PARSING THROUGH STATISTICAL TESTS: *GARCIA-DORANTES V. WARREN* PORTRAYING THE NECESSITY FOR THE COMPARATIVE DISPARITY TEST IN FAIR (AND REASONABLE) CROSS-SECTION CHALLENGES

Introduction

In *Garcia-Dorantes v. Warren*, a Michigan state court jury tried and convicted Garcia-Dorantes of second-degree murder and assault.[1] After the trial, however, a local teacher discovered a glitch in the Kent County, Michigan jury selection computer program.[2] After exhausting state court appeals on the issue, the petitioner-appellee filed a 28 U.S.C. § 2254 habeas petition in federal court to challenge the selection program's constitutionally.[3] The district court ruled Garcia-Dorantes established a prima facie case for a Sixth Amendment fair-cross-section violation and granted the petitioner habeas relief.[4] On appeal, the Sixth Circuit affirmed the district court's ruling, holding the jury selection computer program used in Kent County violated the Sixth Amendment.[5]

The primary issue in this case was whether the jury venire Garcia-Dorantes's jury was selected from represented a fair and reasonable cross-section of the community.[6] This case raises various questions such as what a fair and reasonable jury venire requires, at what point does a jury venire transition from fair and reasonable to unfair and unreasonable, and which statistical analysis tests should be used to gauge such abstract concepts.[7] Further, this case illuminates the community confidence and legitimacy fair-cross-section jury pools add to the American judicial system.[8] In its analysis, the Sixth Circuit patched together jurisprudence from various cases and jurisdiction. Additionally, the Sixth Circuit could not rely on the Supreme Court, however, due to the Court failing to determine the appropriate test to use in fair-cross-section cases.[9] In the end, the Sixth Circuit departed from most circuits that primarily reject the comparative disparity test

and implement a lower disparity threshold than other circuits.[10] The uncertainty regarding what fair and reasonable entails leaves challengers' chances at a successful fair-cross-section violation claim a dim luck-of-the-draw.[11]

The goal of this Comment is to examine the Sixth Circuit's use of various statistical tests to determine the fair and reasonable representativeness of juries as it applies to Sixth Amendment fair-cross-section doctrine,[12] and encourage the Sixth Circuit to take a more aggressive stance and adopt the comparative disparity test as its sole *Duren* second prong fair-and-reasonable test. Part I introduces the history of an impartial jury and immergence of the fair-cross-section doctrine. Part II outlines the Sixth Circuit's holding and analysis in *Garcia-Dorantes*. Part III critiques the Sixth Circuit adoption of a case-by-case approach to determine which statistical analysis test to utilize, and explicates the necessity of exclusive and widespread adoption of the comparative disparity test to measure the fair and reasonable representation of underrepresented groups in fair-cross-section analysis.

Part I: Background

Under the Sixth Amendment, all criminally accused persons "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[13] Additionally, in *Duncan v. Louisiana* per the Fourteenth Amendment, the Supreme Court explicitly extended the right to an impartial jury to state court trials.[14] Consequently, trial by jury ideas can be traced back to the Constitution's drafting and the Sixth Amendment ratification, yet remain prevalent in present judicial dialogue.[15]

A. Development of the Fair-Cross-Section Doctrine

Past legislative action, case law and ever-changing public policy created the fair-cross-section doctrine, and continue to mold the doctrine today.[16] While the idea of an impartial jury as

a fundamental right dates back to before the Magna Carta,[17] for two centuries, the American judicial system envisioned a proper jury as a twelve white, and often landowning, men.[18] Over time, however, the "notions of what a proper jury is have developed in harmony with [the country's] basic concepts of a democratic system and representative government."[19] The Nineteenth Amendment's ratification during the early twentieth century substantially increased the voting population.[20] Paired with the earlier-enacted Fifteenth Amendment,[21] the legislature faced a new question – does the ability to vote translate to the ability to serve on a jury?[22]

Ultimately, Congress answered with the Jury Selection and Service Act of 1968.[23] The act stipulates that "all citizens shall have the opportunity to be considered for service on grand and petit juries . . . ."[24] In *Taylor v. Louisiana*, the Court followed Congress's lead, and held that "petit juries must be drawn from a source fairly representative of the community."[25] In doing so, the Court ruled allowing women to opt-out of jury service deprived the accused of his right to his constitutionally entitled factfinder, one drawn from "a body truly representative of the community."[26] Taken collectively, statutory history, case law and public policy transformed an "impartial jury" to mean a jury drawn from a fair-cross-section of the community.

B. *Duren* and the Three-Prong Prima Facie Case for Fair-Cross-Section Violations

Since the Jury Selection and Service Act termed the phrase "a fair cross section of the community,"[27] the judiciary has struggled to figure out what the doctrine requires.[28] More than a decade after the act, the Supreme Court, via *Duren v. Missouri*, established a three-prong prima facie test for a Sixth Amendment fair-cross-section requirement violation.[29] Accordingly, a defendant must show "(1) that the group alleged to be excluded is a 'distinctive group' in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relations 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."[30] The burden then shifts to the prosecution to prove that the exclusion furthered a legitimate state interest.[31] Thus, the Court's decision in *Duren* created a framework for future fair-cross-section challenges.

C. Various Tests are Used to Determine the Second Prong, Fair and Reasonable Threshold

While all three prongs of *Duren's* prima facie case come under scrutiny, the second prong is the most commonly disputed in cases.[32] The first prong requires determining the distinctive group's percentage within the community.[33] Using that baseline benchmark, lower courts have applied various tests to determine whether the distinctive group's representation in each jury venire is fair and reasonable in proportion to the group's presence within that community.[34]

The three most commonly used second prong tests are the absolute disparity test, the comparative disparity test and the standard deviation test.[35] First, the absolute disparity test takes the distinctive group's percentage within the community as a whole, and then subtracts the group's percentage within the entire jury venire.[36] In prior case law, the First, Second, Third, Seventh and Tenth Circuits each applied and adopted the test at different threshold levels.[37] Second, analogous to the absolute disparity test is the comparative disparity test.[38] The comparative disparity test takes the absolute disparity test percentage and divides it by the population percentage of the entire distinctive group eligible for jury service.[39] Comparative disparity test is often used in the Sixth and Eighth Circuits, specifically when the distinctive group population is small.[40] Last, a less commonly applied but regularly discussed test, the standard deviation test, attempts to calculate whether the disparity between the two percentages

is due to chance or rather a systematic exclusion of the distinctive group.[41] To date, however, no circuit has officially adopted the standard deviation test.[42]

Not only is there circuit split on these issues, but when given the chance in *Berghuis v. Smith* to resolve ambiguity, the Supreme Court failed to specify which test should be used.[43] As a result, successful fair-cross-section claims depend primarily on which circuit the petitioner files in rather than the case's merits.[44] Therefore, the second prong test needs precision and reform.

Part II: Case Description

In *Garcia-Dorantes*, the Sixth Circuit held that the district court correctly granted habeas relief because petitioner-appellee established a *Duren* prima facie case for a Sixth Amendment fair-cross-section violation.[45] After detailing the case's procedural posture, the court spent the majority of the opinion analyzing the only aspect of Garcia-Dorantes's prima facie case at issue[46]: "whether Garcia-Dorantes ha[d] shown that the representation of African Americans and Hispanics in the jury venire from which his jury was drawn was not fair and reasonable in relation to the number of such persons in the community."[47] Ultimately, the court held 3.45% absolute disparity and 42% comparative disparity adequately fulfilled *Duren's* second prong.[48] In doing so, however, the Sixth Circuit did not exclusively adopt any particular test for future fair-cross-section claims.[49]

The Sixth Circuit gave three reasons for its holding.[50] First, the court relied on the Supreme Court's guidance, or lack thereof,[51] and acknowledged that when given the option to do so in *Smith v. Berghuis*, the Supreme Court "refrained from taking sides . . . on the method or methods by which underrepresentation is appropriated measured."[52] Second, the court used its own prior fair-cross-section case law.[53] Specifically, the court relied again on *Berghuis*, a factually similar case, that demonstrated a successful fair-cross-section violation with lower

absolute and comparative disparities, 1.28% and 34% respectively.[54] Furthermore, the Sixth Circuit took influence from *United States v. Rogers*, an Eighth Circuit case holding a 30% comparative disparity sufficient under *Duren* second prong analysis.[55] Third, the court distinguished, both legally and factually, the cases from the First, Second, Third and Seventh Circuits on which appellant-respondent relied.[56] Moreover, the Tenth Circuit's persuasive authority in *United States v. Orange*, a case wherein the court held 3.57% absolute disparity and 51.22% comparative disparity insufficient, did not persuade the Sixth Circuit.[57] Instead the Sixth Circuit's preserved its own precedent.[58]

Part III: Analysis

Overall, the Sixth Circuit's holding in *Garcia-Dorantes* was correct. Also, in so much as it was utilized, the court correctly applied the comparative disparity test.[59] The court, however, neglected to wholly adopt the comparative disparity test.[60] Contrarily, uncompromisingly putting the comparative disparity test into wholesale practice would better served the Sixth Circuit in its future fair-cross-section cases. The Sixth Circuit's exclusive adoption of the comparative disparity test would better serve fair-cross-section goals, minimize the marginalization of small minority populations and allow the *Duren* third prong to safeguard in borderline cases.

A. The Comparative Disparity Test Aligns with the Fair-Cross-Section Doctrine Goals

Unlike other tests, the comparative disparity test supports the goal of a representative, impartial jury and adapts to evolving public policy. The fair-cross-section jury venire originated from an increase in the country's voter population.[61] As mentioned in Part I, however, transforming the collective jury venire from white males to include females and minorities challenged the courts.[62] While females make up an equal percentage, and at times more, of the community as males,[63] African American and Hispanics populations are characteristically much

lower than white population percentages.[64] The fair-cross-section doctrine's chief purpose is to ensure defendants' Sixth Amendment right to a trial by jury, while the jury's main function is "to ensure that the verdict reflects the voice of the community, and the jury cannot serve that purpose if distinctive groups in the community are left out of the jury pool."[65] As a result, drawing an impartial jury from a community's fair-cross-section emerged in an effort to achieve more representative juries.[66]

While often criticized for exaggerating the disparity percentage,[67] the comparative disparity test's weakness actually makes the test the best choice for second prong analysis: the comparative disparity test gives defendants the benefit of the doubt at prong two.[68] As a result, the comparative disparity test allows the fair-cross-section doctrine's targeted demographic, distinctive groups encompassing small population percentages, a chance to proceed.

Not only does the comparative disparity test better achieve a more representative jury, the test also advances public policy concerns.[69] Research suggests not only does serving on a jury increase individuals confidence in the judicial system, but the public largely trusts diverse juries more than juries filled with similar, like-minded people.[70] Furthermore, verdicts rendered from more representative juries "are believed to be more likely to render decisions that accord with the larger population's unarticulated interests . . . " and various demographics views of justice.[71]

Contrarily, comparative disparity test and fair-cross-section opponents argue the complete representation of a community is near impossible in a single petit jury.[72] Challengers, however, fail to acknowledge the distinction between a petit jury and a jury venire.[73] A fair-cross-section does not require the twelve people on a petit jury equally represent the community's demographic makeup.[74] Rather, the fair-cross-section doctrine only requires a

defendant's petit jury be drawn from a jury pool, or jury venire, with a proper demographic formation.[75] Therefore, potential petit jury arguments are irrelevant and unfounded.

B. The Widely Used Absolute Disparity Test Marginalizes Small Minority Populations

Unlike the comparative disparity test, the popular absolute disparity test undermines the fair-cross-section doctrine's origin, function and purpose. Most threatening is the absolute disparity test's potential to eliminate the representation requirement for a distinctive group that comprises a small population percentage.[76] For example, in 2010, African Americans comprised 9.45% of the Los Angeles County population.[77] Many circuits adopting the absolute disparity test require a standard 10% absolute disparity threshold.[78] Regardless, even if African Americans were completely unrepresented in the jury pool, the absolute disparity could never exceed 9.45%. Therefore, it would be impossible for a minority, distinctive group comprising less than 10% of the population, in this instance African Americans in Los Angeles County, to ever raise a successful fair-cross-section challenge in a jurisdiction operating under the common threshold.

Applying the absolute disparity in various large cities in the country would threaten the existence of the fair-cross-section jury pool.[79] As previously mentioned, fair-cross-section requirements could be eliminated from somewhere as metropolitan as Los Angeles County. Under the stern absolute disparity test, a fair-cross-section claim always fails under the *Duren* second prong resulting in no prima facie case for a fair-cross-section violation in Los Angeles County, regardless of whether a systematic exclusion of a distinctive group occurred.[80] Therefore, the absolute disparity test diminishes the fair-cross-section's function and purpose.

Challengers argue that comparative disparity analysis requires too much effort for jurisdictions that render little to no benefits.[81] The numbers, however, tell a different story.[82] In San Francisco, African Americans make up only 5.7% of the population.[83] In contrast, in 2016,

African Americans represented 39% of the individuals booked into the San Francisco jail and 51% of the individuals represented by public defenders in the jurisdiction.[84] Additionally, a 10-year study from two Florida counties, Lake and Sarasota, revealed juries containing zero African Americans convicted 81% of black defendants.[85] Those same juries, however, only convicted 66% of white defendants.[86] Contrarily, in those same jurisdictions, when the jury included only one African American, juries resulted in a 71% conviction rate for African American defendants and a 73% conviction rate for white defendants.[87] Such a drastic change in conviction rates show the large potential benefits of using the comparative disparity test rather than the absolute disparity test, or a combination of the two.

C. *Duren* Third Prong Acts as a Safeguard Against Comparative Disparity Concerns

Even with a lessoned second prong standard, the third prong of the *Duren* test acts as a safeguard in borderline cases and ensures that frivolous claims do not proceed. Nonetheless, giving petitioners the benefit of the doubt at the second prong is not a new concept.[88] In practice, however, a more relaxed second prong often does receive scrutiny.[89] Opponents of the comparative disparity test worry that the test lowers the standard necessary for a petitioner to establish a sufficient prima facie case.[90] Those opponents, however, overlook a key component of implementing the comparative test at the second prong. Surpassing the second prong benchmark gets the petitioner only so far.[91] Assuming the first prong is already satisfied,[92] after adequately passing the second prong, the petitioner still must pass the third, final prong.[93] Therefore, even if the second prong is met, the doctrine requires the underrepresentation be a result of systematic exclusion of the distinctive group during the jury-selection process.[94]

Moreover, the standard deviation test, mentioned in Part I, fits within a third prong framework much better than the second prong.[95] This test "ascertains the likelihood that random

chance explains a particular set of observed results."[96] Unlike the other tests, standard deviation measures the probability of a result rather than the significance of a result.[97] Similarly, the third prong looks to the reason behind the disparity discovered in the second prong, rather than the magnitude of the disparity. Therefore, like the absolute disparity test, the standard deviation test does not serve as an adequate second prong test.[98] Therefore, courts are left to adopt the comparative analysis test as a sole test for *Duren* prima facie violations.

Consequently, using the comparative disparity test to give petitioners the benefit of the doubt in second prong challenges does not lessen the prima facie standard, but rather allows the petitioner to surpass the second prong and proceed to the third prong evaluation.[99] Therefore, the third prong can safeguard fair-cross-section claims against warrantless violations.[100]

Conclusion

Despite using a comparative disparity test in its *Garcia-Dorantes v. Warren* analysis, the Sixth Circuit adopted a case-by-case approach to determine what constitutes a fair, and reasonable, cross-section of the community as it pertains to the Sixth Amendment right to an impartial jury.[101] While correct in its holding, the Sixth Circuit should have taken a more aggressive approach and adopted the comparative disparity test in its entirety.

First, the comparative disparity test aligns with the goals of and policy behind the fair-cross-section doctrine. Second, the widely used absolute disparity test marginalizes small minority populations but making a fair-cross-section virtually unattainable. Third, in borderline cases, erring on the side of lenity towards the accused allows the third prong of the *Duren* prima facie case to act as a safeguard against meritless claims. Overall, widespread adoption of the comparative disparity test aligns with the statutory purpose, case law and public policy concerning fair-cross-section challenges.

[1] Garcia-Dorantes v. Warren, 801 F.3d 584, 587 (6th Cir. 2015)

[2] *Id.*; *see also Teacher Discovers Computer Glitch in Jury System*, ASSOCIATED PRESS, Oct. 21, 2002 (documenting the story of how teacher Wayne Bentley discovered the jury system glitch).

[3] 28 U.S.C. § 2254 (2012) (describing the requirements and limitations of a writ of habeas corpus); *see also* 28 U.S.C. § 2241 (2012) (discussing federal power to grant habeas corpus).

[4] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); *Garcia-Dorantes*, 801 F.3d at 588.

[5] *Garcia-Dorantes*, 801 F.3d at 588 ("[T]he district court properly granted habeas relief.").

[6] *See generally Cross section*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cross%20section ("[A] composite representation typifying the constituents of a thing in their relations.").

[7] *Garcia-Dorantes*, 801 F.3d at 600–01. *Compare Venire*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A panel of persons selected for jury duty and from among whom the jurors are to be chosen."), *with Petit Jury*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A jury (usu[ally] consisting of 6 or 12 persons) summoned and empaneled in the trial of a specific case.").

[8] *See, e.g.*, David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463, 466 (2015) (describing the three primary functions of a jury as checking government power, encouraging civic participation and providing public legitimacy to the judicial system).

[9] *E.g.*, Berghuis v. Smith, 559 U.S. 314, 329 (2010).

[10] *See, e.g.*, Nina W. Chernoff & Joseph B. Kadane, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, CHAMPION, Dec. 2013, at 14, 18.

[11] Richard M. Re, *Jury Poker: A Statistical Analysis of the Fair Cross-Section Requirement*, 8 OHIO STATE J. OF CRIM. L. 533, 535 (2011) (comparing jury selection process to poker).

[12] *See generally* William Caprathe et al., *Assessing and Achieving Jury Pool Representativeness*, 55 THE JUDGES' J. 16, 16–20 (2016) (providing a checklist for jury representativeness).

[13] *Compare* U.S. CONST. amend. VI (establishing America's impartial jury), *with* United Nations Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 2889 U.N.T.S. 222 ("[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."), *and* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("[E]veryone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal.").

[14] U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process . . . ."); State v. Holland, 976 A.2d 227, 234 (Me. 2009) ("Sixth Amendment, made applicable to the states by the Fourteenth Amendment . . . .").

[15] *Compare* THE FEDERALIST NO. 83 (Alexander Hamilton) (explaining that explicitly stating the right to trial by jury in a criminal proceeding supports the importance of criminal juries but does not diminish the possibility of juries in civil trials), *with* @misslori, TWITTER, https://twitter.com/misslori/status/849292776705589248. For modern jury selection process interpretations see generally How You Were Chosen, MULTNOMAH COUNTY CIRCUIT COURT, http://www.courts.oregon.gov/Multnomah/General_Info/Jury_Service/pages/how_you_were_chosen.aspx.; Mona Chalabi, What Are the Chances of Serving on a Jury?, FIVETHIRTYEIGHT (June 5, 2015, 10:18 AM), https://fivethirtyeight.com/features/what-are-the-chances-of-serving-on-a-jury/.

[16] *See* Jim Neal, Speech at the Nashville Bar Association Law Day Luncheon (Apr. 29, 2005). For a thorough history of the fair-cross-section doctrine see Sanjay K. Chhablani, *Re-Framing the "Fair Cross-Section" Requirement*, 13 U. OF PA. J. OF CONST. L. 931, 932–36 (2011).

[17] MAGNA CARTA app. at 389 (J. C. Holt et al. eds., Cambridge Univ. Press 3rd ed. 2015) (1215); *See generally John* 8:7 (English Standard) ("And as they continued to ask him, he stood up and said to them, 'Let him who is without sin among you be the first to throw a stone at her.'").

[18] *See* Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 8, Berghuis v. Smith, 559 U.S. 314 (2010) (No. 08-1402) (citing 3 W. BLACKSTONE' COMMENTARIES, 239 (1st ed. 1768)) ("[A] tribunal composed of twelve good men and true.").

[19] Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (quoting Glasser v. United States, 315 U.S. 60, 85–86).

[20] *Compare* 573 Op. Att'y. Gen. Minn. 437 (1921) ("Women generally are now qualified voters of their respective counties. The law requires that a county board select from the qualified voters of a county persons to serve as jurors."), *with* 61 Op. Att'y. Gen. Wis. 137 (1972) (comparing the Nineteenth Amendment adding women to the electorate body to the Twenty-Sixth Amendment lowering the voting age from 21 years-of-age to 18 years-of-age). *See generally* Brandt Williams, *Race Colors Jury Selections for Alleged Jamar Clark Protest Shooter*, MPR NEWS (Jan. 13, 2017), http://www.mprnews.org/story/2017/01/03/jamar-clark-protest-alleged-shooter-scarsella-trial; Juror Qualifications, UNITED STATES COURTS, http://www.uscourts.gov/services-forms/jury-service/juror-qualifications (showing the modern qualification necessary for potential jurors and the parallels between the current electorate body and the current potential jurors).

[21] *See* Coriell, supra note 8, at 468 ("[J]ury service is an avenue through which citizens partake in democracy. The right to serve on a jury may be viewed as akin to the right to vote.").

[22] *Compare* U.S. CONST. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State *on account of race, color, or previous condition of servitude* . . . .") (emphasis added), *with* U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State *on account of sex*.") (emphasis added), *and* U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state *on account of age*.") (emphasis added).

[23] Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 1861, 82 Stat. 53, 54 (1968) ("It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.").

[24] *Compare* Jury Selection and Service Act § 1861 ("To provide improved judicial machinery for the selection of Federal juries, and for other purposes."), *with* Juries Act 1974, c. 23 (UK) (providing information for the Lord Chancellor to summon jurors and for indicted persons to challenged jurors), *and* JAG, PRACTICING MILITARY JUSTICE (U.S. Army ed. 2013) (describing the differences in the challenges to and selection of panel process in military court).

[25] *Taylor*, 419 U.S. at 538 (establishing constitutionality of right to fair-cross-section jury).

[26] *Id.* at 527. *Contra* Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner, *supra* note 18, at 8 (citing Tucker, *Of the Trial by Jury in Virginia*, *in* 4 W. BLACKSTONE, COMMENTARIES, note F, app. at 64–69 (S. Tucker ed. 1803)) ("[R]epresentative cross-section not considered required for "an impartial jury," it was not considered desirable.").

[27] Jury Selection and Service Act § 1861. *See generally* MINN. R. CRIM. P. 26.02. (disclosing Minnesota's jury process); *Summons for Jury Service*, D. CONN (exhibiting a jury summons).

[28] *See also* R. v. Kokopenace, [2015] S.C.R. 398 (Can.) (showing the fair-cross-doctrine is also controversial in Canada); Linda Greenhouse, *Supreme Court Roundup; Justices, 5-4, Say an Impartial Jury Needn't Be a Cross-Section*, N.Y. TIMES, Jan. 23, 1990, at A19.

[29] Duren v. Missouri, 439 U.S. 357, 363–64 (1979) (clarifying the "nature of the fair-cross-section" discussed in prior case law by outlining a proper three-step prima facie case).

[30] *Id.* at 364. For examples of the court applying the prima facie test see generally *Garcia-Dorantes*, 801 F.3d at 595, United States v. Osorio, 801 F.Supp. 966, 976–77 (D. Conn. 1992).

[31] *Duren*, 439 U.S. at 367–68 ("The demonstration of a prima facie fair-cross-section violation by the defendant is not the end of the inquiry . . . ."); *see also* Adam Liptak, *Supreme Court Finds Racial Bias in Jury Selection for Death Penalty Case*, N.Y. TIMES (May 23, 2016), https://www.nytimes.com/2016/05/24/us/supreme-court-black-jurors-death-penalty-georgia.html?_r=0 (showing prosecution's burden is low but cannot be pretextual).

[32] *See* Chernoff, *supra* note 10 at 17 (defining second prong as the "essential claim").

[33] *Duren*, 439 U.S. at 364 ("Initially, the defendant must demonstrate the percentage of the community made up of the group alleged to be underrepresented, for this is the conceptual benchmark for the Sixth Amendment fair-cross-section requirement.").

[34] *See, e.g.*, *Berghuis*, 559 U.S. at 323–24 (explaining the calculations used for the absolute disparity test, the comparative disparity test, and the standard deviation test).

[35] *See, e.g.*, People v. Smith, 463 Mich. 199, 203 (2000); Re, *supra* note 11 at 535.

[36] *Smith*, 463 Mich. at 217 (Cavanagh, J., concurring).

[37] *See Osorio*, 801 F.Supp. at 978 (citing United States v. Biaggi, 909 F.2d 662, 678 (2d Cir.) (1990)) (explaining the Second Circuit's second prong, absolute numbers test); *see also* People v. Omar, 281 Ill.App.3d 407, 415 (1996) ("While there appears to exist a discrepancy among

several federal circuits, the majority of circuits utilized the "absolute disparity" test in analyzing a defendant's challenge to a jury venire.").

[38] *See* Chernoff, *supra* note 10 at 18 (explaining comparative disparity test).

[39] *Smith*, 463 Mich. at 218 (Cavanagh, J., concurring).

[40] *Garcia-Dorantes*, 801 F.3d at 602. *But see Osorio*, 801 F.Supp. at 978.

[41] *See, e.g.*, *Smith*, 463 Mich. at 219–21 (Cavanagh, J., concurring) (describing the calculation).

[42] *Berghuis*, 559 U.S. at 329 (citing United States v. Rioux, 97 F.3d 648, 655 (C.A.2 1996)).

[43] *See, e.g.*, *id.* at 329–30 ("[W]e would have no cause to take sides today . . . .").

[44] *Compare Garcia-Dorantes* 801 F.3d at 600–01(using comparative disparity test), *with Holland*, 976 A.2d at 237 (using and showing preference for absolute disparity test), *and* Omar, 281 Ill.App.3d at 415 (rejecting comparative disparity test as misleading).

[45] *Garcia-Dorantes*, 801 F.3d at 588.

[46] *Id.* ("[I]t is undisputed that Garcia-Dorantes has satisfied the first and third . . . .").

[47] *Id.* at 600 (applying the second prong of the fair-cross-section violation prima facie case).

[48] *Id.* at 601 (applying and accepting both comparative and absolute disparity tests).

[49] *Id.* at 603–04.

[50] *Id.* at 601–04.

[51] *Id.* at 601 ("[T]he Supreme Court has not mandated the proper statistical measure to determine whether a minority is underrepresented for the purposes of *Duren's* second prong.").

[52] *E.g.*, *Berghuis*, 559 U.S. at 329.

[53] *Garcia-Dorantes* at 601–02 (relying on statistics from *Berghuis*).

[54] *See Berghuis*, 559 U.S. at 323 (rev'd on other grounds).

[55] *Garcia-Dorantes*, 801 F.3d at 602 (citing United States v. Rogers, 73 F.3d 774 (8th Cir. 1996)) (allowing 30% comparative disparity with distinctive group making up 1.87% of the population).

[56] *Id*. at 602–03 (citing Ambrose v Booker, 781 F.Supp.2d 532, 545 (E.D. Mich. 2011)).

[57] *See id.* at 603 (citing United States v. Orange, 447 F.3d 792, 798–99 (10th Cir. 2006)).

[58] *Id.* at 603 (quoting *Ambrose*, 781 F.Supp.2d at 545) (reaffirming circuit's *Berghuis* holding).

[59] *See id.* at 602–03 (quoting United States v. Shinault, 147 F.3d 1266, 1272 (10th Cir. 1998)).

[60] *Id.* at 603–04 ("Because Garcia-Dorantes has satisfied the *Duren* second prong based on the *combination* of absolute and comparative disparity . . . .") (emphasis added).

[61] *See* Stephen Knack, Deterring Voter Registration Through Juror Source Practices: Evidence from the 1991 NES Pilot Study, 1 (GEORGE MASON UNIV. PRESS 1992) (explaining research shows voter registration is lower due to people attempting to avoid jury duty); *see also* Christina Tetreault, *Don't Fall for a Jury Duty Phone Scam*, CONSUMER REPORTS (June 16, 2015, 3:30 PM), http://www.consumerreports.org/cro/news/2015/06/jury-duty-phone-scam/index/htm#.

[62] *See generally* 61 Op. Att'y. Gen. Wis. 137, 138 (1972) (describing the changes required in the jury selection process when younger voters were added to the electorate).

[63] *See Taylor*, 419 U.S. at 524 (using statistic that females make up 53% of the population).

[64] *See* Vivian Ho, *For SF's Black Defendant, It's Hard to Find Jury of Peers*, S. F. CHRON. (Mar. 4, 2017, 5:07 PM), http://www.sfchronicle.com/crime/article/For-SF-s-black-defendants-it-is-hard-to-find-10977625.php. ("The shrinking of the African American population in big cities . . . is prompting growing concern that black defendants are being denied their right . . . .").

[65] Chernoff, *supra* note 10 at 14.

[66] *See, e.g.*, *Taylor*, 419 U.S. at 527 (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

[67] *See* Re, *supra* note 11 at 545 (criticizing test for not measuring probabilistic injuries).

[68] People v. Bryant, 822 N.W.2d 124, 153 (Mich. 2012) (Cavanagh, J., dissenting) (citing *Smith* 463 Mich. at 222) ("'[W]hen the showing of underrepresentation is close, or none of the methods of analysis are particularly well-suited to a case,' I believe courts should 'glance ahead' . . . .").

[69] *See* Richard M. Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L. J. 1568, 1596 (2007).

[70] *Id.* at 1573 (footnote omitted).

[71] *Id.* (explaining the benefits of verdicts made by substantively representative juries).

[72] *See, e.g.*, *id.* at 1572 ("A jury might run afoul of demographic representativeness . . . but only a finite number of these categories can be represented in a twelve-person jury.").

[73] *See* Coriell, supra note 8, at 468 (quoting Powers v. Ohio, 499 U.S. 400, 406 (1991)) ("[A]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.").

[74] *See Taylor*, 419 U.S. at 537–38 (citing Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970)) ("The fair-cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.").

[75] *See, e.g.*, *Osorio*, 801 F. Supp. at 975 (citing *Biaggi*, 909 F.2d at 678) ("[T]he Sixth Amendment guarantees only the opportunity for a representative jury, not a representative jury itself."); Re, *supra* note 69 at 1571 (requiring simply a "fair possibility" of a representative jury).

[76] *See Osorio*, 801 F. Supp. at 978; Re, *supra* note 69 at 1596.

[77] Edward P. Schwartz, *Supreme Court Absolutely Unclear on Constitutionality of Absolute Disparity Test*, JURY BOX (Jan. 26, 2010), http://juryboxblog.blogspot.com/2010/01/supreme-court-absolutely-unclear-on.html (deeming the absolute disparity test "twisted logic").

[78] *See, e.g.*, *Omar*, 281 Ill.App.3d at 415 ("An absolute disparity of less than 10%, by itself, is insufficient to demonstrate unfair or unreasonable representation . . . .").

[79] For an illustration of declining percentages of African Americans see Ho, *supra* note 64.

[80] *See Omar*, 281 Ill.App.3d at 415 (holding 10% absolute disparity needed to reach third prong).

[81] Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner, *supra* note 17, at 3 ("The Sixth Amendment cross-section requirement provides little benefit . . . .").

[82] *Compare* Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 955–62 (2016) (using data to revamp jury selection), *with* Andria Simmons, *State Expands Jury Duty Pool*, ATL. JOURNAL-CONSTITUTION (July 2, 2012, 6:09 AM), http??ajc.com/news/local/state-expands-jury-duty-pool/iy78gVxXv6pE6jD1rPRvoL/ (explaining how states are improving jury pool statistics), *and* Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 76 JUDICATURE 273 (1996) (encouraging "engineering" jury lists).

[83] Ho, *supra* note 64 (describing a jury pool of 102 people, only four of which were black).

[84] *Id.*; *see also* Schwartz, *supra* note 77 at (providing Los Angeles statistics).

[85] Ho, *supra* note 64 (citing Q. J. OF ECON. (2011)).

[86] Ho, *supra* note 64; *see also Finding a Jury of Your Peers Actually is Pretty Complicated*, NPR (Dec. 27, 2014), http://www.npr.org/templates/transcript.php?storyId=372916940.

[87] Ho, *supra* note 64 ("Race matters in a courtroom.").

[88] *See, e.g.*, *Smith*, 463 Mich. at 205 ("[W]e give the defendant the benefit of the doubt on the underrepresentation and proceed to the third prong of the *Duren* analysis.").

[89] *See, e.g.*, *Omar*, 281 Ill.App.3d at 415 ("The smaller the underrepresented group is in the community, the more the 'comparative disparity' test distorts the proportional representation.").

[90] *See generally Taylor*, 419 U.S. at 538–43 (Rehnquist, J., dissenting).

[91] State v. Griffin, 846 N.W.2d 93, 102 (Minn. Ct. App. 2014) ("[Third prong] requires a demonstration that the underrepresentation was not the result of reasonable and plausible alternative possibilities shown by the [second prong] statistical data.").

[92] *See Berghuis*, 559 U.S. at 319 ("The first showing, in most cases, easily is made; the second and third are more likely to generate controversy.").

[93] *See, e.g.*, CTR. FOR JURY STUDIES, NAT'L CTR. FOR STATE COURTS, *A Primer on Fair Cross Section Jurisprudence*, *in* JURY MANAGERS' TOOLBOX 6, 6 (2010), http://www.ncsc-jurystudies.org/~/media/Microsites/Files/CJS/What%20We%20Do/A%20Primer%20on%20Fair%20Cross%20Section.ashx ("[A]n effective jury system will ensure the jury operations are free of systematic exclusions and that the resulting jury pool is a reasonable reflection of community demographic characteristics.").

[94] *Duren*, 439 U.S. at 364 (summarizing purpose of the prima facie case's third prong).

[95] *See, e.g.*, *Smith*, 463 Mich. at 219–21 (illuminating the standard deviation test's narrow use).

[96] Re, *supra* note 11 at 549 (explaining the result of standard deviation calculations).

[97] Chernoff, *supra* note 10 at 18–19 (characterizing standard deviation as probability analysis).

[98] *See Smith*, 463 Mich. at 224 (Cavanagh, J., concurring) (citing *Rioux*, 97 F.3d at 655) ("[N]o court in the country has accepted [standard deviation] alone as determinative in Sixth Amendment challenges to jury selection systems").

[99] *Id.* (Cavanagh, J., concurring) ("As a final step in establishing a fair cross-section violation, defendant must show that the underrepresentation of black jurors was systematic . . . .").

[100] *See Griffin*, 846 N.W.2d at 101 (holding if the appellant is given the benefit of the doubt at the second prong the claim can fail at prong three for lack of a systematic exclusion).

[101] *Garcia-Dorantes*, 801 F.3d at 603–04.