissible).
- *Jones v. Georgia*, 389 U.S. 24 (1967) (14.7% absolute disparity between Black people listed on annual tax lists and Black people selected for a jury list used in assembling the grand jury list deemed impermissible).
- *Hernandez v. Texas*, 347 U.S. 475 (1954) (14% absolute disparity between people of Mexican descent in the county and such people on a jury commission, grand jury, or petit jury over a period of 25 years deemed impermissible; no one with a Mexican surname had served on any of these bodies in 25 years).

As in the fair cross-section context, courts have refrained from adopting a bright line rule concerning how great the disparity must be before it violates equal protection. However, absolute disparities over 10%, and especially those over 15%, are generally considered constitutionally significant. The Supreme Court of Louisiana found constitutionally significant disparities with an absolute disparity between 15.5% and 15.9% for African Americans and 25.4% women in grand jury foreperson selection. *See State v. Langley*, 813 So. 2d. 356 (La. 2002). The court held that those absolute disparities were "sufficient statistically to establish the degree of underrepresentation from which the district court could find that the defendant had established a prima facie case of intentional

discrimination." *Id.* at 371. Similarly, the Appellate Court of Illinois held that a 20% disparity in conjunction with discriminatory selection of White jurors was constitutionally significant. *See People v. Hollins*, 852 N.E.2d 414 (Ill. App. Ct. 2006); *see also Stephens v. Cox*, 449 F 2d 657, 659–60 (4th Cir. 1971) (prima facie case shown by 15% disparity); *Rideu v. Whitley*, 237 F.3d 472 (5th Cir. 2000) (prima facie case satisfied with showing of 14.5% disparity). *Cf. Woodfox v. Cain*, 926 F. Supp. 2d 841 (M.D. La. 2013) (22.3% disparity found significant for grand jury forepersons).

The only case in which a North Carolina appellate court found a sufficient absolute disparity to constitute prima facie evidence of an equal protection violation was *State v. Cofield*, 320 N.C. 297 (1987), where there was a nearly 60 percent disparity between the percentage of Black people serving as grand jury forepersons over an 18-year period and the percentage of Black people in the county. In other cases, North Carolina appellate courts have noted that the absolute disparity demonstrated by the defendant did not rise to the level of those found constitutionally significant in other cases. *See, e.g.*, *State v. Avery*, 299 N.C. 126 (1980) (nine percent disparity between Black population in Mecklenburg County and Black people represented on county jury pool insignificant in comparison to cases in which disparities of between 18% and 40% were demonstrated, especially since the evidence did not support a finding that the jury pool composition process was susceptible of abuse).

For information on gathering statistical evidence to support a claim of underrepresentation, see "Expert assistance in substantiating claims of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation. As with fair cross-section claims, courts generally have considered absolute disparities when reviewing equal protection challenges to jury formation, though in many cases, other measurements of disparity may better reflect underrepresentation. *See supra* "Practice note: calculating underrepresentation" in § 6.3E, Second Prong of a Fair Cross-Section Claim: Underrepresentation. As the U.S. Supreme Court recently recognized in the related context of a fair cross-section challenge, no method of measuring disparity is perfect, and defenders should therefore consider calculating disparities according to the methods that best illustrate the underrepresentation at issue. *See id.*

F. Third Prong of an Equal Protection Claim: Procedures that Are not Racially Neutral or Are Susceptible of Abuse

Last, a successful equal protection claim requires evidence that the jury selection procedure is susceptible of abuse or not racially neutral. A presumption of purposeful discrimination arises from "the combined force of the statistical showing and the highly subjective method of selection." *See Castaneda v. Partida*, 430 U.S. 482, 495 n.14 (1977). Such evidence supports an inference of invidious and purposeful discrimination. *Id.* Without this proof, the statistical evidence will not raise an inference of discrimination sufficient to establish a prima facie case. This prong is related to the second prong of the test, since "a borderline disparity figure looks more troubling if the system uses subjective selection policies, and less worrisome if the polices are objective and race-neutral." Nina W. Chernoff, *Wrong About the Right: How Courts Undermine*

the Fair Cross-Section Guarantee by Confusing It with Equal Protection, 64 HASTINGS L.J. 141, 159 (2012); *see also infra* "Gathering evidence of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation.

G. Burden Shifting

Once the defendant has made out a prima facie equal protection claim, the burden of proof shifts to the State to "dispel the inference of intentional discrimination." *Castaneda v. Partida*, 430 U.S. 482, 497–98 (1977). *See also Alexander v. Louisiana*, 405 U.S. 625, 631–32 (1972) ("Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.").

H. Raising Due Process Claims Alongside Equal Protection Claims

Before the adoption of article I, sec. 24 and 26 of the North Carolina Constitution and the development of fair cross-section jurisprudence, some challenges to the exclusion of racial minorities from jury service were raised and analyzed as due process violations under the law of the land clause now found in art. 1, sec. 19 of the state constitution. In *State v. Lowry*, 263 N.C. 536, 545–46 (1965), the North Carolina Supreme Court declared that "[t]his Court has held in a long and unbroken line of cases beginning with *State v. Peoples*, 131 N.C. 784, 42 S.E. 814 (1902), that arbitrary exclusion of citizens from service on grand juries on account of race is a denial of due process to members of the excluded race charged with indictable offenses." *See also State v. Yoes*, 271 N.C. 616 (1967); *State v. Covington*, 258 N.C. 501, 504 (1963). For example, in *State v. Speller*, 229 N.C. 67 (1948), the North Carolina Supreme Court relied on the right to due process in rejecting the practice in Union County by which "the names of Negroes in the jury box were printed in red, while those of whites were printed in black. When the name of a Negro was drawn from the box it was discarded and the juror was not summoned. This Court ruled that these practices are discriminatory and arbitrary, and declared . . . that the law knows no distinction among those whose names are rightly in the jury box, and none should be recognized by the administrative officials." *State v. Lowry*, 263 N.C. 536, 545–46 (1965) (quotation omitted).

In recent years, North Carolina appellate courts have confined their consideration of constitutional challenges to jury composition to fair cross-section and equal protection claims. Thus, there is no recent North Carolina case discussing the elements necessary to make out a due process challenge to exclusion of racial minorities from the jury system. However, given the historical reliance on the due process right when considering cases of racial discrimination in jury composition, defenders should consider raising due process claims alongside equal protection claims if the evidence suggests that racial discrimination may have played a role in the jury formation process.

6.5 Challenges to North Carolina Procedures for Jury Formation

A. North Carolina Procedures for Jury Formation

G.S. 9-1 through 9-7 describe the statutory requirements for compiling the lists of people for jury service. The provisions are as follows:

- G.S. 9-1 details the composition and funding mechanisms of the jury commission.
- G.S. 9-2 sets out the requirements for the preparation of the master jury list. It describes the timing of preparation; the acceptable sources from which the lists may be drawn, including the mandatory use of driver and voter lists; the mandatory size of the jury list; the random method that must be used to select jury panels; and the mandate that the procedures for preparing the master list be in writing and available for public inspection with the clerk of the court.
- G.S. 9-3 outlines the qualifications of prospective jurors. It provides that citizens of the state and residents of the county are qualified to serve as jurors if they have not served as jurors during the preceding two years, are over the age of 18, are physically and mentally competent, can understand the English language, and if they have been convicted of a felony, have had their citizenship rights restored.
- G.S. 9-4 describes how and where the jury list should be kept. It requires that the public be able to examine the alphabetized list of names of each juror, but provides that juror addresses are confidential and may not be discovered without an order of the court.
- G.S. 9-5 describes the procedure for drawing panels of jurors from the master jury list.
- G.S. 9-6 sets forth the reasons why a juror may be excused from jury duty. It mandates that chief district court judges publish procedures by which they or the court administrator will entertain and rule on applications to be excused from jury service. This section does not affect the discretionary authority judges have to excuse jurors at the beginning or during a session of court.
- G.S. 9-7 requires that the names of people summoned and their dates of service be noted on the master jury list and sets out a two-year period where those individuals cannot be called again for jury service. It also allows the clerk of court to assign duties to the court administrator.

See NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 13 (5th ed. 2013).

In a case decided before the U.S. Supreme Court clarified the standards applicable to jury formation equal protection challenges in *Castaneda v. Partida*, 430 U.S. 482 (1977), the North Carolina Supreme Court held that North Carolina's statutory procedure for selecting and drawing jurors for service is non-discriminatory. *State v. Cornell*, 281 N.C. 20, 37 (1972). The court determined that the jury formation statutes leave little room for exercising discretion, and thus serve as a system of jury selection that is not susceptible to abuse if followed. *Id.*; *see also Folston v. Allsbrook*, 691 F.2d 184, 186 (4th Cir. 1982)

(impartiality of North Carolina jury selection procedures dispelled any inference of discrimination arising from statistical disparity). In *State v. Hardy*, 293 N.C. 105, 116 (1977), the court concluded that, by following the statute and utilizing a race neutral selection procedure for selecting names from the list, the State was not in violation of a defendant's right to equal protection. *See also State v. Blakeney*, 352 N.C. 287 (2000) (observing that G.S. 9-2, which governs the selection of the jury pool, "has been expressly recognized as providing a system for objective selection of veniremen" (quotation omitted)).

These cases do not preclude the possibility that constitutional or statutory violations may occur in North Carolina's jury formation process, however. First, they only address the right to equal protection, not the right to a fair cross section of the community, which does not require a showing of discriminatory intent. *See, e.g.*, *State v. Price*, 301 N.C. 437, 445 (1980) (even if "the procedure followed by the . . . Jury Commission comport[s] with the statutory requirements for constituting a jury pool . . . that observation does not [end the inquiry]"). Second, a statutory or equal protection challenge might lie where the statutory process is not followed. Third, the leading North Carolina cases are over thirty years old, and North Carolina courts may find that the statutory plan should be reconsidered if it is consistently producing disparities. The following section describes violations that may arise at various stages of the jury formation process and how to raise them.

B. Mechanics of Challenging Jury Formation

Time to investigate claims. The North Carolina Supreme Court has held that a defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged exclusion of a racial group from the jury pool. *State v. Spencer*, 276 N.C. 535 (1970). Whether a defendant has been given a reasonable time and opportunity to investigate and produce evidence of racial discrimination in the drawing and selection of jurors depends on the facts of each case. *State v. Perry*, 248 N.C. 334 (1958). In rejecting a claim that a defendant's due process rights were violated when he was denied a continuance to investigate possible underrepresentation in the jury pool, the North Carolina Supreme Court provided the following guidance on what might constitute a reasonable time to investigate such claims:

> It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. The jury list from which petit jurors are selected is prepared biennially, G.S. 9-2, is a public record, G.S. 9-4, and the jury commissioners who possess knowledge of the sources from which the master jury list is compiled are local residents. G.S. 9-1. Persons who wish to be excused from jury duty must apply to the chief district judge, or another district judge designated by him, at a publicly announced time and place.

> 9-6(b). The record here shows that the names of the sixty jurors were publicly known for fifty-five days prior to the time the case was called for trial. This afforded defense counsel reasonable time and opportunity to inquire into the race of each juror, the composition of the jury box, the procedures for drawing the jury, the race and number of jurors not summoned by the sheriff and the reason therefor, the race and number of jurors excused, and the practices and procedures employed by the chief district judge when passing upon excuses. Failure to make such inquiry creates no constitutional right, in the name of Due Process, to additional time for such investigation simply because all jurors who reported for jury duty on the day defendant's case was called for trial were white. An automatic continuance for such inquiries, upon motion lodged for the first time when the case is called for trial, would fatally disrupt every session of court.
>
> Under the facts of this case defendant has not been deprived of a reasonable opportunity to investigate the "possibility" of systematic exclusion of blacks from the petit jury.

State v. Harbison, 293 N.C. 474, 481–82 (1977) (internal citation omitted). In light of this holding as well as the requirements for showing a violation in the jury formation process, defense attorneys should conduct factual investigations and seek discovery, discussed further below, well before their client's case is scheduled for trial.

Discovery. Because of the showing required to establish underrepresentation in the jury formation process, commentators and courts have recognized that a defendant's right to question whether a jury reflects a fair cross section of the community is "meaningless without an entitlement to discovery." *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 16. The same can be said of equal protection guarantees.

Courts interpreting the fair cross-section guarantees of the Sixth Amendment have generally held that there is no threshold showing required to obtain discovery about the jury formation process when preparing a fair cross-section claim. *See, e.g.*, *Mobley v. United States*, 379 F.2d 768, 772 (5th Cir. 1967) (trial court erred by denying defendant's motion for discovery on claim of racial discrimination in formation of grand and petit jury); *State v. Ciba-Geigy Corp.*, 573 A.2d 944, 950 (N.J. Super. Ct. App. Div. 1990) ("It 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."). *But see People v. Jackson*, 920 P.2d 1254, 1268 (Cal. 1996) (defendant entitled to discovery concerning jury formation process "upon 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 Jury Selection and Service Act of 1968 (JSSA), 28 U.S.C. §§ 1861–1878, a federal statute that guarantees grand and trial juries composed of a randomly selected fair cross section of the community, includes a right to discovery. The

U.S. Supreme Court has interpreted the JSSA as providing "essentially an unqualified right to inspect" jury selection materials, and has held that this right is based not only on the statutory language, but also on the law's "overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community,'" a purpose inherent in the Sixth Amendment fair cross-section guarantee as well. *Test v. United States*, 420 U.S. 28, 30 (1975) (quoting 28 U.S.C. § 1861); *see* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 16.

The Missouri Supreme Court, although finding that a fair cross-section claimant's discovery rights were not guaranteed by either the federal JSSA or Missouri state statutes, recognized that a state court defendant's Sixth Amendment fair cross-section right "would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." *State ex rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980) (upholding defendant's request for jury list data on constitutional grounds); *see also Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1268 (Mass. 2003) ("The 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."). *See* Discovery Motion – Fair Cross Section Claim in the Race Materials Bank at www.ncids.org (select "Training and Resources").

Type of information to seek in discovery. Discovery requests should be tied to the specific showing necessary to support the claims you intend to raise. For example, in the case of a fair cross-section claim, a defendant may want to seek:

- demographic information concerning the groups allegedly underrepresented, at each stage of the jury formation process;
- where such information is unavailable or not collected, information from which demographic data can be obtained, such as jury questionnaires and, in some cases, opportunities to send additional questionnaires to past jurors to collect demographic data; *see* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION Dec. 2013, at 14, 20 (noting that "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" and collecting cases in which courts issued such orders);
- master jury lists;
- data reflecting excusals, deferrals, or disqualifications occurring at any stage in the jury formation process;
- data reflecting the process by which jury commissioners determine whether a person's name should be removed from the master jury list because he or she does not speak English, is not a citizen, or is a felon whose rights have not been restored;
- data concerning the summoning process;
- data reflecting the procedures for responding to undeliverable summonses;

- depositions of jury commissioners or others involved in the jury formation process. *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION Dec. 2013, at 14, 20 (noting that courts have ordered "jury system administrators to participate in depositions designed to improve the defendant's understanding of the jury selection system" and collecting cases).

For more information on seeking discovery in fair cross-section cases, see Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION Dec. 2013, at 14, 20.

Gathering evidence of underrepresentation. Defendants cannot wait until the potential jurors enter the courtroom to begin collecting evidence relevant to an underrepresentation claim. A viable fair cross-section claim may exist, for example, where a master jury list has been assembled using a process that systematically underrepresents a distinctive group regardless of whether the particular venire for a given case is representative. Additionally, evidence of a historical pattern of underrepresentation typically must be produced by defendants raising fair cross section claims. Defendants often will not have time to conduct such research immediately before trial, as North Carolina courts have denied continuances for the purposes of investigating claims of underrepresentation where there was a reasonable opportunity to do so before trial. *See, e.g.*, *Harbison*, 293 N.C. 474, 481–82. Thus, in addition to seeking discovery, it is important, alone or in partnership with other defenders, to investigate the racial composition of jury panels in your county over an extended period of time to lay the groundwork for a successful claim. In some cases, counsel may be able to obtain records from the clerk of superior court regarding the demographic information of past jurors and juror panelists. *See, e.g.*, *State v. Cofield*, 320 N.C. 297 (1987) (defendant "introduced a report prepared by Mr. R.J. White, Northampton County's Clerk of Superior Court, listing all who had served as grand jury foreman since 1960 by name, race, and sex"). To prepare for jury selection, attorneys can check the list of jurors on a defendant's jury panel in the clerk's office approximately one week before trial. Attorneys can review that list to ensure that there are no obvious violations of the randomness requirement (e.g., not all people have last names beginning with the same letters), and may try to discover the race of the people listed on the jury panel by searching on the Board of Election's website or on LexisNexis peoplefinder.

Where it appears that either (1) proper jury formation procedures have not been followed, or (2) racial minorities are consistently underrepresented on the jury panels in the county, attorneys should be prepared to document the problems observed and put that documentation in the record. For example, if you rarely observe Black jurors on jury panels in a county with a sizable Black population, you may consider working with an investigator or other defense attorneys to take notes of the number of jurors reporting for service along with their gender, ethnicity, and race (to the extent that such information can be gathered from observation). If the evidence collected through informal observation over a sustained period of time (for example, six months) suggests that a distinctive racial group or groups is not represented fairly in comparison to county census data, this

evidence may provide support for a challenge to the composition of the jury pool. Informal data collection methods may be particularly useful in this context since "[t]ypically only the court and the jury selection system have access to information about . . . preliminary stages of the selection process." *See* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 15. The observed disparities may indicate the need to seek discovery in an individual case and/or constitute evidence supporting a constitutional or statutory challenge. *See supra* § 6.5A, North Carolina Procedures for Jury Formation; *see also infra* § 6.6, Beyond Litigation: Efforts to Ensure Representative Juries (discussing analysis of jury formation in North Carolina judicial district 15B). Trial attorneys should develop a practice of asking the trial court to have panel members state their race on the record to ensure the reliability of the evidence. *See State v. Mitchell*, 321 N.C. 650, 656 (1988) (inappropriate for court reporter to note the race of the jurors based on his or her perception; "if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence"); *see* Motion for Court Reporter to Note Race of All Jurors Examined for Selection in the Race Materials Bank at www.ncids.org (select "Training and Resources").

Expert assistance in substantiating claims of underrepresentation. A statistical showing is generally required to demonstrate underrepresentation. When you believe that data available through discovery or investigation may support a claim of underrepresentation, consider seeking funds to hire an expert in statistics to analyze data relevant to your anticipated claims. An expert qualified to perform such an analysis will usually be a university statistics professor, or a PhD candidate with at least a Master's level knowledge of statistics. *See, e.g.*, Website of Professor Joseph B. Kadane, STAT.CMU.EDU (last visited Sept. 2, 2014) (expert witness in at least two successful fair cross-section cases).

North Carolina courts have granted requests for funds for a statistician to analyze jury data where adequately supported. *Compare State v Moore*, 100 N.C. App. 217 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds*, 329 N.C. 245 (1991), *with State v. Massey*, 316 N.C. 558 (1986) (finding defendant did not make adequate showing to warrant funds for statistician). *See also Isaacs v. State*, 386 S.E.2d 316, 324 (Ga. 1989) ("in an appropriate case, based upon a sufficient showing of need, the denial of funds for expert assistance might violate due process"). For a further discussion of requesting funds for expert assistance, see 1 NORTH CAROLINA DEFENDER MANUAL § 5.3 (Applying for Funding) (2d ed. 2013).

Defense attorneys should work with their experts to identify the information needed to assess whether the underrepresentation occurred by chance. The expert can start by accessing the county's master jury list, which is available to the public in the clerk of superior court's office, along with the procedures used to assemble it. This list does not include the race or ethnic background of potential jurors. For this reason, the expert may have to independently research the race of those listed on the master jury list, for

example, by searching public databases containing voter registration data. North Carolina records the race and ethnicity of all registered voters, and voter registration information is available in electronic databases such as Lexis. *See* G.S. 163-82.4. Additionally, the defendant may file a discovery motion to obtain background information from the clerk of court. *See* "Type of information to seek in discovery," above, in this subsection B.

Once the expert has gathered information about the racial composition of the jury pool, the procedures used to gather jurors, and the racial composition of the county (using census data reflecting the voting age population), the expert should attempt to determine the stages of the jury selection process at which underrepresentation may be occurring. *See supra* "Does persistent underrepresentation alone constitute systematic exclusion?" in § 6.3F, Third Prong of a Fair Cross-Section Claim: Systematic Exclusion (discussing possible requirement to identify systematic cause of underrepresentation).

Timing and procedure for challenges to grand jury. In the grand jury context, challenges to the propriety of a grand jury indictment, based either on discrimination in the selection of grand jurors or discrimination in the selection of the grand jury foreperson, must be made at or before arraignment in the form of a motion to dismiss. *See* G.S. 15A-952(b)(4); G.S. 15A-955; *State v. Cofield*, 320 N.C. 297 (1987); *State v. Miller*, 339 N.C. 663 (1995) (motion challenging selection of grand jury foreperson is waived if not made by arraignment). If the defendant pleads guilty, he waives the right to challenge discrimination in grand jury composition. *State v. Newkirk*, 14 N.C. App. 53 (1972) (objections to composition of grand jury waived if not raised before plea entered); *see also State v. Green*, 329 N.C. 686 (1991) (plea of guilty constitutes waiver of challenge to selection of grand jury foreperson).

The defendant waives arraignment unless he or she files a timely written request for arraignment with the clerk of court. If arraignment is waived, certain pretrial motions, including challenges to grand jury proceedings, must be filed with 21 days of the return of the indictment. *See* G.S. 15A-941(d), 15A-952(c). Where the motion is not filed within the statutory deadlines, courts have discretion to grant relief from waiver. *See* G.S. 15A-952(e). *See State v. Wilson*, 57 N.C. App 444 (1982).

Remedy for constitutional violation in grand jury. "[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review." *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986); *see also State v. Moore*, 329 N.C. 245, 246–48 (1991) (noting that when art. I, sec. 26 is violated, "[t]he integrity of the judicial system is at issue, and a harmless error analysis under these circumstances is inapposite"). The Supreme Court has reasoned that, because discrimination on the basis of race in the selection of grand jurors strikes at the fundamental values of our judicial system and society as a whole, reversal is the only appropriate remedy at the appellate level. *Vasquez*, 474 U.S. 254, 261–62. If the motion to dismiss succeeds at the trial level and the indictment is dismissed, the State is free to reindict. *See State v. Pigott*, 331 N.C. 199 (1992).

Timing and procedure for challenges to jury panel. A challenge to the jury panel (the group of potential jurors from which jurors for a particular trial may be drawn) must be made in accordance with G.S. 15A-1211(c). The challenge must be made on the ground that the panel members were not selected or drawn according to law, and should take the form of a written motion to discharge the trial panel. *Id.* Be sure the record reveals the race of each panel member. *State v. Mitchell*, 321 N.C. 650, 656 (1988) (inappropriate for court reporter to note the race of the jurors based on his or her perception; "if there is any question as to the prospective juror's race, this issue should be resolved by the trial court based upon questioning of the juror or other proper evidence"); *see* Motion for Court Reporter to Note Race of All Jurors Examined for Selection in the Race Materials Bank at www.ncids.org (select "Training and Resources"). If the challenge to the panel is sustained, the judge must discharge the panel. G.S. 15A-1211(c).

The motion to discharge the panel must specify the facts constituting the ground of challenge, and it must be made and decided before any juror is examined. *Id.* Failure to follow these steps may constitute a waiver of the claim. *See State v. Smith*, 359 N.C. 199 (2005) (defendant failed to preserve his challenge to the randomness of the jury where he did not comply with G.S. 15A-1211(c)); *State v. Johnson*, 161 N.C. App. 68, 75 (2003) (although a trial judge's failure to follow a statutory mandate usually preserves an error without an objection, the defendant waived appellate review because he failed to follow the procedures outlined in G.S. 15A-1211(c) for challenging a jury panel). The requirements of G.S. 15A-1211(c) may apply to statutory violations only, but to minimize the risk of waiver, counsel should follow them when raising constitutional challenges as well. *See generally* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 15 ("Constitutional fair cross-section claims, however, are not required to meet the . . . timeliness requirements of state statutes. 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 the state equivalent." (emphasis in original) (footnote omitted)).

Preserving denial of challenges to the trial jury panel. If a challenge to the trial jury panel is denied, the issue must be properly preserved or the appellate court may find waiver. To obtain relief on appeal for some violations, the defendant also may need to show prejudice by exhausting all of his or her peremptory challenges. The cases do not always distinguish clearly between the requirements for preserving error and for showing prejudice.

To preserve a challenge to the jury panel based on the right to a fair and impartial jury under the state and federal constitutions, you must object and state the constitutional basis for the objection. Failure to challenge the jury panel on constitutional grounds at the trial level will waive review of the constitutional issue on appeal. *See State v. Tirado*, 358 N.C. 551, 571 (2004); *State v. Wiley*, 355 N.C. 592, 606 (2005).

To preserve a statutory challenge to a jury panel for appellate review, counsel must follow the mandates of G.S. 15A-1211(c). *See State v. Johnson*, 161 N.C. App. 68

(2003). This statute requires that challenges to the panel:

1. be made on the ground that the jurors were not lawfully selected or drawn;
2. be in writing;
3. specify the facts supporting the ground for the challenge; and
4. be made and decided before the examination of any juror.

G.S. 15A-1211(c).

If you consent to the jury procedures used by the trial judge, appellate review of the issue will be waived. *See, e.g.*, *State v. Meyer*, 353 N.C. 92 (2000) (not only did defendant never object to the jury selection process or follow the statutory procedures for challenging the jury panel, he expressly approved of the reassignment of a prospective juror; court concluded that defendant failed to preserve the issue for appellate review).

Counsel also should be wary of expressing satisfaction with the jury once jury selection has concluded. *See State v. Bell*, 359 N.C. 1 (2004) (denying appellate review where defendant failed to follow the procedures set out in G.S. 15A-1211(c) and noting that defendant answered in the affirmative when asked if he approved of the panel).

For a detailed discussion of how to preserve jury challenges, see "Recommended approach" in 2 NORTH CAROLINA DEFENDER MANUAL § 25.1G (Preserving Denial of Challenges to the Panel) (2d ed. 2012).

C. Statutory Claims

In addition to constitutional challenges, defendants may raise claims that the jury formation process did not comply with North Carolina statutes. G.S. 9-1 through 9-7 describe the statutory requirements for juror selection and outline the procedures for preparing juror lists for grand and trial juries. *See supra* § 6.5A, North Carolina Procedures for Jury Formation. North Carolina appellate courts have held that evidence of a statutory violation alone is not a sufficient basis to sustain a challenge to the jury composition; the defendant must demonstrate "corrupt intent, discrimination, or irregularities which affect the actions of the jurors actually drawn and summoned." *State v. Vaughn*, 296 N.C. 167, 175 (1978) (internal citations omitted). The North Carolina Court of Appeals has suggested that a defendant must also demonstrate that a statutory irregularity affected the defendant. *See State v. Riggs*, 79 N.C. App 398 (1986). Statutory claims should always be raised alongside appropriate constitutional claims.

D. Challenges to Source Lists

Source lists defined. The earliest stage in the jury formation process at which disparities may arise is in the use of source lists. A source list is a list of names that county jury commissions use to compile the master jury list, which is a list compiled each odd-numbered year of all prospective jurors qualified to serve in the two years starting January 1 of the following year. *See* G.S. 9-2(a). (Each county has a jury commission

composed of three members who serve two-year terms; one member is appointed by the board of county commissioners, the second by the senior resident superior court judge, and the third by the clerk of superior court. *See* G.S. 9-1.) Since the source lists "define[] the total population from which prospective jurors may be qualified and summonsed . . . the choice of source lists is an important policy decision for state courts insofar that it establishes the inclusiveness and the initial demographic characteristics of the potential jury pool." GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13 (2007).

Source lists in North Carolina. G.S. 9-2(b) identifies the source lists that may be used to compile a master jury list:

> In preparing the master list, the jury commission shall use the list of registered voters and persons with drivers license records supplied to the county by the Commissioner of Motor Vehicles pursuant to G.S. 20-43.4. The commission may use fewer than all the names from the list if it uses a random method of selection. The commission may use other sources of names deemed by it to be reliable.

North Carolina follows the trend of many other states that have begun mandating the use of drivers' lists as a supplement or replacement for voter registration lists because drivers' lists may be more representative of racial minorities than voter registration lists alone. Empirical research into this presumption has resulted in mixed conclusions. *See, e.g.*, Ronald Randall et al., *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71 (2008) (study of source lists in one Ohio county revealed that moving from voter registration lists to lists of licensed drivers decreased the representativeness of Black jurors but increased the representativeness of Hispanic jurors); GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007).

Most of the constitutional challenges to the source lists used to assemble jury pools in North Carolina were raised before the state legislature mandated the use of driver and voter lists in assembling the master jury list. While there were sound reasons to assume that the use of these two lists would draw from a wider cross-section of the community than the previous methods used to assemble juror lists (including property tax lists and the key-man system where "prominent" community members recommended jurors), there is little data available to verify whether this expectation has been borne out. In Nebraska, where juror names are also drawn from a combination of driver and voter lists, a committee examining the representativeness of the jury composition process concluded in 2008 that racial and ethnic minorities were still significantly underrepresented in the initial and eligible pools of jurors. *See* ELIZABETH M. NEELEY, NEBRASKA MINORITY JUSTICE COMMITTEE, REPRESENTATIVE JURIES: EXAMINING THE INITIAL AND ELIGIBLE POOLS OF JURORS (2008). In response to these disparities, the Committee explored whether additional source lists could improve the racial and ethnic diversity of the jury

lists. Ultimately, the committee recommended, and the State enacted, legislation mandating the addition of names of residents with state issued identification. Elizabeth Neeley, *Addressing Nonsystematic Factors Contributing to the Underrepresentation of Minorities as Jurors*, 47 CT. REV. 96, 98 (2011) (noting that racial minorities "comprise a much greater percentage of state-identification-card holders than of registered drivers"). North Carolina counties do not include "[i]ndividuals with state issued identification cards from the DMV . . . on the jury list unless they were a licensed, cancelled or suspended driver in the previous eight years." NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 5 (5th ed. 2013).

The process of creating the list must be random. The State Board of Elections and the Division of Motor Vehicles create a merged "raw" list of registered voters and licensed drivers, with duplicates removed by the Commissioner of Motor Vehicles, and provide it to the jury commission of each county. *See* G.S. 20-43.4; G.S. 163-82.11. The jury commission may supplement the list using any other reliable source, but this practice happens rarely, if at all. *See* NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 5 (5th ed. 2013) ("In recent practice, no counties have elected to supplement the two required lists."). From this raw list, the jury commission creates the master jury list by removing deceased or disqualified people (*see* 1 NORTH CAROLINA DEFENDER MANUAL § 9.1B (Qualifications of Individual Grand Jurors) (2d ed. 2013)) and then randomly selecting the number of names needed. *See* G.S. 9-2(e). "Random" is defined in G.S. 9-2(h) as a method of selection that results in each name on a list having an equal opportunity to be selected.

Source lists in your county. You can discover the source lists used by the jury commission in your county by reviewing the procedure for preparing the master list. Pursuant to G.S. 9-2(j), the jury commission's procedure must be in writing, adopted by the jury commission, and kept available for public inspection in the office of the clerk of court.

Supplementing driver and voter lists with other sources of reliable names. Although it occurs infrequently, G.S. 9-2 allows the jury commission to use other sources of names that it deems to be reliable. North Carolina is among the minority of states that allows jury commissions to supplement mandated source lists with additional lists. *See* GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13 (2007), ("15 states and the District of Columbia permit local courts to supplement the required lists with additional lists").

If the jury commission is using a list other than the drivers' license or voter registration list, there may be grounds for objection. For example, North Carolina previously utilized tax lists to select jurors, but these lists have fallen out of favor as they may exclude low-income, minority, and female residents from jury service. *See* Kurt M. Sanders, *Balancing the Jury Pool*, 69 PA. B.A. Q. 133, 136 (1998) ("Reliance on . . . tax lists [has]

a disproportionate impact on economically disadvantaged groups who . . . do not pay taxes."). *But see State v. Cornell*, 281 N.C. 20, 31 (1972) (in a case decided before the fair cross-section right was closely considered by the U.S. Supreme Court, court noted that "a jury list is not discriminatory or unlawful because it is drawn from the tax list of the county").

Process for raising challenge to source list. Since the same source lists underlie the formation of the grand jury and the trial jury, unlawful source lists may taint both juries. For this reason, a defendant challenging the source lists relied on by the jury commission should always challenge the composition of both the grand jury and the trial jury.

To challenge the composition of the jury based on the use of improper source lists, a defendant should file written motions to dismiss the grand jury indictment and quash the trial jury panel. *See supra* § 6.5B, Mechanics of Challenging Jury Formation. The motion to dismiss the grand jury's indictment must be made at or before arraignment. *See* G.S. 15A-952(b)(4); G.S. 15A-955. The motion to quash the trial jury panel must be made and decided before any juror is examined. *See* G.S. 15A-1211(c)(4). Both motions should be made in writing, setting forth the facts constituting the grounds of challenge.

Required showing to challenge source list. Generally speaking, a single unrepresentative panel is not sufficient to show a violation of statutory or constitutional rights; however, a flaw in a single source list that produces underrepresentation may support a statutory or constitutional claim. Defendants challenging source lists should present any evidence that:

- the source list procedures laid out in G.S. 9-2(b) were not followed, resulting in either a statutory violation or fair cross-section violation for underrepresentation; or
- the jury commission relied on an unreliable or unrepresentative source of names in addition to the lists of drivers and registered voters mandated by statute (equal protection and/or fair cross-section violation).

If the county jury commission is relying on an additional source list beyond the voter and driver lists, defense attorneys should determine whether that source list is representative of the demographic composition of the community. This may require assistance from an expert in statistics. *See supra* "Expert assistance in substantiating claims of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation.

Defense attorneys should compare the demographic composition of the source list to census data reflecting the population in the county as a whole to determine whether there is underrepresentation. While the jury commission's alphabetized master list is public record (*see* G.S. 9-4), the source lists are not (*see* G.S. 20-43.1; G.S. 20-43.4). However, the source lists may be discoverable by order of the court. *See* G.S. 20-43.1(a) (requiring Division to disclose personal information from motor vehicle records in accordance with 18 U.S.C. § 2721(b)(4)); 18 U.S.C. § 2721(b)(4) (stating that personal information collected by a state Department of Motor Vehicles may be disclosed "in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local

court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court").

Equal protection challenge to source lists. Given our Supreme Court's holding that the statutory procedures governing jury formation are facially non-discriminatory (*see State v. Cornell,* 281 N.C. 20 (1972)), the most viable equal protection claim based on source lists in North Carolina would be one against the use of additional lists. *See also supra* § 6.5A, North Carolina Procedures for Jury Formation (discussing possible limitations of the *Cornell* court's holding). If the jury commission relies on additional source lists, the defendant can argue that the procedure in G.S. 9-2(b) allowing jury commissions to supplement driver and voter lists with additional lists deemed reliable is susceptible to abuse as it allows individual jury commissioners to exercise discretion in determining what additional source lists are reliable or representative. This evidence would support the third prong of the test laid out in *Castaneda v. Partida*, 430 U.S. 482 (1977), a procedure susceptible of abuse. The second prong of the test—underrepresentation of a distinctive group—would have to be shown with statistical evidence.

Source lists of drivers and voters are not public record (*see* G.S. 20-43.4), but if research suggests that the additional source lists are being used and do not fairly represent a distinctive group, the defendant should seek discovery of information about the additional source lists, including names and any demographic information. The defense attorney and the expert retained to challenge the additional source list should compare the rate at which the distinctive group appears in the voting age community from U.S. census data with the rate at which the group appears in the additional source list. Evidence that the distinctive group is underrepresented in the source list, especially where the absolute disparity is over 10%, would support the first two prongs of an equal protection claim. *See supra* § 6.4, Equal Protection Challenges.

Fair cross-section challenge to source lists. To support a fair-cross section challenge to source lists, the defendant must show that the representation of a distinctive group (such as African Americans or Latinos) in the source lists was not fair and reasonable in relation to the number of jury-eligible members of that group in the community. In a challenge to source lists, this can be done by comparing county census data to an analysis of the representation of the distinctive group in the additional challenged source lists.

In addition, the defendant must show that the underrepresentation was due to a systematic exclusion of the group. *See Duren v. Missouri*, 439 U.S. 357 (1979). In a challenge to source lists, systemic exclusion could be demonstrated by showing that the jury commission relied on a source list that itself inherently underrepresents the distinctive group. For example, a jury commission that uses membership lists from groups primarily consisting of a particular race, gender, or economic status would result in a systemic exclusion of other classes of people. *See, e.g.*, *People v. White*, 278 P.2d 9 (Cal. 1954) (holding that the jury commissioner's use of membership lists from clubs such as the Rotary Club, the Lion's Club, and certain women's groups tended to produce venires that were not representative of a cross-section of the community).

Defendants also may challenge source lists for grand juries. *See supra* "Application to grand jury" in § 6.3A, Applicability and Standing (discussing argument for applying fair cross-section guarantee to grand juries).

Defendants alleging that the source lists used to form the grand or trial jury did not reflect a fair cross section of the community should also raise claims based on article I, sections 24 and 26 of the North Carolina Constitution. *See supra* § 6.3A, Applicability and Standing (North Carolina courts use the same standards when reviewing fair cross-section claims raised pursuant to federal and state constitutional guarantees).

E. Challenges to the Master Jury List

After the sources are identified, the jury commission takes the names from the source lists, removes the names of deceased and disqualified people, and randomly selects the number of names needed to form the master jury list from which individual jury panels are drawn for specific trial proceedings. This procedure is governed by G.S. 9-2.

Challenges to master jury list based on North Carolina statutes. At least one court has recognized that "if [the master jury] list is not representative of a cross-section of the community, the process is constitutionally defective *ab initio*." *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). As with other statutorily-based challenges to jury formation procedures, the defendant must demonstrate a statutory violation along with evidence of corrupt intent, systemic discrimination, or irregularities affecting the jurors. *State v. Vaughn*, 296 N.C. 167, 175 (1978) (internal citations omitted); *see also State v. Johnson*, 317 N.C. 343, 379 (1986).

"Irregularities" might result from a failure to use the required random selection method in assembling the master jury list. A random selection method is one "that results in each name on a list having an equal opportunity to be selected." G.S. 9-2(h). When raising a statutory violation, a defendant should raise constitutional claims as well, as the court may view statutory irregularities as circumstantial evidence of discriminatory intent supporting an equal protection claim or systemic exclusion supporting a fair cross-section claim.

Equal protection or fair cross-section challenge to the master jury list. Where disparities in jury panels exist and suggest possible constitutional violations in the construction of the master jury list, the defense attorney should work with an expert to examine the composition of the list. *See supra* "Expert assistance in substantiating claims of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation. The expert can start by accessing the county's master jury list, which is available to the public in the Clerk of Court's office, along with the procedures used to assemble it. However, this list does not include the race or ethnic background of potential jurors. For this reason, the expert will either have to independently research the race of those listed on the master jury list, by searching voter registration data or other public databases, or the defendant will have to file a discovery motion seeking background information sufficient to support the defendant's constitutional claim. *See supra* "Expert assistance in substantiating

claims of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation; *see also* Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, THE CHAMPION, Dec. 2013, at 14, 20. ("[W]hen 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."); Discovery Motion – Fair Cross Section Claim in the Race Materials Bank at www.ncids.org (select "Training and Resources"). The North Carolina Supreme Court has held that, even if juror commissioners can guess the race of potential jurors from their home addresses, that alone is not enough to raise an inference of intentional discrimination. *State v. Cornell*, 281 N.C. 20, 34–35 (1972).

Required showing and procedure. The master jury list is used for both grand and trial juries. For this reason, if there is a flaw in the compilation of the master jury list, the defendant should raise challenges to both the grand and the trial jury. To challenge the use of an improper master jury list, a defendant should file written motions to dismiss the grand jury's indictment and quash the trial jury panel. *See supra* § 6.5B, Mechanics of Challenging Jury Formation. The motion to dismiss the grand jury's indictment must be made at or before arraignment. *See* G.S. 15A-952(b)(4). The motion to quash the trial jury panel should be made before any juror is examined. *See* G.S. 15A-1211(c)(4). Both motions should be made in writing, setting forth the facts constituting the grounds of challenge.

F. Challenges to the Exclusion of Qualified Jurors from the Jury List

A defendant may object to the master jury list if he or she can show that the list excludes qualified jurors who should appear on the list. Under G.S. 9-3, qualified jurors include residents of the county who have not served as a juror during the past two years (six years for grand jury service) and are eighteen or older, mentally and physically competent, citizens of the State, able to understand English, and, if ever convicted of a felony, have had their citizenship rights restored. When a person convicted of a felony completes his or her sentence, including any period of probation or parole or other required actions such as community service or restitution payments, his or her citizenship rights are automatically restored pursuant to statute. *See* G.S. 13-1; G.S. 13-2. However, jury commissioners may face practical challenges in ensuring that felons whose citizenship rights have been restored are not excluded from the master jury list. *See, e.g.*, NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 8 n.11 (5th ed. 2013) (noting that jury commissioners may request a list of convicted felons from the Administrative Office of the Courts, but warning that "extreme caution" should be exercised in using such lists to remove names from the master jury list since neither the clerks nor the Administrative Office of the Courts are notified when a felon's rights are restored).

English language requirement. The requirement that jurors be able to "hear and understand the English language" has been challenged as a violation of article I, section 26 of the North Carolina Constitution, which prohibits exclusion from jury service based on national origin, and as a violation of the equal protection guarantee found in article I,

section 19 of the North Carolina Constitution. *State v. Smith*, 352 N.C. 531 (2000). The North Carolina Supreme Court has rejected this argument, holding that differences in ethnicity or national origin do not preclude English comprehension and concluding that the provision does not violate due process or equal protection guarantees. *Id.* Other courts that have considered this challenge have also rejected it. *See People v. Eubanks*, 266 P.3d 301 (Cal. 2011).

However, jury commissioners must apply the English language requirement properly. If you observe, for example, underrepresentation of native Spanish-speakers on jury panels in your judicial district, check the jury commissioners' procedures to find out how they are determining whether potential jurors listed on the merged lists speak and understand English, and whether potential jurors have been improperly disqualified because they have Hispanic-sounding names. *See* NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT 7–8 (5th ed. 2013) (noting that jury commissioners shall remove non-English speakers from the jury list, but manual does not provide standards by which this determination is to be made).

Administrative practices that may remove qualified jurors from jury lists. Certain methods to remove unqualified or inaccurate names from the master jury list or jury panels could present constitutional concerns. For example, in Santa Barbara County, California, the court routinely removed from the master jury list individuals who had failed to appear for jury service in the past, with the intention of following up with these individuals in the future. When a defendant raised a challenge claiming that Latinos were underrepresented in the jury pool, the court discovered that a disproportionate number of individuals whose names were removed from the master jury list for this reason had Latino last names. National Center for State Courts, *Jury Managers Toolbox: Characteristics of an Effective Master Jury List*, NCSC CENTER FOR JURY STUDIES (2009).

In Wayne County, Michigan, potential jurors who had not responded to a questionnaire were removed from the master jury list indefinitely. As it turned out, the vast majority of those removed from the jury list for this reason were residents of Detroit, a city whose residents are 80% African American. *Id.* at 4–5.

In Washington, D.C., individuals convicted of felonies have the right to serve on a jury ten years after the completion of their sentence. The administrative method used to ensure that these individuals were returned to the juror lists was flawed and kept felons off the jury list longer than the statute allowed, resulting in the improper removal of qualified jurors. *Id*. at 5.

Uncovering evidence of the exclusion of qualified jurors. The examples listed above illustrate the importance of obtaining your county jury commission's procedures for removing unqualified jurors from the master juror list and ensuring that names previously removed from the juror list are not permanently removed. Such policies may then be analyzed for any potentially disparate effect on distinctive groups. For example, how do

jury commissioners determine whether a person should be removed from the master jury list because the person doesn't speak English, is not a citizen, or is a felon whose rights have not been restored? These procedures should be available in the Clerk or Court's office or through discovery.

If, in reviewing the jury commission's procedures, you uncover evidence suggesting that a technique used to remove unqualified jurors from the master jury list results in the underrepresentation of a distinctive group from jury service, you may challenge that technique as a violation of the defendant's fair cross-section and equal protection rights. *See supra* § 6.3, Fair Cross-Section Challenges; § 6.4, Equal Protection Challenges.

G. Challenges to the Selection of the Grand Jury

Raising challenges to the composition of the grand jury presents unique challenges because the grand jury operates in secret and sometimes issues an indictment before counsel is appointed. The information below is designed to help assemble evidence about the selection of the grand jury and determine whether any challenges are warranted.

Discrimination in the selection of the grand jury. To establish a claim of discrimination in violation of the state and federal guarantees of equal protection in the selection of grand jurors, defendants must show that a recognizable, distinct class or group has been discriminated against; that the procedures employed for the selection of jurors has resulted in substantial underrepresentation of the race or identifiable group for a significant period of time; and that the selection procedure is susceptible of abuse or is not racially neutral. *Castaneda v. Partida*, 430 U.S. 482 (1977); *see also State v. Foddrell*, 291 N.C. 546, 554, (1977) ("defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few [Black people] have served on the juries of the county notwithstanding a substantial [Black] population therein, or both"; cited with approval in *State v. Cofield*, 320 N.C. 297 (1987)). The same type of evidence may be used to support a fair cross-section claim based on the selection of grand jurors.

Improper grand jury selection procedures. A defendant is entitled to learn the identity of the grand jurors who issued the indictment. *See generally* G.S. 15A-955 (court may dismiss indictment if it finds there is ground to challenge the array); *State v. Kirkland*, 119 N.C. App. 185 (1995) (defendant moved to compel disclosure of jury records in support of motion to quash indictment on ground that grand jury, grand jury foreman, and petit jury were unlawfully selected on basis of race; trial court did not err in denying defendant's motions where motion to quash was untimely), *aff'd per curiam,* 342 N.C. 891 (1996); *see also* G.S. 132-1 (public records law). A defendant may move to dismiss an indictment if the grand jury as a whole was illegally constituted or individual grand jurors were unqualified. 1 NORTH CAROLINA DEFENDER MANUAL Ch. 9 (Grand Jury Proceedings) (2d ed. 2013).

H. Challenges to the Selection of the Grand Jury Foreperson

The courts may quash an indictment if there was discrimination in the selection of the grand jury foreperson. In North Carolina, the presiding judge selects the grand jury foreperson. G.S. 15A-622(e); *see also State v. Cofield*, 320 N.C. 297, 301 (1987). The North Carolina Supreme Court has stated that racial discrimination in the selection of grand jury foremen violates article I, section 26 of the North Carolina Constitution, irrespective of whether there was discrimination in selection of the grand jury itself. *See State v. Cofield*, 320 N.C. 297, 303 (1987); *see also State v. Miller*, 339 N.C. 663 (1995); *State v. Pigott*, 331 N.C. 199 (1992); *State v. Robinson*, 327 N.C. 346 (1990). Discrimination in the selection of a grand jury foreperson also violates the Equal Protection Clause of the Fourteenth Amendment. *Cofield*, 320 N.C. 297, 306 (identifying and agreeing with federal courts reaching this conclusion). Therefore, if the defendant can make a sufficient showing of racial discrimination in the foreman selection process, the conviction must be overturned. *Id.* at 308.

The defendant is entitled to discover the identities of the members of his or her grand jury, including the identity of the foreperson. *See* G.S. 15A-955, G.S. 132-1; *see also supra* § 6.5G, Challenges to the Selection of the Grand Jury. To make out a prima facie case of an equal protection violation, the defendant must show either that:

- the selection process was not racially neutral, or
- that for a substantial period in the past, relatively few members of the distinctive class have served as forepersons on grand juries, although a substantial number have served on grand juries.

Cofield, 320 N.C. 297, 308; *see also State v. Jefferies*, 333 N.C. 501, 506; *State v. Phillips*, 328 N.C. 1, 11. If this showing is made, the indictment must be dismissed unless the State can rebut the prima facie case by showing that the foreperson in this particular case was chosen in a racially neutral manner. *Cofield*, 320 N.C. 297, 308. *See also Chin v. Runnels*, 343 F. Supp. 2d 891 (N.D. Cal. 2004) (petitioner made out prima facie case of race discrimination in selection of grand jury foreperson based on exclusion of Chinese-Americans from such positions, but state court's finding that the State had rebutted the prima facie case was not an unreasonable application of clearly established federal law).

Racially neutral selection method. To meet the racially neutral standard, the method of selecting a grand jury foreperson must ensure that all grand jurors were considered by the presiding judge and that the selection was made on a racially neutral basis. *See State v. Cofield*, 324 N.C. 452, 461 (1989) (*Cofield II*). The focus is on whether the process used to select the foreperson was influenced by race; neither the race of the foreperson nor the race of the defendant determines the viability of the claim. *See State v. Moore*, 329 N.C. 245, 246–48 (1991) (applying article I, section 26 of the North Carolina Constitution and rejecting the State's argument that a Black defendant had no standing to object to the replacement of a White foreperson with a Black one). Where a district court judge, on the suggestion of the prosecutor, removed a White foreperson and replaced him with a Black foreperson in order to correct for the "historical custom in Rutherford County of failing to

appoint black persons as foremen," the North Carolina Supreme Court found that selecting a particular foreman on the basis of his race was unconstitutional even if intended to remedy past discrimination. *Id*.

What constitutes consideration of race by the judge may sometimes be at issue. For example, former North Carolina Supreme Court Justice Mitchell repeatedly questioned whether the consideration of each member equally is racially neutral, and he suggested a random selection method to eliminate the potential for racial bias. *Cofield*, 324 N.C. 452, 465–66 (Mitchell, J., concurring) (*Cofield II*), *State v. Jefferies*, 333 N.C. 501, 513 (1993) (Mitchell, J., dissenting).

If the defendant makes out a prima facie case that the selection method was not racially neutral, the burden shifts to the State to explain the discrepancy. The court then determines whether the practice was race neutral. For example, the N.C. Supreme Court held that the State had rebutted a prima facie case when the foreperson chosen was the first person to volunteer for the position. *See Jefferies*, 333 N.C. 501.

Evidence of past discrimination. In *State v. Cofield*, 320 N.C. 297 (1987), the defendant made out a prima facie case of racial discrimination with historical evidence showing that the racial composition of the county was approximately 61% Black and 39% White, and that the racial composition of the county's grand juries, on average, reflected the county as a whole. In an 18 year-period, only one Black person had been appointed grand jury foreperson, although 50 appointments had been made and 33 different people had been appointed.

I. Challenges to Jury Panel Selection Procedures

Assembling the Jury Panel. Once the appropriate lists are merged into the master jury list, G.S. 9-5 outlines the process for preparing the list of jurors necessary for the jury panels for a particular session of court. The process requires a clerk to prepare or obtain a computer generated, randomized list of names of individuals who will be prospective grand jurors or petit jurors for a particular session.

Defendants may challenge panel selections that are not conducted randomly. For example, if only jurors with a name starting with the same letter were chosen, this may result in underrepresentation of certain racial groups. Defense counsel should be able to check the list of jurors on a defendant's jury panel in the clerk's office approximately one week before the case goes to trial. While demographic information will not be included on the list, defense counsel can look at voting registration records to determine the race of the potential jurors. *See also supra* "Expert assistance in substantiating claims of underrepresentation" in § 6.5B, Mechanics of Challenging Jury Formation. Additionally, defense attorneys should be alert to lists that do not look random. For example, in a small town, if a large number of the last names on the jury panel begin with the same letter, that may be evidence that the selection was not random.

Attorneys also should be aware of possible glitches in computer-generated lists. Courts in other jurisdictions have overturned convictions based on glitches in computer operated jury systems. For example, problems in the application of a computer system resulted in the exclusion of 4,364 people from jury service and caused the Indiana Supreme Court to reverse a death sentence and mandate a new penalty phase of a murder trial. *See Azania v. State,* 778 N.E.2d 1253 (Ind. 2002). The computer error in *Azania* produced racial disparities as it excluded a portion of the jury pool that contained three-fourths of the African American population in the county. Counsel discovered the glitch after noticing the racial disparity between the jury venire and the surrounding community.

Last, defense attorneys should be alert to disparities that may result from policies and practices used to evaluate applications for excusal from jury service. For example, if excusals are routinely granted for low-wage workers or stay-at-home moms, a distinctive group may be underrepresented on jury panels as a result. Attorneys investigating such claims should obtain records of the procedures promulgated by the chief district court judge for reviewing applications for excuses from jury service pursuant to G.S. 9-6(b), as well as the list of all people excused by the judge pursuant to G.S. 9-6. *See* G.S. 9-6(e) ("[T]he clerk shall keep a record of excuses separate from the master jury list.").

Prejudice. The procedure for calling jurors to the jury box from the jury panel is governed by G.S. 15A-1214(a). The N.C. Supreme Court has held that a defendant must show prejudice from a randomness violation resulting from a deviation from the procedures set out in G.S. 15A-1214(a). *State v. Thompson*, 359 N.C. 77 (2004). It is not clear what evidence would suffice to demonstrate prejudice. In *State v. Golphin,* 352 N.C. 364 (2000), the N.C. Supreme Court found that even if a violation of the statutory requirement of randomness occurred, the defendants failed to show prejudice because they did not exhaust their peremptory challenges, which the court considered to be evidence of the defendants' satisfaction with the seated jury. *See also State v. Tirado*, 358 N.C. 551 (2004) (even assuming that G.S. 15A-1214(a) was violated by the placing of a hearing-impaired prospective juror into the last panel, defendants could show no prejudice where they did not show that they were forced to accept an undesirable juror and, in fact, consented to her excusal). In light of these cases, trial counsel should exhaust peremptories to show prejudice and object to the last seated juror (which should be done outside the presence of the jury). Counsel should also state on the record how the violation will affect the jury and prejudice the defendant.

For a detailed discussion of how to preserve challenges to jury panel selection errors, see "Recommended approach" in 2 NORTH CAROLINA DEFENDER MANUAL § 25.1G (Preserving Denial of Challenges to the Panel) (2d ed. 2012).

J. Challenges to Supplemental Juror Selection Procedures

At times, the court may order the sheriff to summon additional jurors beyond those included on the master jury list. *See* G.S. 9-11. This type of juror is "selected infrequently and only to provide a source from which to fill the unexpected needs of the court." *See State v. White,* 6 N.C. App. 425, 428 (1969). These practices have the potential to result

in discrimination. There is no set method proscribed by statute or case law for the selection of supplemental jurors. *Id*. Instead, the sheriff may use his or her discretion in determining the method of selection of supplemental jurors, limited only by the mandate that he or she "must act with entire impartiality." *Id.* (citation omitted); *see also State v. Nolen*, 144 N.C. App. 172, 180 (2001) (finding that G.S. 9-11, on its face, did not violate the right to an impartial jury, and finding no error where sheriff selected supplemental jurors by contacting people in the county that he and his senior staff members "knew that [jury duty] wouldn't cause a financial hardship for"). However, as noted by the court in *White*, it obviously "would be possible for a sheriff, sent out to execute . . . an order of the court [to summon supplemental jurors], to discriminate in the selection of persons to be summoned." *White*, 6 N.C. App. 425, 427 (quotation omitted); *see also Russell v. Wyrick*, 736 F.2d 462 (8th Cir. 1984) (noting dangers of allowing sheriffs to select jurors, e.g., a sheriff might choose jurors favorable to the prosecution or jurors with whom the sheriff is acquainted).

Challenges to the selection of the supplemental jurors are sustainable if "there is partiality or misconduct in the Sheriff, or some irregularity in making out the list." *State v. Dixon*, 215 N.C. 438, 440 (1939) (quotation omitted); *see also Bass v. State*, 368 So.2d 447, 449 (Fla. Dist. Ct. App. 1979) (reversing defendant's conviction and holding that "[t]he choice of a special venire from an all-Caucasian church body, or from one's Caucasian friends, is a systematic, if unintended, exclusion of blacks"; the selection of supplemental jurors "must be administered in such a way as not to exclude identifiable segments of the populace systematically"). The North Carolina Court of Appeals has rejected a facial constitutional challenge to G.S. 9-11; counsel should therefore challenge the statute as applied. *See State v. Nolen*, 144 N.C. App 172 (2001).

Practice note: If the supplemental jurors selected by the sheriff do not represent a fair cross section of the community, consider moving to discharge the jurors. You may need a continuance to obtain statistical information to support your claim of a fair cross-section violation. If your motion to discharge the jurors is denied, you need to exhaust your peremptory challenges to preserve the issue for appellate review. *See* 2 NORTH CAROLINA DEFENDER MANUAL § 25.1G (Preserving Denial of Challenges to the Panel) (2d ed. 2012); *see also State v. Wilson*, 313 N.C. 516 (1985) (defendant could not complain about judge's order requiring sheriff to recruit supplemental jurors where defendant failed to exhaust his last peremptory challenge to remove twelfth juror, who was one of the supplemental jurors); *State v. Shaw*, 284 N.C. 366, 369 (1973) (no error in trial judge's denial of defendant's motion to allow defense counsel or his representative to be present during the summoning of the jury by the sheriff; defendant failed to challenge array or "offer any proof that the Sheriff violated the trust placed in him as an elected official"), *overruled on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986).

Constitutional challenges to supplemental jurors. Counsel may raise a constitutional challenge if the use of supplemental jurors results in underrepresentation of a distinctive group in the community. For purposes of an equal protection violation, defense attorneys should argue that the discretion afforded sheriffs in selecting supplemental jurors constitutes "a selection procedure that is susceptible of abuse." *Castaneda v. Partida*, 430

U.S. 482, 494 (1977). For purposes of a fair cross-section claim, defense attorneys should present evidence that the supplemental jurors resulted in a panel that was not fair or reasonable in relation to the demographic composition of the community, and that the State did not have a "significant interest" that could only be achieved by the sheriff's selection of supplemental jurors. This showing should not be difficult, since the State could have summoned supplemental jurors from the master jury list. *See* G.S. 9-11(b).

For a further discussion of supplemental jurors, see 2 NORTH CAROLINA DEFENDER MANUAL Ch. 25.1E (Supplemental Jurors) (2d ed. 2012).

6.6 Beyond Litigation: Efforts to Ensure Representative Juries

Fair and representative jury pools protect not only the rights of criminal defendants, but also the entitlement of all North Carolinians to participate in the jury system. Because of their shared interests, defense attorneys may find many partners—including community members, civil attorneys, and other court actors such as prosecutors and judges—when seeking to ensure the representativeness of North Carolina jury pools.

Policy changes that have been suggested to improve jury representativeness include: increasing the number of reliable, representative source lists; increasing the renewal frequency of the master list; addressing non-responsive jurors through effective enforcement; minimizing the length of time jurors serve; and increasing compensation. *See* Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 779–87 (2011). New York, for example, has adopted what has been referred to as "the gold standard for achieving representativeness, including use of five source lists, multiple follow-up mailings to reduce non-response, higher jury pay than that of other states, a one-day one-trial policy, and allowing summoned jurors an automatic postponement to a convenient date." NEW YORK STATE UNIFIED COURT SYSTEM OFFICE OF COURT RESEARCH, JURY REPRESENTATIVENESS: A DEMOGRAPHIC STUDY OF JUROR QUALIFICATION AND SUMMONING IN MONROE COUNTY, NEW YORK (2011).

Raising underrepresentation challenges may spur initiatives to address systemic problems in the jury formation process. For example, in 2008, defense attorneys in a capital case tried in downtown San Diego presented evidence that Latinos were underrepresented by 50% in the jury pool for the city's downtown courts. Evidence suggested that a flaw in the juror summons process was responsible for producing this disparity. Specifically, under the existing procedures, fewer juror summons were sent to judicial districts with large populations of jury-eligible Latino residents. The San Diego District Attorney wrote to the court to request immediate action to cure the defect in the juror summons process. Although the defendant's constitutional challenge was denied, the issue prompted procedural changes and drew attention to the underrepresentation of Latinos on juries. *See* ASHLEY NELLIS ET AL., THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN

THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 36 (2008).

Similarly, evidence presented by defendants in Colorado in support of a fair cross-section claim prompted corrective action by the court. While the claim in the individual case was ultimately unsuccessful, the court nevertheless recommended changes to practices used to assemble juries:

> [T]he underrepresentation of African–Americans and Hispanics on jury panels in Arapahoe County at the time of the defendants' trials was statistically significant. For this reason, we disapprove of the practice of giving double credit to prospective jurors for service in Aurora municipal court, and we direct that this practice be stopped immediately.
>
> However, our review of all the statistical evidence presented by Washington leads us to conclude that the underrepresentation of African–Americans and Hispanics on jury panels in Arapahoe County was not unfair or unreasonable.

Washington v. People, 186 P.3d 594, 605–06 (Colo. 2008).

In Massachusetts, a federal court found that the higher undeliverable and failure-to-appear rates from potential jurors living in predominantly minority neighborhoods produced unrepresentative juries, and ordered the court to re-mail undeliverable summons to different addresses within the same zip code as a possible remedy. While this order was overturned as beyond the scope of the court's authority, the United States District Court for the District of Massachusetts eventually changed its jury plan to respond to undeliverable summonses in the manner proposed by the district court. *See* Paula Hannaford-Agor, *Systematic Negligence In Jury Operations: Why The Definition Of Systematic Exclusion In Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 778 n.99 (2011) (discussing *United States v. Green*, 389 F. Supp. 2d 29, 38 (D. Mass. 2005)).

Any irregularities in the jury composition process, as well as disparities in the jury pool, should be brought to the attention of the court. *See* AMERICAN BAR ASSOCIATION, AMERICAN JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS (2005) ("It is the duty of the courts to enforce and protect the rights to jury trial and jury service[.]"). Any concerns also can be presented to standing committees examining diversity issues in criminal justice system administration. Attorneys should determine whether their judicial district has such a committee and, if not, consider (1) starting such a committee; (2) bringing concerns to the attention of the county's jury commission; (3) contacting the North Carolina Advocates for Justice Racial and Ethnic Bias in the Criminal Justice System Task Force; and/or; (4) contacting the North Carolina Commission on Racial Disparities in the Criminal Justice System. Information about both the Task Force and the Commission can be found at http://www.ncaj.com/index.cfm?pg=NC_Racial_Justice.

One reform that could be explored is the adoption of a local rule that all panel members report their race on the record as a standard procedure.

Case study: Jury Formation Process in Judicial District 15B. In North Carolina Judicial District 15B, comprised of Orange and Chatham counties, court actors have expressed concerned about the possible underrepresentation of racial minorities in jury pools. *See*, *e.g.*, James Williams Letter to Representative Hackney in the Race Materials Bank at www.ncids.org (select "Training and Resources"). Recently, the Judicial District Executive Council, which includes local leaders such as the resident Superior Court judge, the Chief District Court judge, the Chief Public Defender, the elected District Attorney, and the elected Clerk of Court, decided to undertake a study to determine whether anecdotal observations about underrepresentation are correct and, if so, to try to identify where in the process the racial disparities are produced. With the support of faculty and students in the UNC School of Government's Masters in Public Administration program, a process of gathering and analyzing data regarding jury pools and examining jury formation procedures in Orange and Chatham Counties is underway. Below, Allen Baddour, Resident Superior Court Judge for North Carolina Judicial District 15B, reflects on this process.

Over the years, questions have arisen as to whether the jury pool adequately represents a fair cross section of the community. No one has ever claimed actual bias, or discrimination, to my knowledge. But regularly, the question has arisen: does the jury pool reflect too few persons of color? This is an incredibly difficult question to deal with as a trial judge. We are used to accepting at face value that those brought before us as the jury pool came there randomly, and are as diverse as the county they come from, based on geography, race, ethnicity, gender, and age. And even more difficult to handle as a part of any given case: if there was some sort of discrepancy, what is the solution? Do we dismiss the pool, and call another? Do we throw out the master list (from which this week's names were pulled)?

It finally occurred to me that the best way to resolve these questions, and plenty of others, was to systematically collect data. I have never seen anyone act in a discriminatory way in jury selection, or in the creation of the jury pool. I have traveled the state and seen pools in dozens of counties. Inevitably, some jury pools contain a greater percentage of minorities than others. Do differences in the jury pool track the population of a county as a whole? It is hard to say. I also know that I cannot "tell" someone's race just by looking at them.

Another difficulty in sorting out whether a disparity exists is in the difference between who we ask to join us (by summons) as compared to who actually shows up. Some counties approach a 100% response rate (meaning that all jurors summonsed actually appear), and others are much closer to 50%. Orange County's population is notoriously transient, as many students make it onto the jury list, only to be long gone once they are actually summoned. I have always felt that many people who didn't show up for jury duty were doing the best they could with a very real dilemma: the choice of an hourly wage earner or one who stays home with children giving up that pay or risking putting the children in an unsafe or unstable situation, as compared to risking ignoring a court order. I have tried issuing show cause orders to have those who fail to show for jury duty, but that involves deputy time (to serve the orders), court time (to hear the case), and ultimately, the sanction ($50 fine) really isn't worth it.

I have some concern and empathy for those who don't show up for jury duty when their reasons are economic. I am not sure if there is any correlation between those most affected economically in Orange and Chatham and race.

But I am getting a little bit ahead of myself. Before we can take measures to ensure we consistently have the most representative jury pools possible, before we can decide how representative is "enough," and before we can balance - if at all- the rights of defendants accused of crimes with the circumstances of jurors (and is the defendant most helped by a willing juror or a recalcitrant, distracted, or hostile juror?) . . . before all that, we must understand the data.

And so, District 15B, with great assistance from the School of Government, is undertaking an examination of our jury system. We are analyzing everything: how does the master jury list get created? Who shows up for jury service? Who gets deferred? Who fails to show up? Along the way, we'll examine the decision points - what decisions are made by court officials that may have unintended consequences for who stays in the jury pool? What can we do to improve the response rate for jury summonses? What should we do?

I approach this process with an open mind. I do not have any preconceived notions about what the numbers suggest, other than to believe that no one is intentionally behaving in a discriminatory fashion. It is my hope that with good, reliable data, we can first make a determination about whether anything is to be done, and then, if so, what we should do. This process is just beginning, and it may be awhile before we can meaningfully assess the situation. But the effort must begin somewhere, and so . . . onward!

Defense attorneys interested in reading more about best practices in jury composition should consult the following resources:

- GREGORY E. MIZE ET AL., NATIONAL CENTER FOR STATE COURTS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 13 (2007).
- National Center for State Courts, *Jury Managers Toolbox: Characteristics of an Effective Master Jury List*, NCSC CENTER FOR JURY STUDIES (2009).
- AMERICAN BAR ASSOCIATION, AMERICAN JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS (2005).

6.7 Glossary of Jury Terms and Jury Formation Flowchart

Jury commission. Each county has a jury commission composed of three members who serve two-year terms; one member is appointed by the board of county commissioners, the second by the senior resident superior court judge, and the third by the clerk of superior court. *See* G.S. 9-1.

Jury panel. The prospective jurors randomly drawn from the master jury list and summoned for jury service for a particular session or sessions of court. *See* G.S. 9-2(f); G.S. 9-2(i); G.S. 9-2(j); G.S. 9-5; G.S. 9-10(a).

Jury pool. In North Carolina, "jury pool" appears to be used synonymously with "jury panel" and "jury venire." *See, e.g.*, NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, A MANUAL FOR NORTH CAROLINA JURY COMMISSIONERS AND CLERKS OF SUPERIOR COURT (5th ed. 2013). In cases from other jurisdictions, the term "pool" may be used to refer to a broader group. *See, e.g.*, *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012). ("[P]etitioner raising [a fair cross-section] 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.").

Jury summons. A written order to appear for jury service, issued by either the clerk or the sheriff, and served on prospective jurors at least 15 days before the session of court for which the juror is summoned. *See* G.S. 9-5; G.S. 9-10.

Jury venire. In North Carolina, "jury venire" appears to be used synonymously with "jury panel" and "jury pool."

Master jury list. The list compiled by the jury commission each odd-numbered year of all prospective jurors qualified to serve in the two years starting January 1 of the following year. *See* G.S. 9-2(a).

Source lists. Lists of names used to compile the master jury list. In North Carolina, jury commissions use the list of registered voters and persons with drivers license records supplied to the county by the Commissioner of Motor Vehicles. Jury commissions may use other sources of names if they deem them reliable.