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.