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.