

# MEMORANDUM



**To:** Washington State Supreme Court

**From:** Washington Appleseed Jury Diversity Work Group

**Date:** April 19, 2017

**RE:** Minority and Justice Commission Jury Diversity Symposium “Jury Diversity in Washington: A Hollow Promise or Hopeful Future?””

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Washington Appleseed shares the Court’s interest in ensuring that jurors in Washington reflect the diversity of Washington state citizens. To that end, our jury diversity project has been exploring ways to increase jury diversity in Washington. This memo is intended to inform the Court about our work and provide a list of recommendations based on our research.

### ***Washington Appleseed’s Jury Diversity Work: A Brief History***

In November 2015, after studying the issue for some time, we convened the Washington Appleseed Jury Diversity Forum. The forum brought together judges, lawyers, and scholars to discuss potential tools to increase diversity on Washington juries. Coming out of the forum, we identified the following techniques to increase jury diversity:

1. Expanding source lists beyond traditional motor-voter
2. Clarifying the rules for jury service by ex-felons
3. Increasing efforts to enforce jury summons
4. Modifying jury compensation
5. Providing child care for persons called to jury service
6. Using a modified trial schedule such as from 8:30 a.m.-1 p.m.
7. Clarifying the RCW 2.36.070(4) standard regarding ability to communicate in the English language

We did research in each of these areas. Because of limited resources, we selected the first two topics for the most extensive examination. This memo summarizes work on these two topics and then provides our recommendations.

### ***Source Lists***

Most states, including Washington, emphasize two sources for their jury rolls: state-issued identification (primarily driver’s licenses) and voting records. Together these are referred to as “motor-voter.” Washington Appleseed posited that using additional source lists might pick up additional potential jurors who are missed by motor-voter alone and that using the expanded list would increase jury diversity.

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Our preliminary research identified 26 states that appeared to use additional sources beyond motor-voter. We developed a survey (see Appendix A) and attempted to contact court administrators in each state to learn more about the additional sources they used and whether they had determined if the use of the additional sources had a positive impact on jury diversity. In instances where the state failed to respond, Appleseed researched the relevant state's administrative court website and other sites to determine where it obtains the lists for its jury pools.

The state surveys addressed four key topics for the selected states' source lists:

- Current Status
- History of Changes
- Technical Challenges and Financial Issues
- Outcome Measurement

On the current status questions, we identified eight states and one county that are currently using sources beyond motor-voter<sup>1</sup>:

- *Public Benefits*: Connecticut, Illinois, New York, Rhode Island, Virginia
- *Utility Bills*: Colorado, Reno Nevada, Virginia, Alabama

For a more comprehensive look at our findings of other state's source lists, see our Source lists by State Chart in Appendix B.

On the questions regarding history of changes and technical challenges and financial issues, our survey yielded little information due to the lack of responses from many of the administrative clerks and reticence to provide such information from the clerks that did respond.

On the final questions regarding outcome measurement, none of the states we contacted had done a formal study regarding whether the use of these additional sources has had a positive impact on jury diversity. Illinois does plan to do a study of jury diversity in 2017. In addition, representatives of other states did report anecdotally that they believed that using more sources had a positive impact on diversity.

Our investigation yielded one additional helpful point regarding sources lists. Wisconsin reported that it updates its source lists quarterly (many states update annually or less often) and that the change to more frequent updating had made a positive difference with respect to jury diversity. This is consistent with limited information we obtained regarding a correlation between mobility and race/ethnicity. For example, the US Census Bureau reported that in 2015-16, 13.8 percent of African Americans and 12.6 percent of Hispanic/Latinos moved, compared with 9.8 percent of non-Hispanic Whites.<sup>2</sup>

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<sup>1</sup> This list excludes states that used sources not relevant to Washington, such as state income tax records.

<sup>2</sup> See also Taylor, Morin, Cohn, & Wang. (2008) *American Mobility: Who Moves? Who Stays Put? Where's Home?* Pew Research Center: A Social & Demographic Trends Report, pg. 7, available at: <http://www.pewsocialtrends.org/files/2010/10/Movers-and-Stayers.pdf>.

## ***Felon Disenfranchisement from Jury Service: Background***

The second topic Washington Appleseed researched is felon disenfranchisement from jury service.

Washington has long experienced underrepresentation of minorities on its juries. Racial bias in juror selection and exclusion contributes to many unfair outcomes in our criminal justice system. Research has confirmed that the racial composition of juries has a *direct* impact on conviction rates. While the way race and racial bias affect outcomes in the criminal justice system is now well-documented and has repeatedly caught the attention of both policymakers and the judiciary, few solutions have been presented.

Prolonged felon exclusion from jury service is one of many facially neutral policies with racially disparate effects on minority jurors and minority defendants. Nationwide, about 30 percent of black men are excluded from jury service because of their past felony convictions. Even though felon juror exclusion is a long-standing constitutionally permissible practice, the specific eligibility requirements for felon jurors deserve scrutiny to ensure that such exclusion only lasts only as long as the statute mandates.

### Proposed Solution

Allow ex-felons to serve on Washington juries without obtaining a certificate of discharge. As a matter of policy, “civil rights” should be read and interpreted to mean “voting rights” for purposes of juror eligibility, notwithstanding that under the relevant statutes an ex-felon is required to obtain a certificate of discharge to restore his/her civil rights.

### Legal and Policy Rationales for Ex-Felon Recommendation

RCW 2.36.070 provides the basic juror competency requirements including the requirement that ex-felons have their “civil rights” restored before they can serve on a jury. The phrase “civil rights” is not defined in the statute. However, it can be traced to the WA Cont. art. VI sec. 3, which deals with Elections and Elective Rights and disqualifies individuals from *voting* unless they have had their civil rights restored.

Pursuant to the (nonprecedential) *State v. Cleary*, 2012 WL 205910 (2012) decision, the fact that an ex-felon had not had their “civil rights” restored, but was seated for a jury did not raise a constitutional error. *See also State v. Griener-Jacobsen*, 192 Wn. App. 1051 (2016) (motion for new trial denied notwithstanding that ex-felon juror had no certificate of discharge). Thus, whether a certificate of discharge is actually required for ex-felons to serve as jurors remains unclear.

Historically, the right to vote and the ability to serve on a jury were co-extensive, and it was easy to determine when a former felon could serve as a juror because before registering to vote the ex-felon was required to obtain a certificate that restored the felon’s right to vote. Former RCW 9.96.020. This certificate could not be obtained until every element of the sentence was satisfied, including payment of *all legal financial obligations*. Former RCW 9.96.050. In 1994, the law changed to broaden the potential pool of eligible jurors by expanding juror source lists from “registered voters” to include “registered

voters . . . merged with the list of licensed drivers and identocard holders who reside in the county.” RCW 2.36.010(8).

In 2009, the Legislature altered the rules governing restoration of a felon’s right to vote, restoring the right to vote automatically when an individual is no longer under the supervision of the Department of Corrections. RCW 29A.08.520(1). Further, a felon who has completed all requirements of a sentence, including payment of legal financial obligations, is entitled to receive from the sentencing court a certificate of discharge that restores all civil rights. RCW 9.94A.637(5). *Thus, as it now stands, the right to vote of any felon not serving time in a Department of Corrections facility and not subject to community custody should be restored.*

For policy reasons, potential jurors who have had their voting rights restored should similarly be regarded as having had their “civil rights” restored, including the right to serve on a jury, even before they obtain a certificate of discharge for three reasons:

*First*, as set forth above, the right to vote is strongly linked to the ability to serve on a jury. When the Washington legislature no longer required jurors to be “electors,” they simultaneously added the requirement to exclude people that “ha[ve] been convicted of a felony and ha[ve] not had his or her civil rights restored.” Wash. Rev. Code §2.36.070(5). Thus, the requirement that ex-felon jurors have their civil rights restored was likely not meant to be a new substantive requirement, but instead intended to mirror the voter eligibility requirements.

*Second*, Washington state policy for jury selection and eligibility aims to provide an “opportunity for widespread citizen participation in the jury system.” Selection and Summoning of Jurors, ch. 188, 988 Wash. Sess. Laws §7.

*Third*, because “civil rights” for purposes of juror eligibility likely refers to voting rights, which are restored when the person is no longer under the authority of the Department of Corrections, if completion of legal financial obligations were to be incorporated into the juror civil rights restoration requirements, eligible voters and even registered voters, could be disqualified from jury service. Under this framework, a convicted felon who has returned to the community and registered to vote could be summoned to jury service, incentivized to appear to avoid a misdemeanor, only to be excluded and uncompensated for his time. This outcome would be contrary to Washington policy to “minimize the burden on the prospective jurors, their families and employers resulting from jury service.” Wash. Rev. Code §2.36.080(2).

The civil rights restoration process, including the right to serve on a jury, should thus be viewed concurrently with voting rights restoration occurring at the time the convicted felon is no longer under the authority of the Department of Corrections.

### ***Recommendations***

Based on the work that we have done thus far, we recommend that those seeking to increase jury diversity take the following steps:

1. **Source Lists:**
  - a. Talk with the states using public benefits and utility bills about how they have incorporated these; add these sources to Washington 's source lists.
  - b. Update source lists quarterly, rather than annually, which is Washington's current practice.<sup>3</sup>
2. **Ex-felons:** Consistent with ex-felons' right to vote, automatically restore ex-felons right to serve on Washington juries without obtaining a certificate of discharge.
3. **Jury Compensation:** Jury service imposes a financial burden on many who serve, particularly for longer trials. This likely has a negative impact on responses to summons. Some states have modified their compensation system to provide increased compensation for jurors who serve in longer trials. For example, Arizona's Lengthy Trial Fund increases the daily rate paid to jurors from \$12 to up to \$300 for trials lasting six days or more. We recommend that the Washington State Jury Commission explore adopting a similar graduated payment system.
4. **Promulgate rules for tracking down non-responders:** Our preliminary investigation suggests that summons enforcement efforts vary widely. Increased enforcement efforts may well have a positive impact on jury diversity. We recommend that this topic be investigated further.

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<sup>3</sup> RCW 2.36.054.

# Appendix A

## Jury Diversity Source lists Phone Survey

Contact/Title/Phone/Email		Organization	
Appleseed Surveyor		Interview Date	
Reference/Citation/Jurisdiction			

### ***1. Section One – Clarify current info/status***

- I understand your jurisdiction/state expanded your jury source lists to include x,y,z. Do these sources still support your process for developing your venire? Have any changes been subsequently made? When and why?
- When was the change made?

### ***2. Section Two – History of changes***

- How did the changes to your source lists occur? What information did you use at the time to consider whether changes would be worthwhile? Who were the stakeholders that supported or challenged those changes? What were their issues?
- Did you originally consider other data sources (in addition to x,y,z)? What process did you use to ultimately choose/prioritize x,y,z?
- Did you originally plan (to be done at some future date) to evaluate the impact of adding x,y,z on diversity? Did you have a process in mind to do so? If not, have you considered/implemented since then?

### ***3. Section Three – Technical Challenges and Financial Issues***

- Who are the public/private parties that manage and distribute the source lists data? Is the process flowcharted? Can you generally describe the process and parties involved? How

does data and/or information get handed off/coordinated between parties? Are contract copies available?

- What lessons did you learn in the process? What challenges remain, and how do they create bottlenecks/other issues? Do you have plans for improvements? Expected costs vs. benefits?
- How were the additions to source lists data funded? Legislative vs. other? How long did it take to build a coalition to support these changes?
- Please describe the mechanics of integrating the multiple sources that you use. What do you do to weed out duplicates?
- How often do you update each of the sources you use? (Note: We want to ask about all sources, including motor/voter, re this question). Please describe the mechanics of updating.

#### **4. Section Four – Outcomes Measurement**

- Do you feel you have a good idea of the ‘results’ of expanding your source lists? How did you/do you define ‘results’? How do you define ‘success’? What process(es) did you use to define these? Have those definitions changed in your mind over time?
- Do you know how each of the added x,y,z components (components could be defined as the new source itself, or specific data fields within the new source) have impacted results/success? If not, do you have an idea of which one(s) have been relatively more impactful?
- Which party(ies) is responsible for turning data into information, and evaluating information to report outcomes? Do you have example report pages you might share with us?
- How have your outcomes informed you? Have they changed your definition of ‘success’? Have they identified further ‘gaps’ in your system that should be addressed?
- Have you done any analyses of the impact on jury diversity of using the additional sources that you use? If so, what have you found? Do you know of any other states that have done such analyses?

#### **5. Section Five – Other Considerations**

- Is there anything else your state does to ensure that minorities are represented on juries in proportion to their share of the population?

- Do you have any suggestions for jurisdictions that are seeking to increase minority representation on juries?
- Our team is also interested in whether any of the following could help increase minority representation on juries: (1) increasing juror pay for longer trials; (2) providing child care for jurors or potential jurors; (3) modifying trial schedules, to run from, e.g., 8:30-1:00; (4) providing interpreters for jurors. Do you do any of these things? Do you know of others who do? Are you aware of any studies analyzing whether these efforts have had an impact on minority representation on juries?
- What does your state do with respect to jury summons enforcement? Have there been any studies of the impact of enforcement efforts on minority representation on juries?

## ***6. Section Six – Summary/Wrap-Up Questions***

- What have your process and results taught you? What changes are you planning on making, and in what timeframe?
- Are you aware of/interested in other specific data sources and/or fields that you think could improve your results?
- Are there any questions we should have asked you, but missed?
- Can you suggest any other people we should definitely speak with in other jurisdictions (or experts/authors)?
- Do you know of other states that use sources other than motor/voter? Who does what? With whom should we speak?

# Appendix B

**Source lists by State Chart**

STATE	DMV/ID	VOTER ROLLS	TAX ROLLS	UTILITY RECORDS	PUBLIC BENEFITS	OTHER
Alabama	X	X		X		
California	X	X				
Colorado	X	X	X	X		
Connecticut	X	X	X		X	
Delaware	X	X				
Hawaii						
Idaho						
Illinois					X	
Indiana	X					
Iowa						
Kentucky	X	X	X			
Missouri						
Nevada	X	X		X		
New Jersey	X	X	X			X (includes filers of homestead rebate and credit application forms)
New Mexico						
New York	X	X	X		X	
North Dakota	X	X				
Pennsylvania	X					
Rhode Island	X	X	X		X	
South Carolina	X	X				
Tennessee		X				
Utah	X	X	X			X (Death records are used to clean source lists)

Vermont	X	X				
Virginia	X	X	X	X	X	
Washington	X	X				
West Virginia	X	X				
Wisconsin						