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Jury Selection

VOLUME 3

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This book is dedicated to those who lived through it with me:

To Susan, the one I love and the one whose love and support in return enabled me to write this book.

To May and Stan, a very special couple, whose love and respect for each other make better people of everyone they touch.

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R.L.S.

PREFACE

Jury selection is the initial phase of the trial and the foundation upon which the entire trial will rest. The jurors who are selected will become the judges of the facts, and they alone will render a fair and impartial verdict on the guilt or innocence of the accused. This selection process is critical for the trial attorney because the decisions that he makes at this stage of the proceedings are certain to have a profound impact upon the outcome of the trial.

The trial attorney must also appreciate that there is more to jury selection than the selection of the jury. He can seek to make a positive first impression, develop rapport with the jurors, suggest his theory of the case, explain those legal concepts which are relevant, attempt to minimize weaknesses in his case, and begin the process of persuasion. Thus, jury selection provides a unique and significant opportunity that the trial attorney can ill afford to ignore.

In writing this volume, our goal was to explain the process of jury selection and provide the trial attorney with the knowledge and skills required for trial advocacy. In order to achieve this goal, we have set forth the relevant body of law as well as those techniques which explain how this knowledge can be transformed into effective legal representation. Specific examples are provided which demonstrate how the trial attorney can properly elicit information from jurors and explain relevant concepts through voir dire. Further, we have made an effort to make the volume equally useful to both the prosecution and the defense, and the illustrations provided are presented from both vantage points. Insofar as we have helped advocates represent their respective interests in a more vigorous, thorough and successful manner, we are grateful.

As always with a project such as this, there are several people whose efforts contributed to the completion of this work. We are indebted to Milton Grunwald for his diligent work in researching various points of the law. We thank George Peck, Bruce Ruinsky and Vicki Marani, all fine lawyers, for their thoughts, their ideas and their time. We appreciate the gracious donation of quiet quarters in which to work provided by good friends Thelma and Jimmy. Special thanks go to Cathy Donachie, Margaret Kelly, Barbara Magliaro, Mary Ann Moone, Nancy Tripp and Susan Warren, the team who typed late into the night in the final moments. We are indebted to Don White, whose first rate stenographic skills and whose friendship allowed us to complete more than we thought possible. Finally, we give our most special thanks to Anne Rogan, who typed the bulk of the manuscript and who worked through the night until the job was finally completed.

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A COMPLETE SYNOPSIS FOR EACH CHAPTER APPEARS AT THE BEGINNING OF THE CHAPTER

CHAPTER 50

The Law of Jury Selection—An Overview*

SCOPE

This chapter provides an introductory overview of the law of jury selection. Initially, the chapter examines the right to trial by jury. It then discusses the jury venire and selecting the petit jury, including voir dire and the striking of individual jurors. Finally, the chapter discusses the respective roles of the jury and the judge in jury trials.

SYNOPSIS

* This chapter was written by Richard Ware Levitt, Esq., New York, N.Y.

§ 50.01 The Right to Trial by Jury

[1] In General

Defending the proposed Constitutional provision regarding trial by jury, Alexander Hamilton wrote in The Federalist Papers:

> The friends and adversaries of the plan of the [Constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[1]

Article III of the United States Constitution broadly provides that: "The trial of all Crimes except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed."[2] The Fifth and Sixth Amendments guarantee "the continuance of certain incidents of trial by jury" not mentioned in Article III,[3] including the right to "a speedy and public trial, by an impartial jury."[4] These Constitutional provisions are supplemented by various rules and statutes applicable to state and federal trials, which may be more—but not less—protective of individual rights than is the Constitution.

The Sixth Amendment right to a trial by jury is "fundamental" and applies to state criminal proceedings through the Due Process Clause of the Fourteenth Amendment.[5]

[2] When Does the Right Apply?

The right to a jury trial guaranteed by the Sixth Amendment applies to the trial of all "non-petty" federal offenses. The term "petty offense" initially was defined by reference to the "nature of the offense and . . . whether it was triable by a jury at

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[1] The Federalist No. 83, at 499 (Hamilton) (The New American Library Ed. 1961).

[2] U.S. Const. art. III § 2, cl. 3.

[3] *Ex parte* Quirin, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942). *See also* Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (regarding the Due Process guarantee of an impartial jury).

[4] U.S. Const. amend. VI.

[5] Duncan v. Louisiana, 391 U.S. 145, 149, 157-58, 88 S. Ct. 1444, 20 L. Ed. 2d 491, 45 Ohio Op. 2d 198 (1968).

common law."[6] Courts have attempted to define the term more objectively, focusing primarily, though not exclusively, on the statutorily authorized length of incarceration for the most serious crime alleged in the charging document.[7] The Court will therefore presume that an offense carrying a maximum prison term of six months or less is a "petty" offense, and that a defendant "is entitled to a jury trial under such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."[8] For example, in *International Union v. Bagwell*,[9] the Supreme Court, after first declaring a $52,000,000 fine imposed against a union to constitute a criminal, rather than civil, contempt, agreed that such a sanction was sufficiently "serious" to require a jury trial under the Sixth Amendment.[10]

In determining whether a defendant is entitled to a jury trial, the sentences for petty

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[6] Blanton v. City of North Las Vegas, Nev., 489 U.S. 538, 541, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989) (DUI is a petty offense under Nevada law); *see also* United States v. Nachtigal, 507 U.S. 1, 113 S. Ct. 1072, 122 L. Ed. 2d 374 (1993) (DUI in a national park is a petty offense).

[7] "Petty offense" is defined in 18 U.S.C. § 19 as a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in 18 U.S.C. § 3571(b)(6) or (7) in the case of an individual or 18 U.S.C. § 3571(c)(6) or (7) in the case of an organization. Although this definition makes no reference to sentence, 18 U.S.C. § 3581(b) provides that the maximum sentence for a Class B misdemeanor is six months; for a Class C misdemeanor, thirty days; and for an infraction, five days.

[8] Lewis v. United States, 518 U.S. 322, 326, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996); Blanton v. City of North Las Vegas, Nev., 489 U.S. 538, 543, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989). *See* District of Columbia v. Colts, 282 U.S. 63, 71-73, 51 S. Ct. 52, 75 L. Ed. 177 (1930) (recognizing right to a jury trial for reckless driving, "an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense").

11th Circuit: *See also* United States v. Chavez, 204 F.3d 1305 (11th Cir. 2000) (crime that carries a maximum incarcerative term of six months or less is presumed petty, not entitling a defendant to a jury trial).

[9] 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994); *cf.* Muniz v. Hoffman, 422 U.S. 454, 477, 95 S. Ct. 2178, 45 L. Ed. 2d 319 (1975) ($10,000 fine does not trigger the right to a jury trial).

[10] *International Union*, 114 S. Ct. at 2562.

1st Circuit: *See also* United States v. Browne, 318 F.3d 261, 265 (1st Cir. 2003) (jury trial is required if the sentence is for more than six months).

2d Circuit: *See also* United States v. Marshall, 371 F.3d 42, 48 (2d Cir. 2004) (defendant has a right to a jury trial before being sentenced to a prison term of more than six months for criminal contempt); Modeste v. Horn, 499 F. Supp. 2d 272 (E.D.N.Y. 2007) (to determine whether offense is serious or petty, courts look to objective indications of the seriousness with which society regards the offense, particularly the legislature's judgment of an offense's severity as measured by the maximum penalty authorized for that offense).

11th Circuit: *See also* United States v. Chavez, 204 F.3d 1305 (11th Cir. 2000) (offense that carries a possible sentence exceeding six months' imprisonment is severe and affords a defendant the right to a jury trial).

Citation for *International Union* case is: 512 U.S. 821, 114 S. Ct. 2552, 129 L.Ed.2d 642 (1993).

offenses arising from the same transaction may not be aggregated.[11] In *Lewis,* defendant argued that where a defendant was charged with multiple petty offenses in a single prosecution, the Sixth Amendment required that the aggregate potential penalty was the basis for determining whether a jury trial was required. He contended that the Court must look to the aggregate prison term to determine the existence of the jury trial right, and not to the petty character of the offenses charged. The Court disagreed. The Court held that no jury trial right existed where a defendant was prosecuted for multiple petty offenses. The Sixth Amendment's guarantee of the right to a jury trial did not extend to petty offenses, and its scope did not change where a defendant faced a potential aggregate prison term in excess of six months for petty offenses charged.[12]

However, if there can be no determination of character of the offense, the sentences may be aggregated. In Codispoti v. Pennsylvania,[13] the Supreme Court held that consecutive sentences of imprisonment imposed for several contempts committed during a single trial must be aggregated. The *Lewis* court held that the decision in *Codispoti* was inapposite to the case presented in *Lewis*. "There, defendants were each convicted at a single, nonjury trial for several charges of criminal contempt. The Court was unable to determine the legislature's judgment of the character of that offense, however, because the legislature had not set a specific penalty for criminal contempt. In such a situation, where the legislature has not specified a maximum penalty, courts use the severity of the penalty actually imposed as the measure of the character of the particular offense."[14] In contrast, the *Lewis* court did not need to "look to the punishment actually imposed, because [the Court was] able to discern Congress' judgment of the character of the offense."[15]

As the Sixth Amendment applies only to criminal cases,[16] it has been found not to apply to probation revocation proceedings,[17] sentencing proceedings,[18] juvenile proceedings,[19] or military trials.[20]

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[11] Lewis v. United States, 518 U.S. 322, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996).

[12] Lewis v. United States, 518 U.S. 322, 327, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996).

[13] 418 U.S. 506, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974).

[14] Lewis v. United States, 518 U.S. 322, 328, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996).

[15] Lewis v. United States, 518 U.S. 322, 328, 116 S. Ct. 2163, 135 L. Ed. 2d 590 (1996). The Court also distinguished *Codispoti* due to the special concerns raised by the criminal contempt context. *See* Walls v. Spell, 722 So.2d 566, 573 (Miss. 1998) (discussion of *Lewis* and *Codispoti;* holding that in the particular case at bar, the law of *Codispoti* applied).

[16] The right to a jury trial in civil cases is protected by the Seventh Amendment.

[17] Minnesota v. Murphy, 465 U.S. 420, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984).

[18] Spaziano v. Florida, 468 U.S. 447, 464-65, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989) (per curiam); Chatman v. Marquez, 754 F.2d 1531, 1534 (9th Cir. 1985).

[19] McKeiver v. Pennsylvania, 403 U.S. 528, 545, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

[20] *See, e.g.*, 917 F.2d 1250, 1251-53 (10th Cir. 1990).

[3] Waiver of the Right

A defendant may waive his right to a jury trial,[21] but there is no absolute right to do so,[22] as the government is also entitled to a jury trial.[23] Under Rule 23 of the Federal Rules of Criminal Procedure, the waiver must be in writing, with the approval of the court and the consent of the government. It must be entered knowingly, intelligently and voluntarily by the defendant herself, rather than by counsel.[24] Voluntariness is not vitiated, however, by statutes that require a convicted defendant to pay the costs of

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[21] Duncan v. Louisiana, 391 U.S. 145, 158, 88 S. Ct. 1444, 20 L. Ed. 2d 491, 45 Ohio Op. 2d 198 (1968); Fed. R. Crim. P. 23(a).

1st Circuit: *See also* United States v. Leja, 448 F.3d 86 (1st Cir. 2006) (defendant may waive his Sixth Amendment right to jury trial).

2d Circuit: *See also* McMahon v. Hodges, 382 F.3d 284 (2d Cir. 2004) (under Sixth Amendment, defendant may waive right to a jury trial in exchange for something of value).

6th Circuit: *See also* Fitzgerald v. Withrow, 292 F.3d 500 (6th Cir. 2002) (defendant may waive Sixth Amendment right to jury trial and, if the state also consents, have a bench trial, but for that waiver to be valid, the waiver must be knowing, voluntary and intelligent).

7th Circuit: *See also* United States v. Brazelton, 557 F.3d 750 (7th Cir. 2009) (right to an impartial jury can be waived).

10th Circuit: *See also* United States v. Leach, 417 F.3d 1099 (10th Cir. 2005) (defendant's Sixth Amendment right to a jury trial at sentencing can be voluntarily waived).

[22] Singer v. United States, 380 U.S. 24, 34, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965).

See, e.g., Mich. R. Crim. P. 6.401 (requiring the consent of the prosecutor and the approval of the court for proceeding with a bench trial).

2d Circuit: *See also* Francolino v. Kuhlman, 365 F.3d 137 (2d Cir. 2004) (criminal defendant does not have a federal constitutional right to a bench trial).

3d Circuit: *See also* D'Amario v. United States, 403 F. Supp. 2d 361 (D.N.J. 2005) (defendants do not have a constitutional right to a bench trial).

6th Circuit: *See also* Fitzgerald v. Withrow, 292 F.3d 500 (6th Cir. 2002) (criminal defendant does not have a constitutional right to bench trial).

[23] *6th Circuit:* *See* Fitzgerald v. Withrow, 292 F.3d 500 (6th Cir. 2002) (defendant may waive Sixth Amendment right to jury trial and, if the state also consents, have a bench trial, but for that waiver to be valid, the waiver must be knowing, voluntary and intelligent).

10th Circuit: United States v. Shelton, 736 F.2d 1397, 1408 (10th Cir. 1984), *citing* Hayes v. Missouri, 120 U.S. 68, 7 S. Ct. 350, 30 L. Ed. 578 (1887).

[24] *See also* 18 U.S.C. § 3401(b), which prescribes, as follows, the mechanism by which a defendant charged with a misdemeanor may consent to trial by a magistrate:

> Any person charged with a misdemeanor may elect, however, to be tried before a judge of the district court for the district in which the offense was committed. The magistrate shall carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court and that he may have a right to trial by jury before a district judge or magistrate. The magistrate shall not proceed to try the case unless the defendant, after such explanation, files a written consent to be tried before the magistrate that specifically waives trial, judgement, and sentencing by a judge of the district court.

5th Circuit: *See also* United States v. Dodson, 288 F.3d 153 (5th Cir. 2002) (criminal defendant may knowingly and voluntarily waive most Constitutional rights, including right to jury trial).

prosecution, including jury costs, even though such statutes encourage waivers.[25]

It is generally believed that a defendant should very rarely waive a jury trial, as there is little reason to dispense with a jury of one's peers and the requirement of unanimity. Waivers might be considered, however, where an "unpopular" or particularly complex defense—such as insanity—is contemplated, or where the facts are likely to evoke strong negative emotions against the defendant, and juror impartiality might therefore be severely compromised. The temperament of the judge should, quite obviously, be considered before making such a decision, lest the defendant make worse an already bad situation.

In addition to waiving a jury trial for all purposes, defendants occasionally offer to concede certain facts or elements of the offense and thereby remove them from jury consideration. Typically such offers are made to keep prejudicial evidence from the jury. For example, a defendant in a drug case may seek to avoid prejudicial evidence of other bad acts under Rule 404(b) of the Federal Rules of Evidence(or its state analog) by conceding the matters to which the proposed evidence is directed, such as intent or knowledge. Likewise, a defendant may offer to stipulate to the existence of a prior conviction where an element of the charged offense (*e.g.*, possession of a weapon by a convicted felon) is that the defendant was previously convicted. The response of the courts to such motions has not been uniform. It has been suggested that the first type of waiver should be accepted,[26] but the second type has been deemed more problematic, as it has been said to impinge on the jury's right "to be informed of the nature of the crime, as well as to find the defendant guilty of the offense at issue beyond a reasonable doubt."[27]

A motion to withdraw a jury trial waiver should be granted if filed timely, that is, if "granting the motion would not unduly interfere with or delay the proceedings."[28]

§ 50.02 The Jury Venire and Petit Jury

[1] Fair Cross-Section of the Community

A litigant is entitled to a petit jury "drawn from a source fairly representative of the

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[25] *See, e.g.*, 26 U.S.C. § 7203 (willful failure to file federal income tax returns); United States v. Palmer, 809 F.2d 1504, 1508–1509 (11th Cir. 1987).

[26] *2d Circuit:* *See, e.g.*, United States v. Gordon, 987 F.2d 902 (2d Cir. 1993).

8th Circuit: *See also* United States v. James, 564 F.3d 960, 963 (8th Cir. 2009) (evidence of prior bad acts may be used to establish a defendant's knowledge or intent).

[27] *2d Circuit:* United States v. Gilliam, 994 F.2d 97 (2d Cir. 1993); *see also* United States v. Amante, 418 F.3d 220, 223 (2d Cir. 2005) (stipulation to the felony element itself violates foundation of jury system because it removes element of crime from jury consideration).

4th Circuit: *See also* United States v. Muse, 83 F.3d 672, 679 (4th Cir. 1996) (while valid stipulation relieves prosecution of burden of producing any other evidence to establish fact stipulated, it does not relieve prosecution from burden of proving every element of crime beyond reasonable doubt).

[28] *8th Circuit:* *See also* Zemunski v. Kenney, 984 F.2d 953 (8th Cir. 1993) (motion to withdraw waiver, filed on first day of second bench trial, was not timely).

9th Circuit: United States v. Mortensen, 860 F.2d 948, 950 (9th Cir. 1988).

community."[1] This requirement, codified in both state and federal[2] law, "does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political or geographical groups of the community . . . But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusions of any of these groups."[3]

[2] Selection of the Jury Pool

Prospective jurors may be chosen from one or more sources so long as cognizable groups are not thereby underrepresented. Typically, voter registration lists are used, either alone or supplemented by lists culled from the Department of Motor Vehicles or elsewhere.[4]

[3] Discrimination in Selection of the Jury Pool

To make out a prima facie claim of discrimination in the selection of the jury pool—a so-called "fair cross-section" claim under the Sixth Amendment[5]—a defen-

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[1] **Representative of the community.**

Supreme Court: Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); Smith v. Texas, 311 U.S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84 (1940).

1st Circuit: United States v. Flores-Rivera, 56 F.3d 319, 326 (1st Cir. 1995) (court upheld requirement that all grand and petit jurors are required to have ability to speak English, and to read, write and understand English, even though it excluded from service two-thirds of population of Puerto Rico,"the national interest served by the use of English in a United States court justifies conducting proceedings in the district of Puerto Rico in English and requiring jurors to be proficient in that language.").

2d Circuit: Johnson v. New York, 974 F. Supp. 185, 188–189 (E.D.N.Y. 1997) (defendant of mixed black and native American ancestry claimed jury did not meet requirement for being a fair cross-section of community because there were no jurors with similar ancestry in venire, however, no showing of systematic exclusion, constitutional argument failed).

6th Circuit: *See* Smith v. Berghuis, 543 F.3d 326, 335 (6th Cir. 2008) (underrepresentation of African Americans in county's venire panels was a result of systematic exclusion, and was prohibited by right to jury trial from cross-section of community).

8th Circuit: *See also* Johnson v. Norris, 537 F.3d 840, 852 (8th Cir. 2008) (African American murder defendant's right to jury selected from fair cross-section of community was not violated by change of venue to county which contained small pool of African-American residents).

11th Circuit: *See also* United States v. Carmichael, 560 F.3d 1270, 1277 (11th Cir. 2009) (even if percentage of African Americans registered to vote in the district and therefore eligible for jury service was as defendant asserted, defendant failed to demonstrate that the disparity between that percentage and the percentage of African Americans summoned from the wheel and in the pool was greater than ten percent).

[2] *See* 28 U.S.C. §§ 1861–1869 (1978).

[3] *Supreme Court:* Thiel v. Southern Pacific Co., 328 U.S. 217, 66 S. Ct. 984, 90 L. Ed. 1181 (1946). *See also* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 154, 114 S. Ct. 1419, 1424, 128 L.Ed.2d 89 (1994) (Constitution guarantees a right only to an impartial jury, not to a jury composed of members of a particular race or gender).

[4] *See, e.g.*, Rule 4, Jury Selection Plan, Eastern District of New York.

[5] *Supreme Court:* Thiel v. Southern Pac. Co., 328 U.S. 217, 220, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) (fair cross-section requirement was first defined and addressed).

dant must show that (1) the group alleged to be excluded or underrepresented is a "distinctive" group in the community;[6] (2) the representation of this group in the challenged pool is not "fair and reasonable in relation to the number of such persons in the community,"[7] and (3) the underrepresentation is due to "systematic exclusion" of the group.[8] "Discriminatory purpose" need not be established.[9] Once a prima facie

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[6] *Supreme Court:* Thiel v. Southern Pac. Co., 328 U.S. 217, 220, 66 S. Ct. 984, 90 L. Ed. 1181 (1946) (distinctive groups have been held to include: blue collar workers);

1st Circuit: *See* United States v. Royal, 174 F.3d 1, 6 (1st Cir. 1999) ("There is no dispute that . . . Blacks are unquestionably a 'distinctive' group for the purposes of a fair cross-section analysis.").

2d Circuit: *See* United States v. Jackman, 46 F.3d 1240, 1246 (2d Cir. 1995) ("There is little question that both Blacks and Hispanics are 'distinctive' groups in the community for purposes of this test.").

3d Circuit: *See* United States v. Weaver, 267 F.3d 231, 240 (3d Cir. 2001) Hispanics and African Americans are distinct group in community).

5th Circuit: Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807 (5th Cir. 1980) (low income individuals);

6th Circuit: *See* Smith v. Berghuis, 543 F.3d 326, 336 (6th Cir. 2008) (African Americans are distinctive group in community).

7th Circuit: The circuit *but see* Johnson v. McCaughtry, 92 F.3d 585 (7th Cir. 1996);

9th Circuit: United States v. Yazzie, 660 F.2d 422, 426 (9th Cir. 1981) (Native Americans).

[7] *3d Circuit:* *See* United States v. Weaver, 267 F.3d 231, 244 (3d Cir. 2001) (appellant's statistical evidence was far too weak to support a finding of representation that was unfair and unreasonable).

6th Circuit: *See* Smith v. Berghuis, 543 F.3d 326, 336 (6th Cir. 2008) (because of relatively small size of African American population in county, none of the applicable tests could appropriately measure the underrepresentation that occurred on venire panels).

11th Circuit: *See* United States v. Clarke, 562 F.3d 1158, 1163 (11th Cir. 2009) (second element is not satisfied where the absolute disparity between the percentage of the distinctive group among the population eligible for jury service and the percentage of the distinctive group on the jury panel is ten percent or less).

[8] **Systematic exclusion.**

Supreme Court: Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979); Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).

2d Circuit: *See* United States v. Bullock, 550 F.3d 247, 252 (2d Cir. 2008) (no evidence that African Americans were systematically excluded or that trial court's use of voter registration and motor vehicle bureau lists to select venire resulted in unfair underrepresentation).

Johnson v. New York, 974 F. Supp. 185, 188–189 (E.D.N.Y. 1997) (defendant of mixed black and native American ancestry claimed jury did not meet requirement for being a fair cross-section of community because there were no jurors with similar ancestry in venire, however, no showing of systematic exclusion, constitutional argument failed).

3d Circuit: *See* United States v. Weaver, 267 F.3d 231, 245 (3d Cir. 2001) (appellant made no showing of anything in the system that has discouraged or prevented a group from participating).

6th Circuit: *See* Smith v. Berghuis, 543 F.3d 326, 340 (6th Cir. 2008) (persistent underrepresentation of African Americans on Kent County venire panels by between 15 and 18 percent combined with Petitioner's evidence that this disparity was not random was sufficient to establish systematic exclusion).

8th Circuit: United States v. Coronell–Leon, 973 F. Supp. 1094, 1100–1101 (D. Neb. 1997) (under representation of Hispanics in jury pool was too slight to have constitutional significance and no evidence of systematic exclusion).

case is made, the government must demonstrate that the underrepresentation serves a significant or overriding government interest.

The procedure by which the jury selection process is challenged in federal courts is addressed in Title 28 of the United States Code Section 1867, which contains strict time limitations on bringing the motion, as well as a requirement that counsel file "a supporting affidavit of facts which, if true, would constitute a substantial failure to comply with the provisions of" Title 28. In the preparation or presentation of the motion, counsel is permitted to review, as necessary, the "contents or records or papers used by the jury commission or clerk in connection with the jury selection process . . ."[10] Moreover, in *Test v. United States*,[11] the Court held that, under the Jury Selection Act, (28 U.S.C. §§ 1861-1869), parties are entitled to inspect jury lists on request.[12]

§ 50.03 Selecting the Petit Jury

[1] Jury Selection by Judge or Magistrate Judge

Consistent with United States Constitution Article III and the Magistrate's Act,[1] Magistrate-Judges may preside over the selection of misdemeanor petit juries, with or without the permission of the parties, but may pick felony petit juries only if the defendant consents.[2] When a Magistrate-Judge picks a jury the process is identical to

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10th Circuit: United States v. Gault, 973 F. Supp. 1309, 1314–1316 (D.N.M. 1997) (jury selection plan which under represented Hispanic, American Indians and Blacks did not systematically exclude these groups nor was under representation significant enough to be constitutionally violative).

Minnesota: State v. McKenzie, 532 N.W.2d 210, 221 (Minn. 1995) (loss of jurors identified by defendant to both criminal justice system and defendant's particular case was not "the product of systematic exclusion created by unfair or inadequate selection procedures, but rather occurred because of individual decisions made by potential jurors.").

[9] *Supreme Court:* Duren v. Missouri, 439 U.S. 357, 368, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). (a selection plan that is not racially neutral may also violate Equal Protection principles embodied in the Due Process clause of the Fifth Amendment). Castaneda v. Partida, 430 U.S. 482, 494, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977); Peters v. Kiff, 407 U.S. 493, 496, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972).

[10] 28 U.S.C. § 1867(f).

[11] *Supreme Court:* Test v. United States, 420 U.S. 28, 95 S. Ct. 749, 42 L. Ed. 2d 786 (1975) (per curiam).

[12] *1st Circuit:* United States v. Davenport, 824 F.2d 1511 (7th Cir. 1987) (some courts have interpreted *Test* narrowly, limiting its reach to jury lists alone, and not to include juror qualification questionnaires).

3d Circuit: *See* United States v. Wecht, 537 F.3d 222, 240 (3d Cir. 2008) (district court failed to articulate serious and specific reasons and failed to sufficiently consider alternatives to overcome the presumption under the First Amendment that jurors' names be publicly available in an impending criminal trial).

7th Circuit: *See, e.g.*, United States v. Schneider, 111 F.3d 197, 204 (1st Cir. 1997) (defendant was properly denied new trial because nondisclosure of a juror's questionnaire was not prejudicial);

[1] 28 U.S.C. §§ 631 *et seq.*

[2] *Supreme Court:* Gomez v. United States, 490 U.S. 858, 872, 109 S. Ct. 2237, 104 L. Ed. 2d 923