Chapter 21

Election or Waiver of Jury Trial; Motions Relating to the Jury

§ 21.01 THE RIGHT TO JURY TRIAL IN JUVENILE DELINQUENCY CASES

In *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971), a majority of the Court held that juvenile respondents in delinquency proceedings do not possess a federal constitutional right, under either the Sixth Amendment or the Due Process Clause, to trial by jury. The plurality opinion by Justice Blackmun, joined by three other Justices, concluded that the "applicable due process standard" of "fundamental fairness" (*id.* at 543) does not require juries because "one cannot say that in our legal system the jury is a necessary component of accurate factfinding" (*id.* at 543); therefore "[t]he imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, provide an attrition of the juvenile court's assumed ability to function in a unique manner" (*id.* at 547), converting "intimate, informal protective proceeding[s]" into "a fully adversary process," *id.* at 545. Justice Harlan concurred in the holding on the basis of his view that "criminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process." *Id.* at 557. Justice Brennan, in a concurring and dissenting opinion, concluded that "the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve" – "to 'protect the [juvenile] from oppression by the Government,' . . . and to protect him against 'the compliant, biased, or eccentric judge' . . . [by] allow[ing] . . . what is in essence an appeal to the community conscience." *Id.* at 554. *See generally* Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, in *Symposium on Juvenile Justice Reform*, 33 WAKE FOREST L. REV. 553 (1998).

The States are, of course, free to enact statutes granting a jury trial right to respondents in delinquency proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. at 547; *id.* at 553 (White, J., concurring). Approximately one quarter of the States have enacted statutes providing for jury trials in juvenile cases. *See* COLO. REV. STAT. ANN. § 19-2.5-610 (2022) (establishing "a right to a jury trial for juveniles charged as aggravated offenders, and for juveniles charged with having committed a crime of violence," and "permit[ting] the court to order a jury trial in other kinds of juvenile cases, excepting only misdemeanor, petit offense or municipal ordinance violations," *A.C., IV v. People*, 16 P.3d 240, 242 (Colo. 2001)); MASS. GEN. LAWS ANN. ch. 119, § 55A (2022); MICH. COMP. LAWS ANN. § 712A.17(2) (2022); MONT. CODE ANN. § 41-5-1502(1) (2022); N.M. STAT. ANN. § 32A-2-16(A) (2022); OKLA. STAT. ANN. tit. 10A, § 2-2-401 (2022); TEX. FAM. CODE ANN. § 54.03(c) (2022); W. VA. CODE § 49-4-709 (2022); WYO. STAT. ANN. § 14-6-223(c) (2022). *See also* ARK. CODE ANN. § 9-27-505(a) (2022) ("right to a jury trial" for juveniles tried as an "extended juvenile jurisdiction offender"); MINN. STAT. ANN. § 260B.163(1)(a) (2022) ("child who is prosecuted as an extended jurisdiction juvenile has the right to a jury trial on the issue of guilt"); *In re G.O.*, 191 Ill. 2d 37, 42, 727 N.E.2d 1003, 1006, 245 Ill. Dec. 269, 272 (2000) (Illinois "Juvenile Court Act grants a jury trial to both habitual and

violent juvenile offenders"). The Alaska Supreme Court has construed its state constitution as conferring a right to a jury trial upon juveniles in delinquency cases. *R.L.R. v. State,* 487 P.2d 27, 32-33 (Alaska 1971). The Kansas Supreme Court, which had initially followed *McKeiver* in holding in 1984 that juveniles do not have a right to a jury trial, reached the opposite result in 2008 on both federal and state constitutional grounds because "the Kansas juvenile justice system has become more akin to an adult criminal prosecution" as "the focus has shifted to protecting the public, holding juveniles accountable for their behavior and choices, and making juveniles more productive and responsible members of society," all of which has "eroded the benevolent *parens patriae* character that distinguished . . . [the juvenile justice system] from the adult criminal system." *In the Matter of L.M.*, 286 Kan. 460, 466, 469-70, 473, 186 P.3d 164, 168, 170, 172 (2008). The courts in other States have thus far declined to find a right to a jury trial in juvenile court on either federal or state constitutional grounds, *see, e.g.*, *In the Matter of Reynolds*, 317 Or. 560, 857 P.2d 842 (1993); *State v. Lawley,* 91 Wash. 2d 654, 591 P.2d 772 (1979), although some courts have held on federal or state constitutional grounds that the state's denial of a jury trial right for juveniles has systemic ramifications such as precluding placement of juveniles in adult correctional facilities (*see In re C.B.*, 708 So.2d 391 (La. 1998); *In re Jeffrey C.*, 146 N.H. 722, 725, 781 A.2d 4, 7 (2001); *In the Interest of Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998)) or precluding the use of a delinquency adjudication as a predicate conviction for enhancing an adult criminal sentence (*see State v. Brown*, 879 So.2d 1276 (La. 2004); *State v. Hand*, 2016-Ohio-5504, 149 Ohio St. 3d 94, 73 N.E.3d 448 (2016)), or requiring more intensive appellate review of the sufficiency of the evidence underlying a delinquency finding in a bench trial (*see In the Interest of A.K.*, 825 N.W.2d 46, 51 (Iowa 2013) ("juvenile proceedings differ from criminal proceedings in . . . [the] important respect . . . [that] [n]either statutory nor constitutional provisions guarantee juveniles the right to a jury trial," and "[t]his important distinction between adult and juvenile proceedings favors a more in-depth appellate review of the facts supporting and opposing an adjudication")). *See also* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111 (2003).

The plurality also observed in *McKeiver v. Pennsylvania* that "[t]here is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury." 403 U.S. at 548. The California Supreme Court in *People v. Superior Court of Santa Clara County,* 15 Cal. 3d 271, 539 P.2d 807, 124 Cal. Rptr. 47 (1975), construed the California juvenile code as authorizing judges in delinquency cases to appoint advisory panels to assist in the factfinding process, while the Illinois Supreme Court in *People ex rel. Carey v. White,* 65 Ill. 2d 193, 357 N.E.2d 512, 2 Ill. Dec. 345 (1976), interpreted the Illinois statute in precisely the opposite manner.

Even though the federal Constitution does not impose the requirement that a State provide jury trials to juveniles, the Constitution does regulate the manner in which jury trials are conducted in those jurisdictions that have opted for them in delinquency cases. The due process mandate of "fundamental fairness" demands that procedures in delinquency cases be conducive

to "accurate factfinding." *McKeiver v. Pennsylvania,* 403 U.S. at 543 (plurality opinion); *see id.* at 534-55 (Brennan, J., concurring). *See also In re Gault,* 387 U.S. 1, 30-31 (1967); *In re Winship*, 397 U.S. 358 (1970). Accordingly, jury trial procedures in delinquency cases must comport with any aspects of adult jury procedure that are necessary for accurate and impartial factfinding. This certainly includes the requirement that the jury be impartial. "[D]ue process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992). *See, e.g., People in the Interest of R.A.D.,* 196 Colo. 430, 586 P.2d 46 (1978) (juries in juvenile cases must comply with the due process requirement of an impartial jury, and therefore juveniles can exercise the traditional adult criminal right to challenge for cause venirepersons who are employed by a law enforcement agency). See § 21.03(a) *infra* (further discussing the requirement of impartiality).

The federal constitutional restraints against discriminatory jury selection (see § 21.03(b) *infra*) also control juvenile court juries just as they do adult criminal juries; the recognition of those restraints predated the incorporation of the Sixth Amendment into the Fourteenth and does not depend upon an underlying federal constitutional right to jury trial at all.

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the United States Supreme Court held that whenever the Sixth Amendment right to jury trial applies, it requires a unanimous jury verdict to support a conviction. jury verdict to support a conviction. Because this ruling does not apply retroactively in federal habeas proceedings (*Edwards v. Vannoy,* 141 S. Ct. 1547 (2021)), the more complicated state of unanimity law prior to *Ramos* requires a brief summary. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that the Sixth Amendment did not require a common-law jury of twelve persons but was satisfied by a jury of six. Five, however, was too few. *Ballew v. Georgia,* 435 U.S. 223, 244-45 (1978). In *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court sustained provisions allowing nine-to-three and ten-to-two nonunanimous criminal verdicts, although Justice Blackmun (whose vote was necessary to make up a majority for these results) indicated that he might have trouble sustaining a provision authorizing anything much less than nine-to-three, 406 U.S. at 366; and Justice Powell (whose vote was also necessary) indicated that he would not sustain a nonunamimous jury verdict in a *federal* criminal case, *id*. at 371. "[C]onviction by a nonunanimous six-member jury in a state criminal trial for a nonpetty offense" was subsequently held unconstitutional. *Burch v. Louisiana*, 441 U.S. 130, 134 (1979); *see also Brown v. Louisiana*, 447 U.S. 323 (1980). The upshot seemed to be that if reductions of the size of the jury or of the number of jurors required to concur in a guilty verdict or both sorts of reductions together sufficiently impaired the capacities of the jury to (1) reflect a representative cross-section of the community, or (2) bring multiple viewpoints to bear in deliberating upon factual issues determinative of guilt, or (3) stand as a truly independent body with the strength to resist domination by the judge or prosecutor, the Sixth Amendment would be held to be violated. *See Ballew v. Georgia*, 435 U.S. at 229-45; *Burch v. Louisiana*, 441 U.S. at 134-39. But just how much impairment was sufficient for this purpose and whether any given combination of numbers

and other circumstances would produce this impairment were questions for judicial hunch. Counsel challenging pre-*Ramos* convictions by undersized juries and jury majorities will find extraordinarily useful discussions of jury functioning in the classic work, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966), and in Professor Hans Zeisel's several periodical publications concerning the jury.

§ 21.02 ELECTION OR WAIVER OF JURY TRIAL

§ 21.02(a) Procedure

The right to trial by jury may be waived by a respondent. The respondent technically has no right to insist upon a bench trial rather than a jury trial, *see Singer v. United States,* 380 U.S. 24 (1965); *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 383 (1979) (dictum), and in most jurisdictions a respondent's waiver of the state-created right to jury trial is conditioned on approval by the prosecutor and the judge. However, prosecutors and judges are almost invariably willing to approve a jury waiver without second thought because bench trials are generally quicker and less cumbersome than jury trials. As a consequence, the choice between jury trial and bench trial is, as a practical matter, the respondent's in most cases. Prosecutors and judges are ordinarily only too happy to sign off on a respondent's waiver. See § 21.02(b) *infra.*

In many jurisdictions the respondent's waiver must be in writing. *See also State v. Liddell*, 672 N.W.2d 805, 813-14 (Iowa 2003) (construing a state rule of criminal procedure to require that when a defendant waives the right to a jury trial, the judge must engage in "some in-court colloquy with the defendant . . . in order to ensure the defendant's waiver is knowing, voluntary, and intelligent," and listing matters for the judge to cover in the "in-court colloquy" to "ascertain whether the defendant understands the difference between jury and non-jury trials"). Local practice often requires that the written waiver be signed not only by the respondent, but also by his or her parent, the defense attorney, the prosecutor, and the judge.

Procedures vary regarding when the respondent is required to make an election between jury trial and bench trial. In some States s/he must demand or waive a jury at arraignment; in other States, within a specified period before trial. If the respondent demands a jury at arraignment, s/he is ordinarily given leave, rather freely, to withdraw that demand later and ask for a bench trial. If s/he waives at arraignment, subsequent requests for jury trial may be entertained in the court's discretion; some judges grant them liberally, but many are grudging. Of course, the initial waiver may also be attacked as invalid. *See, e.g.*, *In re R.A.B.*, 197 Ill. 2d 358, 368, 757 N.E.2d 887, 894, 259 Ill. Dec. 24, 31 (2001). If made without a lawyer at arraignment, it is pretty clearly invalid by force of the federal constitutional right to counsel. *See Hamilton v. Alabama,* 368 U.S. 52 (1961); *Coleman v. Alabama,* 399 U.S. 1 (1970).

§ 21.02(b) Factors That Should Be Considered in Deciding Whether To Elect or Waive a Jury Trial

Because bench trials are generally quicker and less cumbersome than jury trials, prosecutors and judges are ordinarily willing to approve a jury waiver without second thought. As a consequence, the choice between jury trial and bench trial is, in most cases, the respondent's. The factors to be considered in making this choice are manifold. See §§ 27.04-27.05 *infra*. A few of the more important are these:

1. *What judge will try the case if a jury is waived, and how appealing to that judge is this type of case, or this respondent's defense, or this respondent as a person?* Particular judges may be known to be "easy" or "hard" on respondents of certain ethnic or religious groups or social backgrounds, and this inclination should be evaluated. Similarly, particular judges are "hard" or "easy" on drug cases, or sex cases, or consent defenses in sex cases, and so forth. If there is a strong likelihood of a guilty verdict, how stiff a sentencer is the judge?

2. *What judge will try the case if a jury is not waived?* The trial judge is ordinarily the sentencing judge. Therefore, the sentencing predilections of the two judges who will try the case with and without a jury respectively must be compared.

3. *What evidence that the judge will hear can be excluded from a jury's consideration?* Judges at a bench trial invariably hear some things that a jury would not because (a) some exclusionary rules of evidence are more lax in nonjury trials; (b) the judge at a bench trial both rules on the admissibility of evidence and receives the evidence as the trier of fact (*see State v. Rodriguez,* 2020 S.D. 68, 952 N.W.2d 244 (S.D. 2020)); and (c) it is virtually impossible to convince an appellate court that the receipt of inadmissible evidence in a bench trial was prejudicial. Although trial judges are given great credit by appellate courts for having reasoning powers that allow them to compartmentalize their minds and segregate admissible from inadmissible evidence in arriving at a verdict (*see Harris v. Rivera,* 454 U.S. 339, 346 (1981) (per curiam); see § 20.05 *supra*), as a practical matter trial judges are no less human than jurors. Thus a judge may be unwilling to acquit a person of a serious crime after the judge has heard and excluded an inadmissible confession, even though the admissible evidence of guilt is weak; whereas a jury hearing the same admissible evidence but unaware of the confession might well acquit.

4. *Is there an angle in the case that may win over a jury but that would be disregarded by a judge?* Juries may react with aversion to police brutality, an overzealous prosecutor, or other circumstances that would not affect a judge.

5. *Conversely, on the evidence admissible at a jury trial, is the case one in which jurors would be more likely than a judge to be swayed by emotional factors prejudicial to a respondent?* Several points are involved here. Experienced trial judges are more accustomed than jurors to seeing the physical injuries of victims of crimes of violence and may be less shocked by them. Even if the judge is incensed by the atrocity of a crime, s/he is usually more able than jurors to apply certain technical rules for weighing evidence on the question of the respondent's identity as its perpetrator – for example, the rules requiring corroboration of the testimony of a

rape complainant or accomplice. Similarly, judges, more than juries, are concerned about the specific legal elements of a crime and may be able to keep attention focused on them even in a gruesome case. In general the concept that the prosecution bears the burden of proof beyond a reasonable doubt has more meaning to a judge than to jurors; and the closer is the question of guilt, the more likely is a judge than a jury to acquit.

6. *Is there a good legal defense that a jury will not be able to comprehend?* Generally, apart from individual judges' idiosyncrasies and predilections, it is advisable to submit legally complicated defenses to a judge. For example, questions of "breaking" in a burglary case, of "asportation" in a larceny case, and of property valuation, when the value of property may spell the difference between a misdemeanor and a felony, are more likely to be understood by a judge than by a jury.

7. *Are there controversial factual questions not resolvable from the evidence except by "hunches" with regard to credibility or by inferences that may be drawn differently by persons with different backgrounds?* Generally, a jury must be unanimous to convict, and it is harder to secure the agreement of the hunches or intuitions of 12 persons than of 1 person.

8. *Will some sort of evidence be presented that a judge is more likely to credit than a jury or vice versa?* Judges (and particularly some judges) are notorious for their inability to discredit police testimony. This is understandable enough; the judge has probably heard this same officer testify against a dozen or a hundred guilty respondents. On the other hand, judges are frequently far more skeptical than jurors with regard to the testimony of child sex complainants.

9. *Is it a general practice in the locality, or has the judge who will try the respondent on a waiver made it a practice, to reward jury waivers by more lenient sentencing?* In theory, a respondent cannot be punished by a harsher sentence for exercising his or her right to jury trial. *See*, *e.g.*, *United States v. Whitten*, 610 F.3d 168, 194-96 (2d Cir. 2010). But when trial judges who have imposed a range of more and less severe sentences upon respondents convicted of the same offense impose a severe sentence upon any individual respondent following a jury trial – and do not state explicitly that they are doing so as a penalty for the respondent's failure to waive a jury – it will be the rare case in which an appellate court can be convinced that the sentence should be set aside as a forbidden penalty for the respondent's election of a jury trial. Consequently, trial judges – particularly in courts with a docket-congestion problem – frequently do reward jury-trial waivers by favorable sentencing consideration and get away with it despite the notorious character of the practice.

10. *Is the evidence of guilt overwhelming, and is the defense essentially specious?* Quite apart from any general practice of rewarding jury waivers with sentencing leniency, a judge will often punish a respondent harshly for taking a jury trial in a frivolous case.

11. *Is the case likely to raise difficult or unsettled questions of legal doctrine, either with regard to the admissibility of evidence or with regard to the substantive elements of the offense?*

There are more ways in a jury trial than in a bench trial for a judge to err and for the judge's errors to be made visible and reversible. In a bench trial, a judge can conceal beneath a general finding of guilt the resolution of points of law that in a jury trial s/he would have to state explicitly in the jury charge. The more unsettled those questions are, the more likely the judge is to err; hence the more desirable it is to have the judge rule explicitly as s/he must in a jury-tried case. Similarly, in a bench case, some judges make it a practice to take defense objections to the admissibility of evidence under advisement, and then, when it is clear that the prosecution has a sufficient case apart from the contested evidence, to insulate themselves from reversal by announcing that they are not going to consider the contested evidence but find the respondent guilty without it. This sort of evasion of tricky evidentiary issues cannot be worked in a jury trial.

12. *Will a jury waiver speed up the disposition of the case, and is speedy disposition in the respondent's interest?*

§ 21.02(c) Counseling the Client

The many complex and interrelated tactical factors that affect the choice of jury trial or bench trial are better appraised by counsel than by the respondent. Counsel therefore should make the choice in the first instance and explain to the client thoroughly and persuasively his or her reasons for that choice. Counsel may properly urge upon the client that counsel's choice is the only safe one and that the alternative is foolhardy, if this is true. The right to jury trial is, however, the sort of highly personal and emotionally charged right that should ultimately be left the client's wishes. If the respondent insists on a jury trial against the advice of counsel, a jury trial would seem to be advised. *See Jones v. Barnes,* 463 U.S. 745, 751, 753 n.6 (1983) (dictum); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (dictum); *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018) (dictum).

§ 21.03 MOTIONS CHALLENGING JURY SELECTION AND HANDLING

§ 21.03(a) State Law and Federal Constitutional Grounds for Challenging the Composition or Handling of the Jury

The processes by which jurors are selected vary enormously from jurisdiction to jurisdiction. Violations of the applicable statutes or court rules – such as, for example, a jury commissioner's lack of the requisite qualifications, the failure to follow required procedures for composing the jury roll, or the improper service of jury notices or summons – may provide a state law basis for challenging a venire that has been selected through the flawed process.

Federal constitutional challenges to jury selection procedures or to the composition or the handling of jury rolls, jury lists, venires, or panels also may be available. The principal constitutional claims of this sort are:

1. Systematic exclusion of a racial or other "distinct class" of citizens (discussed in

§ 21.03(b) *infra*);

2. Deprivation of a fair trial by an impartial jury because of prejudicial publicity, community hostility, and the like (see § 20.03(b) *supra*); and

3. Deprivation of a fair trial by an impartial jury because of the jurors' exposure to extrajudicial proof of guilt, *Rideau v. Louisiana,* 373 U.S. 723 (1963), their subjection to unfair domination of court officers, *Turner v. Louisiana,* 379 U.S. 466 (1965), their subjection to prejudicial remarks by such officers, *Parker v. Gladden,* 385 U.S. 363 (1966), or their exposure to such officers in the dual role of prosecution witness and bailiff, *Gonzales v. Beto,* 405 U.S. 1052 (1972) (per curiam), or other prejudicing circumstances..

Objections to jury panels and to particular jurors are ordinarily made immediately prior to and during *voir dire* examination respectively. See §§ 28.02-28.05 *infra.* However, attacks upon the standards or manner of selection or upon the composition of the jury rolls or the venire, based on defects in any anterior stage of the process, are frequently required to be raised at some specified time before trial by a motion to quash the venire, by an objection to the rolls or the array, or by a similar procedure.

§ 21.03(b) Motions Challenging the Jury Selection Process on the Ground of Systematic Exclusion of a Racial or Other "Distinct Class" of Citizens

The Equal Protection Clause of the Fourteenth Amendment to the federal Constitution forbids the systematic exclusion of racial, ethnic, religious, or economic groups from jury service. *Coleman v. Alabama,* 389 U.S. 22 (1967), and cases cited (African Americans); *Turner v. Fouche,* 396 U.S. 346, 356-61 (1970) (same); *Hernandez v. Texas,* 347 U.S. 475 (1954) (Mexican-Americans); *Castaneda v. Partida,* 430 U.S. 482 (1977) (same); *Schowgurow v. State,* 240 Md. 121, 213 A.2d 475 (1965) (atheists); *Labat v. Bennett,* 365 F.2d 698 (5th Cir. 1966) (wage earners). This principle condemns the systematic exclusion of any "distinct class" of citizens shown to be viewed or treated differently from other classes in the local community. *Hernandez v. Texas,* 347 U.S. at 478; *Castaneda v. Partida,* 430 U.S. at 494-95. In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that the systematic exclusion of women from juries in criminal cases is forbidden by the Sixth Amendment as incorporated into the Due Process Clause of the Fourteenth; and in subsequent cases the Court has treated *Taylor* as overruling its antiquated holding in *Hoyt v. Florida*, 368 U.S. 57 (1961), that exclusion of women from criminal juries did not violate the Equal Protection Clause. *See J.E.B. v. Alabama* ex rel. *T.B.*, 511 U.S. 127, 134-35 (1994) (describing *Taylor v. Louisiana* as having "repudiated the reasoning of *Hoyt*," and observing, that although "*Taylor* distinguished *Hoyt* . . ., [t]he Court now . . . has stated that *Taylor* 'in effect' overruled *Hoyt*" (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991))). Given the Court's application of the Equal Protection Clause in *J.E.B. v. Alabama* ex rel. *T.B.* to prohibit a state actor's intentional discrimination on the basis of gender in using peremptory strikes in jury selection, and given the Court's record in other contexts of

barring gender discrimination on equal protection grounds, *see, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-28 (1982), it is evident that women would now be held to be a "distinct class" whose exclusion from any jury selection process would render the resulting juries unconstitutional. *See also Machetti v. Linahan,* 679 F.2d 236 (11th Cir. 1982); *White v. Crook,* 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court). Whether the systematic exclusion of particular age groups – for example, young people or the elderly – would also be condemned is a more difficult question, which the Supreme Court has reserved. *Hamling v. United States,* 418 U.S. 87, 137 (1974). *See* Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection,* 76 MICH. L. REV. 1045 (1978). A jury whose composition is affected by systematic exclusion may be challenged even by a respondent who is not a member of the excluded class. *Campbell v. Louisiana*, 523 U.S. 392 (1998) (dealing with a racial-exclusion challenge to the selection of grand jurors but explicitly assimilating the rule for grand-jury challenges and petit-jury challenges); *Peters v. Kiff,* 407 U.S. 493 (1972).

The accepted method of proving claims of systematic exclusion has been described as follows:

> "The first step is to establish that the group [claimed to be excluded] is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve [as jurors] . . . , over a significant period of time. . . . This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing."

Rose v. Mitchell, 443 U.S. 545, 565 (1979), quoting *Castaneda v. Partida,* 430 U.S. at 494. The opinion in *Duren v. Missouri,* 439 U.S. 357 (1979), implies that underrepresentation alone is not sufficient; it must also be shown that "this underrepresentation is due to systematic exclusion of the group in the jury-selection process," *id.* at 364, as the result of "discriminatory purpose," *id.* at 368 n.26. *See also Berghuis v. Smith*, 559 U.S. 314, 327 (2010); *State v. Plain*, 898 N.W.2d 801, 822, 826-27 (Iowa 2017). However, *Duren* also recognizes that both systematic exclusion and discriminatory purpose may be inferred from a "significant discrepancy shown by the statistics" comparing a group's numbers in the general population with its numbers in jury pools and panels, and on juries. *Duren*, 439 U.S. at 368 n.26. *See also Berghuis v. Smith*, 559 U.S. at 327-33; *Woodfox v. Cain*, 772 F.3d 358, 372-76 (5th Cir. 2014). Counsel will therefore want to investigate jury lists, going back ten years or so, in order to demonstrate a pattern of discrimination. These are public records, available from the jury clerk or commissioners. If the clerk's or commissioners' records contain racial designations, the jury is probably challengeable upon the showing of even a relatively small discrepancy between the percentages of the racial minority group in the general population and on jury panels. *Avery v. Georgia,* 345 U.S. 559

(1953); *Whitus v. Georgia,* 385 U.S. 545 (1967); *Alexander v. Louisiana,* 405 U.S. 625 (1972); *cf. Castaneda v. Partida,* 430 U.S. at 493-95. When racial designations or indications of a selection process that "is not racially neutral" (*Rose v. Mitchell,* 443 U.S. at 565) do not appear in the records, it is important to seek out other aspects of the procedure that are "susceptible of abuse" (*id.*). Any nonrandom method of culling or cutting prospective jurors would seem to be "susceptible of abuse" in this sense (*see id.* at 548 n.2, 566; *and see Castaneda v. Partida,* 430 U.S. at 497, describing the key-man system as "highly subjective"); but, in the absence of some form of identification of prospective jurors by nonneutral characteristics in the records available to jury-selection officials, a stronger statistical showing of underrepresentation is apparently required.

In any event counsel should conduct the most thorough statistical study practicable for a period going back at least a decade, comparing the proportion of minority individuals in the general population of the country (as reflected in the latest federal census figures), with the proportions of minority individuals (a) who are on the jury rolls and (b) who have actually served as jurors. *See Alexander v. Louisiana,* 405 U.S. 625 (1972). If the jury records do not contain racial identifications, tax digests may. Sophisticated statistical methods for analyzing the data are available, and it is wise to consult a statistician for possible use as an expert witness. *See, e.g.,* NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES, chs. 5 & 6 (2d ed. 2021-22); NATIONAL JURY PROJECT & NATIONAL LAWYERS GUILD, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (David Kairys, ed. 1975); Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV. L. REV. 338 (1966); David Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study,* 10 AM. CRIM. L. REV. 771 (1972); Peter W. Sperlich & Martin L. Jaspovice, *Statistical Decision Theory and the Selection of Grand Jurors: Testing for Discrimination in a Single Panel,* 2 HASTINGS CONST. L.Q. 75 (1975). Judicial receptivity to these statistical modes of proof is reflected in *Castaneda v. Partida,* 430 U.S. at 496-97 n.17; *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 339-40 (1977); *Vasquez v. Hillery,* 474 U.S. 254, 259-60 (1986); *cf. McCleskey v. Kemp,* 481 U.S. 279, 293-94 & n.13 (1987).

§ 21.04 INVESTIGATION OF PROSPECTIVE TRIAL JURORS

Local practice may require that the jury list (containing the names of all venirepersons for the term of court at which a respondent is scheduled to be tried) be served upon the respondent. Elsewhere, the jury list may be published or may be available for inspection in the office of the clerk of court; or counsel may be entitled to demand a copy from the clerk or to obtain a copy from the jury commission. This jury list, which ordinarily contains the names, addresses, and occupations of the venirepersons, is an indispensable document. Once counsel has it, counsel can begin to make such investigation of the prospective jurors at the forthcoming trial as s/he wishes and can practicably manage. Counsel is going to have some opportunity to pick and choose among jurors when the case comes to trial, and the effective use of this opportunity may make the difference between conviction and acquittal for the client. See Chapter 28 *infra*. The more

counsel knows about the prospective jurors, the more sagacious use s/he will be able to make of the opportunity.

Since there will be little time for background investigation after the jury panel enters the courtroom, counsel needs all the advance information s/he can get. Methods of getting it range from systematic, very extensive (and expensive) investigation of the venirepersons – or the employment of the juror investigating services that are found in many large cities – to casual inquiries of other attorneys or of counsel's acquaintances who may happen to be neighbors or associates of a listed venireperson. How much investigation counsel can undertake will be determined by the resources at counsel's disposal, in light of the nature and seriousness of the case. But, at least in any serious criminal prosecution, counsel should get the list if at all possible and make what inquiries s/he practicably can about the character and attitudes of the men and women on it. Prosecutors frequently maintain records of jurors who have served on past venires, with notes on their performances and demonstrated attitudes. A motion for discovery of these records on the theory advanced in § § 9.09(b)(7) *supra* may be worth a try.