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Recent Developments: The Right to a Fair Cross-Section of the Community and the Black Box of Jury Pool Selection in Arkansas

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RECENT DEVELOPMENTS:

The Right to a Fair Cross-Section of the Community and the Black Box of Jury Pool Selection in Arkansas

A Washington County, Arkansas court conducted a hearing on October 15, 2018 on a criminal defendant's motion to compel discovery to assure a fair and accurate cross-section of the community for the jury as guaranteed by the United States and Arkansas Constitutions.[1]At the hearing, the jury coordinator for the Circuit Clerk's office testified that counties may elect to use a state-sponsored jury selection computer program, or they may use proprietary programs.[2] Washington County uses a proprietary computer program to select the jury pool from a list of registered voters.[3] The clerk described how her office takes an extra step to follow up with property owners, thus making them more likely to be summoned for jury duty.[4] When discussing individuals who cannot afford phone service or who do not have voice mail, she stated, "You can't talk to them. So I

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1. Order Denying Deft.'s Mot. To Compel Discovery to Assure a Fair & Accurate Cross Section of the Cmty. For the Jury, Arkansas v. Jenner, No. 72 CR-17-3297 (Oct. 23, 2018); *see also* U.S. CONST., amend. VI, XIV. ARK. CONST. art. II, §§ 8, 10; *see also* Amend. Mot. To Compel Discovery to Assure a Fair & Accurate Cross Section of the Cmty. for the Jury at 1, Arkansas v. Jenner, (No. CR 17-3297).

2. Arkansas v. Jenner, No. 72 CR-17-3297, Trial Tr. (Oct. 15 2018) Pg. 32-33. Most Arkansas counties use ACS/Xerox Juror for Windows, an obsolete automated jury selection and management system implemented in 2002. *See* Tim Holthoff, et. al., *The Path to Change: AgileCourt and AgileJury?* 2016 ACAP Systems Conference (July 2016), https://www.arcourts.gov/sites/default/files/2016%20ACAP%20Systems%20Conference%20-%20Closing%20Session.pdf [https://perma.cc/7EV9-SLXL]; cf. Racial and Ethnic Disparities in Alameda County Jury Pools, ACLU OF N.CAL.at 2 (Oct. 2010), https://www.aclunc.org/sites/default/files/racial_and_ethnic_disparities_in_alameda_county_jury_pools.pdf https://perma.cc/UGT3-GJBA
(noting that as of 2010 only four California counties continued to use the ACS/Xerox Juror for Windows program).

3. Arkansas v. Jenner, No. 72 CR-17-3297, Trial Tr. (Oct. 15 2018) Pg. 31, 34.

4. *Id*. at 38–39; *see also id.* at 50. Only 53.3% of housing units in Washington County are owner-occupied. *QuickFacts, Washington County, Arkansas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/washingtoncountyarkansas/DIS010217 https://perma.cc/F2CW-BXZ5.

don't reach that person."[5] She did not know how individuals with criminal records are excluded from the pool so that individuals with duplicate names – which is common, for example, in the Hispanic community – are not excluded.[6] When asked about her system of calling and leaving messages, she stated she does not have a translator because "I've never had anyone talk to me that I couldn't understand."[7] Although the United States Supreme Court has noted that "without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge,"[8] the Washington County judge concluded that the details of the process and software used for creating the venire are "not discoverable in this case because. . .you have not presented any evidence you would find anything."[9]

It is a well-established constitutional jurisprudence that juror selection from a fair cross-section of the community is "fundamental to the jury trial guaranteed by the Sixth Amendment. . . . ." because the jury cannot "guard against the exercise of arbitrary power. . . .if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool."[10] Without access to discovery, jury pool selection process in Arkansas counties using propriety software is a black-box. Indeed, the selection process in the counties using the state-sponsored ACS/Xerox Juror software is nearly as opaque because the Arkansas Judiciary has not made public details about how the aging

5. Arkansas v. Jenner, No. 72 CR-17-3297, Trial Tr. (Oct. 15 2018) Pg. 45. At the close of the hearing, the judge suggested that "if people who don't own property, if they'll just register to vote, they'll get called." *Id*. at 61.

6. *Id*. at 35–37; *see also id.* at 52; *see also* People v. Ramirez, 139 P.3d 64, 93–98 (Cal. 2006) (discussing how defendant's claim that the methods of eliminating duplicate names from the jury pool caused a disproportionate number of Hispanics being eliminated were rendered moot after Los Angeles County adopted defendant's suggested changes to the selection process).

7. Arkansas v. Jenner, No. 72 CR-17-3297, Trial Tr. (Oct. 15 2018) Pg. 46. 17.4% of the Washington County population above 5 years old speaks a language other than English at home. *QuickFacts, Washington County, Arkansas*.

8. Test v. United States, 420 U.S. 28, 30 (1975).

9. Arkansas v. Jenner, No. 72 CR-17-3297, Trial Tr. (Oct. 15 2018) Pg. 62; *see* Order Denying Deft's Mot. To Compel, at 1.

10. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

commercial software selects the jury pool.[11] As the Washington County hearing illustrates, the fair cross-section right can be extremely vexing to enforce because the courts that oversee the jury selection process are themselves the gatekeepers to its inspection.[12] Without discovery into the selection process, the results only become visible when the venire is gathered in the courtroom for voir dire.[13] However, at this point, it is too late to enforce the fair-cross section right because the Sixth Amendment guarantees only that the petit jury will be selected from a fair cross-section of the community, not that a jury represents a fair cross-section of the community.[14]

The Arkansas Supreme Court may have recently changed this in a November 2018 decision, *Reams v. State*, when it wrote, "we hold that a twelve-member jury is meant to include twelve members who represent a fair cross-section of the community."[15] The holding was made within the context of a Rule 37 post-conviction appeal of a three-day 1993 capital murder trial that has been winding its way through Arkansas courts since 1997.[16] The defendant's post-conviction petition raised fourteen claims.[17] Of interest to this note is the Court's handling of his argument that his fair-cross-section claim.

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11. The Florida Judiciary is transparent about how a jury pool is selected in each Florida county and has published descriptions of how the AOC/Xerox Juror for Windows software functions. *See* Attachment "A," Method of Jury Selection for Collier County, *In Re Juror Selection Plan: Collier Cty*, Admin. Order No. AOSC07-48 (Fla. 2007). *See also* Attachment A – Agile Jury. Random Pool Selection Overview, In re: Juror Selection Plan: Pasco County, Admin. Order No. A0SC16-66 (Fla. 2016) (describing how a successor software program several generations beyond ACS/Xerox Juror selects the jury pool).

12. *See* Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1725 (2016).

There is a growing awareness within academic literature of how computer algorithms may lead to discriminatory, erroneous or otherwise problematic results. Robert Brauneis & Ellen P. Goodman, 20 YJLT 103, at 107-08 & nn. 6–9 (2018). However, the Arkansas Supreme Court seems to place blind trust in such programs for jury selection. *See, e.g.*, Davis v. State, 925 S.W.3d 402, 404 (Ark. 1996) ("We have also recognized that where the venire is chosen by computer, using the random selection process mandated by § 16–32–103, there is no possibility of a purposeful exclusion of African–Americans.").

13. Chernoff, *supra* note 12 at 1725.

14. Lockhart v. McCree, 476 U.S. 162, 173 (1986) ("We have never invoked the fair-cross-section principle. . . to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.).

15. 2018 Ark. 324 at 19, 560 S.W. 3d 441, 454.

16. *Id.* at 2, 560 S.W.3d at 445.

17. *Id*. at 2, 560 S.W.3d at 445.

Reams argued that "he was tried, convicted, and sentenced to death by a predominantly Caucasian jury that was drawn from a mostly Caucasian jury pool and did not come close to reflecting a fair cross-section of the . . . community." He asserts this claim was cognizable under *Duren v. Missouri*[18] as an independent claim under Rule 37 because it was structural in nature.[19] Thus, he argued, the circuit court made a clear error when it ruled that under Rule 37 the claim was cognizable only as ineffective assistance of counsel.[20] Ream's interest in the Court's recognition of the fair-cross-section claim as independent is because independent claims (in contrast to ineffective assistance of counsel claims) do not have to show actual prejudice.[21]

In analyzing whether a fair-cross-section claim is structural under Rule 37, the Court seemed to anchor its holding in both the United States and Arkansas Constitutions. Before holding that a petit jury is meant to represent a cross-section of the community, it reaffirmed its prior holdings on the right to a jury trial, explaining that:

[t]he right to a jury in a criminal case is a fundamental right of our jurisprudence and is cognized by the Magna Charta [sic.], the Declaration of Independence, the federal constitution, and our state constitution.

Based on our discussion above, the law is clear: the right to a jury trial is part of the basic structure of our courts. Here, in addressing Reams's [sic.] argument regarding the composition of his jury, we hold that a twelve-member jury is meant to include twelve members who represent a fair cross-section of the community.[22]

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18. *Id.* at 14-15, 560 S.W. 3d at 451. He also argued that his claim was cognizable under Batson v. Kentucky, 476 U.S. 79 (1986), but the Court rejected this as inappropriate for post-conviction in this case because they were raised on direct appeal. *Reams*, 2018 Ark. 324, at 13-14, 560 S.W.3d at 451.

19. Reams, 2018 Ark. 324 at 14, 560 S.W. 3d at 451.

20. *Id.*

21. Reams also claimed that he received ineffective assistance of counsel due to failure to raise "the fair-cross-section-of-the-jury violation based on the systematic underrepresentation of African American potential jurors. False" and that the circuit court erred in its finding that he did not show prejudice under the second prong of Strickland v. Washington, 466 U.S. 668 (1984). The Court held that "the prejudice prong of *Strickland* is demonstrated through the existence of a fair-cross-section violation." Reams v. State, 2018 Ark. 324 at 13, 560 S.W.3d 441, 451.

22. Reams, 2018 Ark. 324 at 19, 560 S.W. 3d at 454 (citations omitted).

But did the Arkansas Supreme Court intend to expand the fair-cross section right to the petit jury when other courts have noted that it is unworkable? The United States Supreme Court has noted the difficulty in applying the fair cross-section to the petit jury when overturning an Eight Circuit decision that applied the Sixth Amendment to the twelve-person jury.[23] The structure of the *Reams* opinion suggests that the Court may have intended the expansion. The Arkansas Supreme Court acknowledged that its decision may burden the system, quoting its landmark decision to expand a criminal jury to twelve members from six:

In reaching this conclusion, we are mindful that this extension is supported by our case law. As we explained in *Grinning*, "We are well aware of the view expressed by the state that some abuse of the criminal justice system could result from our construction of the Arkansas Constitution and the Arkansas Rules of Criminal Procedure. However . . . this may be the price the judicial system must pay to ensure that a defendant is not deprived of his fundamental constitutional right to a trial by jury."[24]

The reference to *Grinning* also seems to indicate that the Court is tethering the expansion of the fair cross-section of the petit jury to the Arkansas Constitution, something that would be necessary for an expansion of the right since, as noted above, the United States Supreme Court has been clear that the Sixth Amendment applies only to the venire.[25]

However, the instructions on the remand suggest that the Reams Court perhaps did not intend to expand the right. The *Reams* Court remanded the case for further findings as to whether Reams has shown a valid fair-cross-section violation under the three-prong Duren v. Missouri test "using the three-prong test set forth above."[26] The Court had previously described the elements of the *Duren* test as:

(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

23. *See* Lockhart v. McCree, 476 U.S. 162, 174 (1986).
24. Reams, 2018 Ark. 324 at 19, 560 S.W. 3d at 454 (citations omitted).
25. *See, e.g.*, Lockhart, 476 U.S. at 174.
26. Reams, 2018 Ark. 324 at 22, 560 S.W. 3d at 455 (citations omitted).

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.[27]

If the Court really intended to hold that a twelve-member jury is meant to include twelve members who represent a fair cross-section of the community it seems that a *Duren* analysis of the venire would not use the three-prong test as stated, but rather the second *Duren* prong would need to be modified to show that the representation of the group on the petit jury is not fair and reasonable in relations to the number of such persons in the community. Otherwise, *Duren* is testing is for a fair cross-section on the venire, not the petit jury as *Reams* explicitly stated.

After deciding that, as a matter of law, a fair-cross section structural claim was cognizable in a Rule 37 petition, the Arkansas Supreme Court remanded the case for "further findings as to whether Reams ha[d] established a valid *Duren* claim."[28] The Court did not discuss any evidence of violation presented during the eighteen-year course of Reams' Rule 37 evidentiary hearings.[29] This indicates that a threshold showing is not required before allowing inquiry into a fair-cross section violation claim in Arkansas. Whatever the Court intended with regard to possible expansion of the fair-cross section right to the petit jury, it is implicit in the Court's remand that the selection process of Reams' venire is discoverable.

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27. *Id.* 18, 560 S.W. 3d at 453.

28. *Id.* at 22, 560 S.W. 3d at 455.

29. The Court limited its discussion of the fair-cross section evidence to a description in its procedural history summary. *See id.* at 4, 560 S.W. 3d at 446. The hearing began on August 20, 2007 and concluded on January 5, 2015.

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