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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH NJONGE,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF AMICUS
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS

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I. INTRODUCTION

It appears that this Court will consider the following question:

“Whether in this criminal prosecution the trial court violated the defendant’s constitutional right to a public trial when it closed the courtroom to spectators while considering and ruling on the dismissal of some prospective jurors for hardship?” Amicus WACDL argues that juror hardships requests should be heard in open court, with judicial oversight and with the public present.

In particular, WACDL disagrees with the State’s assertion that:

“Public access also would not play a significant role in the functioning of this process, where the personal situation of a prospective juror is unrelated to the facts of the case to be tried.” Supplemental Brief of Petitioner, at page 16. Because hardship requests are frequently related to economics and because granting or denying hardship requests can affect the diversity of the jury venire, public access to and oversight of hardship determinations is essential.

II. ARGUMENT

A. THIS COURT SHOULD NOT ALLOW TRIAL COURTS TO CONDUCT JURY HARDSHIP REQUESTS OUTSIDE THE OBSERVATIONS AND OVERSIGHT OF THE PUBLIC

The Sixth Amendment to the United States Constitution and article I, § section 22 of the Washington Constitution guarantee the right to a public trial. The state constitution also requires that “[j]ustice in all cases shall be administered openly.” Const. art. I, § 10. A defendant does not waive his public trial right by failing to object to a closure during trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). “Whether a criminal accused’s constitutional public trial right has been violated is a question of law, subject to de novo review on direct appeal.” *Wise*, 176 Wn.2d at 9 (quoting *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)). Whether the trial court violated the defendant’s right to a public trial is a question of law that this Court reviews de novo. *State v. Sublett*, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Under this Court’s recent guidance on the public trial right, the Court must first determine whether a closure that triggers the public trial right occurred by asking if, under considerations of experience and logic, “the core values of the public trial right are implicated.” *Sublett*, 176 Wn.2d at 73. If there is a closure, the Court looks to whether the trial court properly conducted a *State v. Bone-Club* analysis before closing the

courtroom. *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *Wise*, 176 Wn.2d at 12. If the trial court failed to do so, then a “per se prejudicial” public trial violation has occurred “even where the defendant failed to object at trial.” *Wise*, 176 Wn.2d at 18. The remedy is typically a new trial. *Id.* at 19.

In *Sublett*, this Court explained that the experience and logic test was taken from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press II*). According to this Court, the first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” Citing *Press II*, 478 U.S. at 8. The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* If the answer to both is yes, the public trial right attaches. *Id.*

Historically, all phases of jury selection have been open to the public. Washington has a long history of ensuring that jury selection take place in open court in order to insure the fairness of the proceedings. Most recently, in *State v. Jones*, 175 Wn. App. 87, 303 P.3d 1084 (2013), Division II found that holding the alternate juror drawing off the record and outside of the trial proceedings violated the experience and logic test.

Public access plays a significant positive role in the functioning of jury selection. Considering hardship questions and permitting jurors to be excused based upon a written response or reviewed in private by counsel for the parties without requiring those summoned to appear implicates the core values of the public trial right. One of the primary functions of random jury selection from a master list prepared in accordance with RCW 2.36.054 is to assure the selection of a representative group of citizens. 14A Wash. Prac., Civil Procedure § 29:2 (2d ed.).

No citizen may be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status. RCW 2.36.080. In order to make a claim of systematic exclusion of members of these protected classes under the federal constitution, a criminal 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 systematic exclusion of the group in the jury-selection process.” *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). And, under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), discriminatory challenges against a member of a protected class are prohibited by the equal protection clause

of the Fourteenth Amendment. *See also State v. Saintcalle*, 2013 WL 3946038; *State v. Evans*, 100 Wn. App. 757, 759, 998 P.2d 373 (2000). It is the court's duty to protect the right of jurors to participate in the civic process and to ensure that our justice system is free from any taint of bias. *Id.* at 762.

Experience and logic dictate that these core values of the criminal justice system – the right of every citizen to sit on a jury and the right of the defendant to a jury drawn from a cross-section of the community – cannot be protected when judges do not actively supervise hardship determinations in open court, but rather close the courtroom or delegate that duty to the parties or to a clerk acting under a vague written policy.

In May, 2013, WACDL attorney Hong Tran wrote on the lack of diversity among jurors in this State. *See* Appendix 1. She notes the various efforts made to increase juror diversity and participation around the country. But the Courts of this State can't implement some of these solutions unless there is a record of who does not appear, who seeks to be excused, the reasons for the request and the judicial ruling.

The possibility that a small cadre making the hardship determinations out of public view could make race or gender assumptions based solely upon the jurors' written hardship requests is very problematic. Then, by agreement, the parties could exclude entire juror

populations. This would be accomplished with very little judicial oversight and completely out of sight of the public. In looking at the hardship requests the parties could make assumptions regarding the ethnicity and gender of the potential jurors based upon their name alone. One party or another could agree to a hardship request simply to reduce the number of minorities or women from the panel.

The public should be aware of the innumerable requests for release from working citizens who simply cannot afford to sit on a jury because the rate of pay – \$10 a day for trial that might last for weeks in a serious felony case – prevents them from serving because to do so would ruin them financially. The public should be aware that some businesses refuse to pay their employees their regular salary while they serve on a jury.

These are not the sort of judicial inquiries that can or should be conducted out of the public view. The public is entitled to know that only the rich or those who have employment protection and regular pay during their service will be able to serve on juries – particularly when the trial will more than a day or two. The public is entitled to know which employers value their economic pursuits more highly than insuring that their employees right to serve as jurors. The public needs to know that the rate of pay is so low that many summoned will be excused on that basis alone and that hundreds more simply will not appear. The public cannot

address the shortcomings in the current system of jury service and selection if these issues are not considered in open courtrooms.

In re Yates, 177 Wn.2d 1, 21, 296 P.3d 872, 882 (2013), is the perfect example of this danger. In that case, Yates argued that court personnel violated his Sixth Amendment fair-cross-section right by excusing prospective jurors. He asserted that there was a statutory violation that might give rise to a due process violation but this Court rejected that claim, in part, because there was little or no record of what actually happened in the jury administrator's office. This Court noted that Yates provided "no admissible evidence of Pierce County venire selection process." *Id.* at 882. The State apparently provided only general policies about how the jury source list was created and a copy of Pierce County policies. But Yates apparently did not have any evidence of details of the hardship process to present to the Court so he could not show a violation of his right to a venire that represented a cross-section of the community or even a statutory violation.

Critically, the public needs to know that jury pools are only nominally "random." In a recent capital case the King County Superior Court randomly drew 3,000 names from the jury source lists. But in a January 4, 2013 Seattle Times newspaper article, Greg Wheeler, King County's jury manager, said he expected only about 500 people to appear

for jury selection. “The majority of the summonses will likely be sent to bad or old addresses, to someone who is not a registered voter, noncitizens or non-English speakers, or will be ignored.” Appendix 2. The King County Superior Court does not utilize any mechanism to force potential jurors to comply with the court’s summons. Thus, juries are, at a very significant level, “self-selected.” That is, they are comprised only of the potential jurors who choose to comply with the Court’s summons. There is no way to know if under this “self-selecting” system, the persons who actually appear on the first day of service represent a cross-section of the community.

Absent discussion of these issues in open court there is there no way for the public to address these failures either by supporting an increase in juror pay, insisting on court enforcement of the jury summons or creating some other solution to the problem. Again, this was an issue in *Yates*. But because the hardship requests were not heard on the record this Court found that “Yates’s bare allegation of a discrepancy” between the number of elderly and working class people in Pierce County and the number of people in those groups who actually appeared pursuant to a summons was insufficient to make a prima facie showing of a fair-cross-section claim.

In short, there is no way for this Court or the trial courts of this state to discharge the duty to protect the right of jurors to participate in the civic process and to ensure that our justice system is free from any taint of bias if those summoned are excused in closed proceedings.

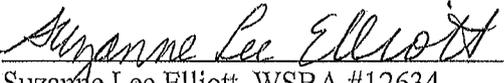
Finally, it is true that in *State v. Beskurt*, 176 Wn.2d 441, 447, 293 P.3d 1159, 1162 (2013), this Court held that there was no closure implicating the right to a public trial right when the trial court sealed pretrial juror questionnaires. But this Court carefully pointed out that the questionnaires in that case were utilized by the attorneys as a “screening tool” and that all of the jurors were actually in the courtroom and questioned by the trial judge and the parties in the presence of the defendant and the public. “At most, the questionnaires provided the attorneys and court with a framework for that questioning.” *Id.* at 447. In this case, however, the jurors’ hardship requests were done entirely in private with no judicial oversight. While the jurors’ initial written requests for excusal have been properly sealed pursuant to a post-trial *Bone-Club* analysis, the consideration, evaluation and questioning of the jurors was required to occur in an open courtroom in the presence of the defendant and the public. *See also In re Yates*, supra at 29.

**III.
CONCLUSION**

This Court should issue an opinion reinforcing the requirement that all of the facts regarding the jury venire are addressed on the record in open court beginning with hardship requests.

DATED this 28 day of August, 2013.

Respectfully submitted,



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Certificate of Service by Mail

I declare under penalty of perjury that on August 29, 2013, I placed a copy of this document and the Brief of Amicus Curiae in the U.S. Mail, postage prepaid, to:

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08.29.2013
Date



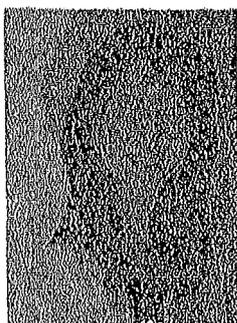
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APPENDIX 1

Jury Diversity

Policy, legislative and legal arguments to address the lack of diversity in juries.

BY HONG TRAN



Even before a defendant steps into a courtroom, there are forces at work that affect whether he or she will get a fair trial. As defense attorneys, we see how these forces have culminated in a jury pool that is largely white, middle and upper class ... deciding the fate of defendants who are not. Before I talk about what efforts should or could be taken, a discussion — while perhaps obvious — of why juror diversity matters merits some discussion.

Why Does Jury Diversity Matter?

The presence of minority jurors impacts the collective process of decision-making, causing jurors to be more careful and thorough in deliberations. Given the different experiences that persons of different races have with the criminal justice system, a multiracial jury helps to eliminate biases and prejudices in the deliberation process.¹ Persons of different races often process the same information in different ways, often to different conclusions.² A diverse jury furthers the goal of ensuring litigants and the public that the system is impartial and fair.³

While beyond the scope of this article, it bears mentioning that it is unclear what effect the presence of minority jurors has on implicit racial biases. "Implicit racial bias" describes the

cognitive processes whereby people automatically classify information in racially biased ways. Researchers have found that people's implicit biases defy their awareness and self-reported egalitarian values.⁴ As one defense attorney put it, "Sometimes the black person on the jury is no more favorable to me than any other juror."⁵ Given

individuals with a felony conviction, which in most states disqualifies a person from jury service.⁹

In 2009, the Washington State Legislature restored the right to vote for persons convicted of a felony, upon release from custody and completion of community custody.¹⁰ The legislation did not address the right to jury

One factor associated with the underrepresentation of minorities is the percentage of juror summons that are undeliverable.

the lack of diversity in our current jury pools, the defense attorney rarely gets to make such strategic calls.

Why Are Minorities Underrepresented on Juries?

One factor associated with the underrepresentation of minorities is the percentage of juror summons that are undeliverable.⁶ Individuals with lower socioeconomic status tend to move more frequently, making them difficult to locate to deliver juror summons.⁷ Because race, ethnicity, and socioeconomic status are highly correlated, the effect on jury pools is that disproportionately fewer minorities serve as jurors.⁸ The exclusion of individuals with felony convictions from jury service also disproportionately impacts minority populations. African-American men and women, in particular, are disproportionately overrepresented among

service. However, since the right to jury service and the right to vote are highly correlated, defense attorneys should encourage their former clients to respond to their jury summons and then be prepared to defend their right to serve on the jury notwithstanding the felony conviction.

The common rationale for excluding individuals with felony convictions from jury service is convicted felons "threaten the probity of the jury" and are "inherently biased against the government."¹¹ There are inherent flaws in the logic that excludes individuals with a felony history from jury service but allows the same individual to practice law, which is the case in twenty-nine states and the federal court system.¹²

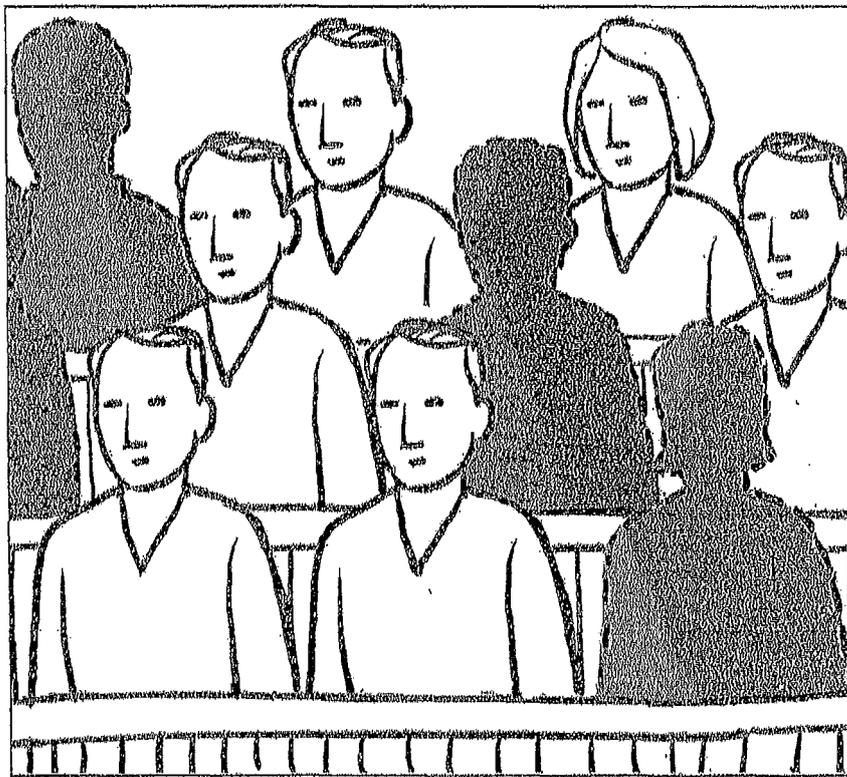
The eligibility requirements for jury service are established by state¹³ and federal¹⁴ statute. Although a common

requirement for jury service is the ability to communicate in English,¹⁵ some notable groups have called this requirement into question. The ABA Commission on the American Jury Project included among its recommendations to the courts that "every effort" be made "to provide reasonable accommodations for non-English speaking jurors."¹⁶ The Washington State Jury Commission recommended that the courts implement a two-year project which would allow the state to gather information on the costs and logistics of accommodating the language needs of limited-English proficient jurors.¹⁷ This recommendation has not been implemented.

Language to some extent can be a proxy for race and ethnicity. In some communities the percentage of the adult population that is limited-English proficient can be significant. If the courts do not consider steps to accommodate the language needs of these potential jurors, they are effectively excluding a portion of the population from jury service. More significantly, by failing to accommodate the language needs of these potential jurors, the court is not providing the litigants, but more critically a defendant, often a person of color, a jury that represents a true cross-section of the community.

Where Do Our Jurors Come From?

To understand the reasons for the lack of juror diversity, it may help to understand where the courts get their jurors. State law determines who the courts summon for jury service.¹⁸ In Washington, potential jurors are randomly selected from a "jury source list" which is created by merging voter registration lists for a county; licensed drivers who reside in the county; and state identification card holders who reside in the county.¹⁹ The superior court assembles the jury lists from these



Although a common requirement for jury service is the ability to communicate in English, some notable groups have called this requirement into question.

sources annually.²⁰

The persons on these lists are identified by first name; last name; middle initial; date of birth; gender; and county of residence.²¹ No other information is tracked.²² Consequently, the courts have no information about the race, ethnicity or socioeconomic status of the people who are receiving and responding to their jury summons. Without this data, we are left to guess if there is a problem with underrepresentation and the scope of the problem.²³

What Efforts Have Courts Taken to Attain More Diverse Jury Pools?

In some states, state law allows the entities responsible for assembling the jury source list to supplement the list from other sources. While supplementing the jury source list may work, such success may depend on what is used to supplement the jury source list, as illustrated by the pilot project below.

In 1995, the Eastern District of Pennsylvania joined several other federal districts in a two-year project

to determine whether using multiple lists improved minority representation in the jury selection process.²⁴ The two groups examined during the pilot were African-Americans and Hispanics.²⁵ The overall conclusion was that if the primary source list — the voter registration lists — are supplemented with driver's license lists, the underrepresentation of minorities actually *increases*.²⁶

Colorado considered the use of utility customer lists; however, rejected the proposal as gender and economically biased, noting that most utility listing as under the name of the male member of the household.²⁷ Also, the

come forward, letters were sent to church leaders, two of whom submitted the names of the entire adult congregation of their church. The use of the parishioner lists substantially increased the minority representation of the jury pool.²⁸

What Efforts Have Been Pursued to Encourage Minority Jurors to Respond to the Juror Summons?

The biggest predictor of nonresponse rates was jurors' expectations of what would happen if they failed to appear. People who believe nothing would happen were less likely to appear for jury service than those

has been summoning jurors for jury service in proportion to their gender, race, and age.⁴¹ Recent legislative efforts suggest these practices failed to create inclusive and accurate jury lists.⁴²

The Eastern District of Massachusetts and the District of Kansas have replaced undeliverable jury questionnaires and nonresponses with mailings "randomly" selected from the jury list to the same zip codes, as those individuals who failed to respond to their summons. No formal evaluation has been made of the effectiveness of this practice.⁴³

In 1999, the Board of Judicial Administration created the Washington State Jury Commission to conduct an inquiry into the state jury system. The commission published its lengthy list of recommendations in July, 2000.

The commission has given the highest priority to increasing juror fees, although all of its recommendations are important steps toward improving jury service. Increased fees will not only address the current inequity in juror compensation, but will contribute to more economically and ethnically diverse juries by enabling a broader segment of the population to serve.⁴⁴

In addition, two of the commission's recommendations address proposals to increase jury pool diversity. One proposal suggests "extensive outreach to targeted communities," which would include educational campaigns targeting high school students, new citizens and minority communities; public service campaigns to promote jury service on radio, television, print media, public transit and other outlets; more extensive advertisement of "juror appreciation week;" and outreach to business and labor groups.⁴⁵ The commission also recommended amending state law to launch a pilot project allowing non-English speaking citizens to serve on a jury with the aid

The use of the parishioner lists increased the minority representation of the jury pool.

listings lacked representation from persons between the ages of eighteen and twenty-one.²⁸ The same issues existed with the use of telephone directories.²⁹ Property tax records were also biased against those unable to afford a home.³⁰ Young adults were underrepresented in these lists.³¹

New York has gone the furthest by combining lists of voters, drivers, income tax payers, and welfare and unemployment compensation recipients.³² However, it is unclear whether this merger of multiple lists results in greater minority representation.³³ In 2010, New York Governor David Patterson signed the Jury Pool Fair Representation Act.³⁴ The act allows the collection and assembly of race and other demographic data into an annual report designed to address the underrepresentation of minorities on New York juries.

Erle County Pennsylvania sought to increase its jury pool by soliciting volunteers. When volunteers did not

who believed they would be punished if they failed to appear.³⁵ Nationally, about 12% of jury summons are returned as "undeliverable."³⁷ The nonresponse rate is between 20% to nearly two-thirds.³⁸

In 1997, a pilot project in Eau Claire, Wisconsin found that increasingly aggressive steps to follow up with nonresponsive individuals reduced the non-response rate from 11% for the first mailing to 5% after a second mailing; the rate fell below 1% after a third mailing that included an Order to Show Cause and warrant. Los Angeles similarly reduced their non-response rate from 41% after the first mailing to 2.7% after follow up efforts.³⁹

It appears that the follow-up efforts employed by the Eau Claire and Los Angeles courts involved a threat of sanction. Courts that relied only on a second summons mailing have noted little change in the failure-to-respond rates.⁴⁰

Since 1989, the State of Georgia

of a certified interpreter. "Amending RCW 2.36.070(4) would lead to a more diverse jury pool, which would ultimately be more likely to arrive at the truth in a decision-making process."⁴⁶

To date, it does not appear that the commission's recommendations have been implemented. Indeed, when I recently spoke to Greg Wheeler, manager of jury services for the King County Superior Court, he was unaware of the commission's report and recommendations.

What Legal Claims Are Available to Challenge the Lack of Juror Diversity?

Litigation challenging the lack of juror pool diversity has primarily evolved around a defendant's Sixth Amendment right to an "impartial jury."⁴⁷ The right to an impartial jury includes the requirement that the jury be drawn from a fair cross-section of the community.⁴⁸

A prima facie violation is established by the *Duren* test:⁴⁹

1. The group alleged to be excluded is a "distinctive" group in the community;
2. The group's representation in the jury pool is not fair and reasonable in relation to the number of such persons in the population; *and*
3. The under-representation of the group results from systemic exclusion of the group in the jury selection process.

If a prima facie violation is established, the burden shifts to the state to provide a compelling justification for systemic exclusion of the distinctive group.

In defining the "distinctive" group, courts have looked for the following:⁵⁰

1. Whether the group is defined and limited by some identifiable factor;
2. Whether a common thread or basic

similarity in attitude, ideas, or experience runs through the group; and

3. Whether the group's interests cannot be adequately represented if the group is excluded from the jury process.

Applying the "distinctive" group test, the groups typically recognized are those based on gender, race, or ethnicity.⁵¹

The second *Duren* prong involves a two-part assessment. First, there is a determination of who is qualified and available for jury service. States retain

community) = 14.5% (women in jury pool) = 39.5%. The courts typically require a threshold showing of 10% or greater.⁵⁴ Comparative disparity equals absolute disparity divided by % (group) in jury-eligible community. For example, 39.5% (absolute disparity) / 54% (jury eligible population) = 73%. The threshold showing is typically 50% or greater. Comparative disparity is useful where the distinctive group is a small percentage of the population.

However, Ninth Circuit case law has upheld the absolute disparity test as the governing measure of under-

The right to an impartial jury includes the requirement that the jury be drawn from a fair cross-section of the community.

broad discretion to define eligible qualifications and exemption criteria.⁵² In Washington State, jurors are qualified for service if they meet the following criteria:⁵³

- Eighteen years old or older;
- U.S. citizen;
- Resident of the county in which summoned;
- English proficient; and
- If convicted felon, had civil rights restored.

Jurors are "available" if they are able to be located and can serve on a jury on the date they are summoned.

Then there must be a statistical measure of under-representation. The two most commonly used statistical tests employed to measure under-representation are absolute disparity and comparative disparity.

Absolute disparity equals % (group) in community minus % (group) in jury pool. For example, 54% (women in

representation for Sixth Amendment claims.⁵⁵ Unfortunately, this case law poses a significant obstacle; the absolute disparity test fails to capture under-representation for communities that comprise a small percentage of the overall community.

Generally, courts have found under-representation where the absolute disparity is at least 10%. That means that it will be impossible to prove underrepresentation for communities making up less than or slightly more than 10% of the population. However, recent cases open the door to challenging the dominance of the absolute disparity test. The recent United States Supreme Court case, *Berghuis v. Smith*,⁵⁶ stated that no statistical measure is superior, and that trial courts should examine all evidence presented. Additionally, in a recent Ninth Circuit concurrence, Judge Kozinski stated that while the absolute disparity test "faithfully applies the law of our circuit," that test, "is clearly wrong."⁵⁷

The final prong under *Duren* is sys-

temic exclusion, defined as an inherent result of the jury selection process. Examples of systemic exclusion are a statute granting automatic exemption to women who when requested or a law providing that women should not be selected for jury service unless she first filed a written declaration of her desire to be subject to jury service.

In Washington State, recent claims challenging the validity of the geographic area from which the jury pool is drawn have proven unsuccessful.⁶⁸ The courts have also rejected claims that convicted felons could constitute a distinctive group in the community for purposes of a Sixth Amendment claim.⁶⁹

Despite the limited successes in the courts, there are still legal theories that have yet to be tested in the courts. Three areas particularly noteworthy are challenges to the citizenship,⁶⁰ the English-proficiency requirement, and economic status. Among the mandates of the jury service are that "[a] citizen shall not be excluded from jury service in this state on account of ... economic status."⁶¹ To the extent the current jury service requirements exclude potential jurors because of their economic status, defendants may have an actionable claim. ■

Hong Tran is a public defender with the King County Department of Public Defense, The Defender Division. Prior to joining the criminal defense bar, she worked as a civil legal aid attorney in Washington State, North Carolina and Utah where she specialized in disability, housing, consumer, and public benefits law.

Notes

1. Edward S. Adams, *Constructing A Jury That is Both Impartial And Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U.L.Rev. 703,

709 (June 1998).

2. *Id.*; see also Stephanie Domitrovich, *Jury Source Lists and the Community's Need to Achieve Racial Balance on the Jury*, 33 Duq. L. Rev. 39, 43-44 (Fall 1994); cf. Albert W. Alschuler, *Racial Quotas and the Jury*, 44 Duke L.J. 704, 704, 722 (February 1995) ("Diverse viewpoints are more important to a jury's performance than diverse skin color; but promoting diversity of race and ethnicity may provide a more workable means of ensuring diverse viewpoints than attempting to probe viewpoints directly through questionnaires, voir dire examinations, and the like.")

3. Paula Hannaford-Agor, *Systemic Negligence In Jury Operations: Why The Definitions of Systemic Exclusion In Fair Cross Section Claims Must Be Expanded*, 69 Drake L. Rev. 761 (Spring 2011).

4. Robert J. Smith and Justin D. Levinson, *The Impact of Implicit Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 797-798 (Spring 2012).

5. cf. Judge Mark W. Bennett, *Unraveling The Gordian Knot Of Implicit Bias In Jury Selection: The Problems of Judge-Dominated Voir Dire, The Failed Promise of Batson, And Proposed Solutions*, 4 Hav. L. & Pol'y Rev. 149 (Winter 2010) (Rev. Jesse Jackson told an audience, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery... Then look around and see somebody white and feel relieved.") (citations omitted).

6. Hannaford-Agor, *supra* note 3, at 773.

7. *Id.* at 773-74; cf. Task Force on Race and the Criminal Justice System, *Preliminary Report of Race and Washington's Criminal Justice System*, 35 Seattle U.L. Rev. 623, 651 (2012) ("African-Americans and Latinos are more likely to be economically disadvantaged, have unstable employment, experience more family disruptions, and have more residential mobility.")

8. Hannaford-Agor, *supra* note 3, at 774.

9. Darren Wheelock, "A Jury of One's

"Peers": The Racial Impact of Felon Jury Exclusion In Georgia," *Justice System Journal Online* 32, no. 3: 335-36 (2011) 10.RCW 29A.08.520.

10. RCW 29A.08.520.

11. James M. Binnall, *Convicts In Court: Felonious Lawyers Make A Case For Including Convicted Felons In The Jury Pool*, 73 Alb.L. Rev. 1379, 1387 (2010).

12. *Id.* at 1379.

13. For example, under Washington State law an individual is ineligible for jury service if he/she:

- Is less than eighteen years of age;
- Is not a citizen of the United States;
- Is not a resident of the county in which he or she has been summoned to serve;
- Is not able to communicate in the English language; or
- Has been convicted of a felony and has not had his or her civil rights restored.

14. See 28 U.S.C.A. § 1856(b).

15. See, e.g. RCW 2.36.054; N.Y.Jud. § 510; Utah Code Ann. § 1297.

16. Resolution of American Bar Association amending 2006 Principles for Juries and Jury Trials, Res. No. 106, Principle 10, p. 3 (adopted 2013).

17. Washington State Jury Commission, *Report to the Board of Judicial Administration* (July 2000), http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf.

18. RCW 2.36.054.

19. RCW 2.36.010; see also GR 18.

20. RCW 2.36.054(1).

21. RCW 2.36.054(2).

22. In contrast to the state system, the Juror Qualification Questionnaire issued by the federal courts asks potential jurors to identify their race/ethnicity. The Jury Information Form attached to the juror summons, also asks for place of birth. The Western Washington District Court draws its jurors from merged lists of active voters, licensed drivers and state id card holders. United States District Court for the Western District of Washing-

- ton, *Amended Plan For The Random Selection Of Grand And Petit Jurors* (adopted September 28, 2011)
23. A 2005 study conducted by Citizen Action of New York, researchers recorded the "apparent" race and ethnicity of 14,000 prospective jurors in Manhattan courts. Their observations form the basis of Citizen Action's conclusion that minorities were under-represented in Manhattan courts. Professor Valerie Hans' of Cornell Law School testimony before the New York General Assembly of the flaws inherent in guessing someone's race or ethnicity helped in the passage of the Jury Pool Fair Representation Act. See John B. Bueker *Jury Source Lists: Does Supplemental Really Work?*, 82 Cornell L. Rev. 390 (January 1997).
 24. *Id.* at 390.
 25. *Id.* at 415.
 26. *Id.* at 418-422.
 27. Domitrovich, *supra* note 2, at 85.
 28. *Id.*
 29. *Id.*
 30. *Id.*
 31. *Id.*
 32. Ronald Randall, James W. Woods and Robert G. Martin, "Racial Representativeness of Juries: An Analysis of Source List And Administrative Effects on the Jury Pool," *Justice System Journal* 29, no 71.: 75 (2008).
 33. Statement of Prof. Valerie P. Hans, *Public Hearing on Jury Diversity, Assembly Standing Committees On Judiciary and Codes*, New York State Assembly, New York, NY (April 30, 2009).
 34. N.Y. Jud. § 528 (September 13, 2010).
 35. Domitrovich, *supra* note 2, at 100. Pennsylvania law does not limit the source of prospective jurors. See Pa. Const. Stat. Ann. § 4521(a).
 36. Bueker, *supra* note 23, at 775.
 37. *Id.*
 38. Martin, *supra* note 32, at 77.
 39. Hannaford-Agor, *supra* note 3, at 785.
 40. *Id.*
 41. Hannaford-Agor, *supra* at 3, at 795.
 - State law authorizes the Department of Licensing and Elections to collect information regarding an individual's race and share such information with the courts. See Ga. Code Ann. § 15-12-40.1 and § 40-5-2(7).
 42. Proposal would change Georgia jury selection process, (3/7/11), www.accessnorthga.com/details.php?n=236818.
 43. Hannaford-Agor, *supra* note 3, at 795.
 44. Washington Jury Commission, *Report to the Board for Judicial Administration, Executive Summary* (July 2000), http://www.courts.wa.gov/committee/pdf/Jury_Commission_Report.pdf.
 45. *Id.* (Recommendations 2-5).
 46. *Id.* (Recommendations 19-22). The Commission argues that the current statutory requirement barring individuals who are "not able not to communicate in the English language" conflicts with the state's policy of providing equal access to the courts for those who do not speak English. See RCW 2.42 and 2.43.
 47. See also Wa. Const. Art. 1, § 22 (interpreted as parallel to the Sixth Amendment) ("In criminal prosecutions the accused shall have the right . . . To have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed.").
 48. See *Taylor v. Louisiana*, 419 U.S. 522, 527, 530 (1975).
 49. *Duren v. Missouri*, 439 U.S. 357, 368 (1979). This test was reaffirmed in *Bergthuis v. Smith*, 130 S.Ct. 1382, 1385 (2010).
 50. See, e.g., *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985), cert. denied, 475 U.S. 1050 (1986).
 51. See, e.g., *Duren v. Mo.*, 439 U.S. 357, 364-365 (1979) (women a distinctive group); *Peters v. Kiff*, 407 U.S. 493, 498 (1972) (African-Americans a distinctive group); *but see, e.g., Lochhart v. McCree*, 476 162, 174 (1986) (individuals against the death penalty not distinctive group); *U.S. v. Raszkievicz*, 169 F.3d 459, 466-67 (7th Cir. 1999) ("reservation [I]ndians" not a distinctive group).
 52. See *Duren v. Missouri*, 439 U.S. at 368.
 53. RCW 2.36.070.
 54. See, e.g., *State v. Gladstone*, 29 Wn. App. 426 (1981) (2.2% disparity insufficient); *State v. Hillard*, 89 Wn.2d 430 (1977) (2.7% disparity insufficient).
 55. See *United States v. Sanchez-Lopez*, 879 F.2d 541, 547 (9th Cir. 1989); See also *United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005).
 56. 130 S.Ct. 1382, 1382 (2010).
 57. *United States v. Hernandez-Estrada*, No. 11-50417, at 18 (9th Cir. Dec. 5, 2012).
 58. See, e.g., *State v. Lanciloti*, 165 Wn.2d 661 (2009) (court rejected facial challenge to the constitutionality of RCW 2.36.055, which authorizes counties that have more than one superior court to divide the county into jury assignment areas, such that jury pools would be drawn for each superior court from the geographic area closer to that court; court also found issue for whether jury source list established by RCW 2.36.055 and KCGLR 18(e) violates the 6th Amendment right to an impartial jury was "unripe" because of the "scant factual record of the actual makeup of the jr source lists."); *City of Tukwila v. Garrett*, 165 Wn.2d 152 (2008) (court rejected statutory and constitutional challenge of jury pool selected from three zip codes, which US Postal Service attributed to City of Tukwila, because zip codes included areas lying outside city as well. Defendant argued jurors should only be drawn from City of Tukwila.); *State v. Twyman*, 143 Wn.2d 115 (2001) (jury pool drawn from less than whole of county is compliant with RCW 2.36.050 and Const. art. 1, sec. 22).
 59. *State v. Christian*, 151 Wn.App. 1006 (Div 1 2009).
 60. See Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded*, 64 Stan. L. Rev. 1503, 1510-12 (2012)
 61. RCW 2.36.080(3).

APPENDIX 2

The Seattle Times

Winner of Nine Pulitzer Prizes

Local News

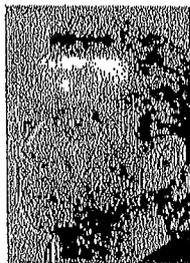
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Jury-duty bulk mailing signals multiple-murder trial near

The trial of Joseph McEnroe, 34, expected to begin in March, will be the county's first potential death-penalty case since Conner Schierman was convicted of killing four members of a Kirkland family and sentenced to death in May 2010.

By Jennifer Sullivan

Seattle Times staff reporter



Three thousand jury summonses have been mailed to King County residents for the upcoming trial of a man accused of killing six members of a Carnation family on Christmas Eve 2007.

The trial of Joseph McEnroe, 34, expected to begin in March, will be the county's first potential death-penalty case since Conner Schierman was convicted of killing four members of a Kirkland family and sentenced to death in May 2010.

Despite the large number of summonses sent out Friday for McEnroe's trial, Greg Wheeler, King County's jury manager, said he expects only about 500 people will show up for jury selection. The majority of the summonses will likely be sent to bad or old addresses, to someone who is not a registered voter, noncitizens or non-English speakers, or will be ignored.

Wheeler said that, on average, about 20 percent of those who receive a jury summons won't respond. Failing to respond to a jury summons is against the law, but Wheeler said the county does not have the resources to enforce it.

Superior Court Judge Jeffrey Ramsdell, who will preside over McEnroe's trial, will decide how many jurors and alternates will be seated.

McEnroe and his former girlfriend, Michele Anderson, are accused of killing Anderson's parents, her brother and sister-in-law and her young niece and nephew at her parents' home. Prosecutors contend the defendants, who lived in a trailer on the elder Andersons' wooded Carnation-area property, planned the shootings because Anderson felt slighted by her parents and was upset they wanted her to pay rent.

McEnroe and Anderson are each charged with six counts of aggravated murder for the deaths of Wayne Anderson, 60, and his wife, Judith, 61; Michele Anderson's brother, Scott, his wife, Erica, both 32, and the couple's two children, Olivia, 5, and Nathan, 3.

Ramsdell has ruled that McEnroe will be tried first.

On Thursday afternoon, Ramsdell set out a detailed timeline for the prosecution and defense leading up to jury questioning, or voir dire, on March 4. Before then, the lawyers will have to get their pretrial motions filed, create a questionnaire for potential jurors and sort through juror excusal requests.

While neither the court nor the lawyers have said when they expect opening arguments to begin or how long the trial is likely to last, McEnroe's defense team plans to call only one witness during the criminal trial, King County sheriff's Detective Scott Tompkins, the lead investigator, according to a case filing.

The prosecution plans to call 59 witnesses, according to a separate court filing.

If McEnroe is convicted of aggravated murder, his trial will enter a "penalty phase," a second trial before the same jury to determine whether he should be sentenced to death or life in prison without parole.

A trial date has not been set for Anderson, who told The Seattle Times in a 2008 jailhouse interview that she committed the killings and wanted to die. She has since pleaded not guilty.

If convicted, Anderson could become the first female on Washington's death row.

The county has spent \$5.1 million to defend McEnroe and Anderson and another \$725,000 to prosecute the pair, according to the Office of Public Defense and the prosecutor's office. Total cost of McEnroe's defense is at \$2.4 million.

By comparison, more than \$2.5 million in has been spent on the defense of Christopher Monfort, the third person in King County currently facing a potential death penalty, according to the Office of Public Defense. Monfort is accused of ambushing two Seattle police officers, killing one, on Halloween night 2009. His trial could begin as early as this fall.

The amount spent on the Carnation case is the largest in prepping for a potential death-penalty case since the prosecution of Green River killer Gary L. Ridgway, according to prosecutors. Between 2001, when Ridgway was identified as a suspect in the serial killings, and 2003, when he pleaded guilty to dozens of counts of aggravated murder, the county spent nearly \$12 million on the extensive investigation, as well as prosecution and defense, county officials said.

Kathryn Ross, who is part of the three-lawyer team representing McEnroe, has repeatedly said he is willing to plead guilty to the murders in exchange for the death penalty being taken off the table.

Ross, in court Thursday, blamed King County Prosecutor Dan Satterberg for the exorbitant trial costs, but she did not go into detail about her client's willingness to plead guilty.

Satterberg declined to comment for this story, but in 2011 he defended the county's filing of death-penalty cases despite the high cost. He blamed much of the increased costs on what he calls an "industry" that has been created by death-penalty defense attorneys.

Information from Seattle Times archives is included in this report.

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OFFICE RECEPTIONIST, CLERK

To: Willie Brenc
Cc: donna.wise@kingcounty.gov; grannisc@nwattorney.net; suzanne-elliott@msn.com
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Rec'd 8-29-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Willie Brenc [<mailto:willie@davidzuckermanlaw.com>]
Sent: Thursday, August 29, 2013 10:56 AM
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Cc: donna.wise@kingcounty.gov; grannisc@nwattorney.net; suzanne-elliott@msn.com
Subject: In re the State of Washington v. Joseph Njonge, No. 86072-6

Please find the attached "Motion of Washington Association of Criminal Defense Attorneys to File an Amicus Curiae Brief" and the corresponding "Brief of Amicus Washington Association of Criminal Defense Lawyers" for the case *State v. Njonge* No. 86072.

Thanks,

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