UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

SECOND MOTION TO DISMISS INDICTMENT AND STAY PROCEEDINGS PENDING RECONSTITUTING JURY WHEEL TO CONFORM WITH STATUTORY AND CONSTITUTIONAL REQUIREMENTS

Defendant, Dzhokhar Tsarnaev, by and through counsel, moves pursuant to Fed. R. Crim. P. 6(b)(2) and 12(b)(3), and 28 U.S.C. §1867(e), that this Court dismiss the indictment returned in this case and/or stay further proceedings pending reconstitution of the jury wheel to conform with the Jury Selection and Service Act, 28 U.S.C §1861 et seq., the Jury Selection Plan for the District of Massachusetts, and the fair cross-section requirement of the United States Constitution.

The defendant previously filed a similar motion based upon the procedures used to select the grand jury that returned the indictment in this case. [DE 506.] The Court denied the motion. [DE 608.] This motion raises similar issues, plus one additional issue (violation of randomness requirement of Jury Plan) with regard to the procedures used to select the petit (trial) jury in this case. Defendant recognizes that the Court's rulings on the issues previously raised in his first Motion are likely dispositive of analogous issues in this motion, but he respectfully seeks to preserve those issues for appellate review with regard to the petit jury.

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The defendant sought and the Court ordered production of records maintained by the District of Massachusetts which are used or relied upon by the Clerk of the Court, the jury commission, and Jury Commissioner for the Commonwealth of Massachusetts in connection with the selection process of the petit jury in this case. [DE 912, 1005.] Several violations – including substantial violations of the Jury Selection and Service Act and of the fair cross section requirement – surfaced during the review[1]:

1.   The District of Massachusetts Plan for Random Selection of Jurors ("Plan") has been violated by a re-ordering of jurors that undermined randomness. Section 5a of the Plan provides: "It is the policy of this Court that all citizens of this district shall have the opportunity to be considered for service on grand and petit juries and to ensure, to the greatest extent possible, that all grand and petit juries in the three divisions of the District of Massachusetts are drawn at random from source lists in the relevant division, that represent a fair cross-section of the community of that division."

Here, the original numbered random pool order list was modified when new, different numbers were assigned at the time jurors reported to complete written questionnaires. This re-ordering, apparently based on non-random factors such as arrival time, had systemic effects on the order. The re-ordering was not random and had non-neutral effects on cognizable groups.

On average, the re-ordering has caused potential African-American jurors to move back 43 positions while potential White jurors have remained essentially the same by moving 3 positions up in order. Potential jurors from Boston have moved back 25

[1] See Declaration of Jeffrey Martin, attached as Exhibit A.

positions. Potential jurors who are younger than 30 have moved back 13 positions.

Comparing the re-ordering to the original ordering, in the first 94 qualified[2] jurors, there

are zero potential African-American jurors in the re-ordering but there would have been 5

potential African-American jurors in the original ordering.

       2.   The Plan, as applied by the Clerk, violates the Constitutional fair cross

section requirement by permitting the excuse, upon request, of any person over the age of

70 years. Here, 95.96% of persons age 70 and over summoned as potential Trial Jurors

in this case chose to exercise their personal preference not to serve. Persons over the age

of 70 make up 14.60% of the population, while persons over age 70 who choose to serve

make up 0.93% of the Qualified Jury Wheel. This represents under representation of

persons age 70 and over of 13.67% on an absolute disparity basis and 93.63% on a

comparative disparity basis[3]

       3. The substantial under-representation of African Americans identified

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[2] As used in this motion, "qualified" refers to that term as used in the Jury Plan (here, essentially, all eligible potential jurors who completed questionnaires) as distinguished from the much smaller group of jurors who have been "provisionally qualified" after completion of individual voir dire.

[3] There is also a substantial underrepresentation of young people – the Millenial generation – those born between 1981 and 2000, who constitute 25.59% of the population and 22.91% of the qualified jury wheel – an absolute disparity of 2.67% and a comparative disparity of 10.45%, meaning that a tenth of the group is missing. However, unlike the probability that the source lists are the direct cause of under-representation of African Americans, to date, we are unable to identify the cause of the under-representation of young people.

in 2005 in *United States v. Green*, 389 F.Supp.2d 29 (D. Mass. 2005), has not abated

even in the face of the 2009 amendment to the Plan that appears to have been the

District's attempt to address the under-representation. African Americans remain under-

represented by approximately the same percentage as in 2005. African Americans make

up 6.14% of the Eastern Division jury eligible population, but only 4.25% of the

Qualified Jury Wheel. This is an absolute disparity of 1.89% and a comparative

disparity of 30.73%, meaning that over a quarter of the group of African Americans in

the jury-eligible population is missing from the Qualified Jury Wheel.

MEMORANDUM IN SUPPORT

"The Sixth Amendment secures to criminal defendants the right to be tried by an

impartial jury drawn from sources reflecting a fair cross section of the community."

Berghuis v. Smith, 130 S. Ct. 1382, 1387 (2010). Extra precautions must be taken to

protect the defendant's right to an impartial and representative jury in a capital case

because of "the broad discretion given the jury at the death-penalty hearing" and "the

special seriousness of the risk of improper sentencing." *Turner v. Murray*, 476 U.S.

28, 37 (1986); *Sampson v. United States*, 724 F.3d 150, 163 (1st Cir. 2013) ("The right to

an impartial jury is nowhere as precious as when a defendant is on trial for his life.")

The Supreme Court noted one of the rationales behind the constitutional fair cross

section requirement in *Taylor v. Louisiana*, 419 U.S. 522 (1975) (quoting *Peters v. Kiff*,

407 U.S. 493, 502-504 (1972)):

> When any large and identifiable segment of the community is excluded
> from jury service, the effect is to remove from the jury room qualities of
> human nature and varieties of human experience, the range of which is

unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 532 n.12

The constitutionally mandated fair cross section requirement is incorporated into the Jury Selection and Service Act ("JSSA"), 28 U.S.C. §1861 et seq. which provides, in §1861:

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. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

The local Plan, promulgated pursuant to the JSSA must also further the right to a jury selected at random from a fair cross section of the community.

A.   **Substantial Violation of the Massachusetts Plan For Random Selection of Jurors**

Section1867(a) of Title 28 provides, in pertinent part, that a defendant may move to dismiss an indictment "on the ground of substantial failure to comply with the provisions of this title in selecting the . . . petit jury." The term "substantial failure" is not defined in the JSSA, but as explained in *United States v. Green*, 389 FD.Supp.2d 29 (D. Mass. 2005), it does not, as discussed in the legislative history, require a showing of prejudice. It does require more than a mere technical violation. *See id.* at 68-69 and

n.69. As set out below, the failure here is more than technical; it goes to the objective of

obtaining a random fair cross section of the community.

      The JSSA requires a district plan for the random selection of jurors designed to

achieve the objective of, *inter alia*, selection at random from a fair cross section of the

community. 28 U.S.C. §1863(a).   The failure to comply with the provision of the Plan

designed to ensure "random" selection has actual impact on cognizable groups and

cannot be dismissed as a mere technicality.

B. Constitutional and Statutory Fair Cross Section Violations

      Evaluating whether there has been a violation of the fair cross section requirement

is a three-step process. First, the court must determine whether the group allegedly

excluded is a "distinctive group" in the community. The court must then determine

whether the representation of that group in the venire is "not fair and reasonable"

compared to its numbers in the community. Finally, the court must determine whether

the under-representation is due to systematic exclusion of the group during the selection

process. *See United States v. Royal*, 174 F.3d 1, 6 (1st Cir. 1999); *Duren v. Missouri*,

439 U.S. 357, 364 (1979).

(1) Distinctive Group

      Neither the Supreme Court nor the JSSA mandates a particular test for defining a

distinctive group for purposes of fair cross section analysis. It does not require showing

that the group has suffered an historical experience of discrimination, as is the case in an

equal protection analysis. *See, e.g., Commonwealth v. Bastarche*, 382 Mass. 86, 97, 414

N.E.2d 984, 992 (Mass. 1980) (comparing Supreme Court's discussions of requirements

of equal protection clause and Sixth Amendment).

In *Taylor*, the Court stated that the purpose of the jury cannot be met "if the jury

pool is made up of only special segments of the populace or if large distinctive groups are

excluded from the pool." 419 U.S. at 530. It reiterated that "excluding identifiable

segments playing major roles in the community cannot be squared with the constitutional

concept of jury trial." *Id*. Moreover, "[c]ommunity participation in the administration

of the criminal law…is not only consistent with our democratic heritage but is also

critical to public confidence in the fairness of the criminal justice system." *Id*. In

concluding that women were a distinctive group the Court recognized that women may

not act as a class and are influenced by the same factors that influence men, but,

nonetheless, there was an "imponderable" difference requiring recognition of women as a

distinctive group for fair cross section purposes. *Id*. at 531-532.

African-Americans, women, and Mexican-Americans have been recognized as

distinctive groups by the Supreme Court. *See Berghuis v. Smith*, 130 S. Ct. 1382 (2010);

Taylor, *supra*; *Castaneda v. Partida*, 430 U.S. 482 (1977) (equal protection claim).

Here, Tsarnaev maintains that African-Americans are a distinctive group at issue.

Tsarnaev also submits that persons over 70 should be recognized as a distinctive

group. While persons over 70 have been found not to be a distinctive group by some

courts (s*ee, e.g., Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990)), the First Circuit has not

addressed that proposed classification.[4]   Although distinctive groups have not been

defined as limited to those with immutable characteristics, distinctive groups recognized

to date have been of that nature. Being over age 70, like race, sex, and national origin, is

an immutable characteristic – one cannot get younger – and exclusion on the basis of

such a characteristic gives rise to the appearance of unfairness.

Congress has recognized the problematic nature of distinctions based on age in a

variety of anti-discrimination legislation. The Age Discrimination in Employment Act,

29 U.S.C. §621 et seq., was passed to, *inter alia*, "prohibit arbitrary age discrimination in

employment." 29 U.S.C. §621(b).   The Congress found, *inter alia*, that "older workers

find themselves disadvantaged in their efforts to retain employment,…" §621(a)(1). In

the Equal Credit Opportunity Act, 15 U.S.C. §1691 et seq., Congress has also made it

unlawful to for a creditor to discriminate against an applicant "on the basis of race, color,

religion, national origin, sex or marital status, or age (provided the applicant has the

capacity to contract)." 15 U.S.C. §1691(a)(1). That statute further provides that while an

"empirically derived credit system which considers age" may, if "demonstrably and

statistically sound", be used, "the age of an elderly person may not be assigned a negative

factor or value" in such a system. 15 U.S.C. §1691(b)(3). The purpose of the Age

Discrimination Act of 1975, 42 U.S.C. §6101 et seq. is "to prohibit discrimination on the

basis of age in programs or activities receiving Federal financial assistance." 42 U.S.C.

§6101.

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[4] Courts, including the First Circuit, have rejected classification of young adults as a distinctive group for Sixth Amendment purposes. *See, e.g., Barber v. Ponte*, 772 F.2d 982, 996, 1000 (1st Cir. 1995) (en banc) (people between the ages of 18 and 34).

The Silent Generation has been described as shaped by the Great Depression and World War II, factors not shaping later generations, and as sharing a complex of characteristics, lifestyles, and attitudes different from those of other generations. *See* Kaylene C. Williams and Robert A. Page, "Marketing to the Generations", 3 JOURNAL OF BEHAVIORAL STUDIES IN BUSINESS (Apr. 2011), *available at,* <www.aabri.com/manuscripts/10575.pdf>. Most members of the Silent Generation, people born before 1946, are age 70 and over (Martin declaration, par.22). Accordingly, Tsarnaev submits that persons over 70 are a definable group sharing experiences, characteristics, attitudes, and lifestyles different from other groups and that this Court should view persons over 70 as a distinctive group for purposes of fair cross section analysis.

(2) Under-representation

While neither the Supreme Court nor the JSSA has established a particular test to be used in determining whether a distinctive group is under-represented in a jury venire or whether any under-representation is significant (*see Berghuis v. Smith*, 130 S.Ct. 1382, 1393 (2010))[5], most courts, including the First Circuit, have utilized an absolute disparity standard in making those determinations. "Absolute disparity measures the difference between the percentage of members of the distinctive group in the relevant population and the percentage of group members on the jury wheel." *Royal*, 174 F.3d at 6-7.

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[5] *Berghuis* noted that lower court have used at least three tests for measuring representation of groups in jury pools: absolute disparity, comparative disparity, and standard deviation. *See* 130 S. Ct. at 1393. The Court declined to adopt a particular test or measure.

In *Royal*, and *In re United States*, 426 F.3d 1 (1st Cir. 2005) the First Circuit

recognized the under-representation of African-Americans in juries in the Eastern

Division of the District of Massachusetts. The *Royal* court called the statistics presented

at that time "disquieting" and the process, while not a violation of law, "a situation

leaving much to be desired." *Royal*, 174 F.3d at 12. African-Americans were 4.86% of

the 1990 census count for the population 18 and over in the Eastern Division, only 1.89%

of the prospective jurors on the 1994 Master Jury Wheel, only 2.2% of prospective jurors

not deemed exempt, disqualified or excused, and only 2.9% of jurors appearing for jury

orientation.   This produced an absolute disparity of 2.97% *See id.* at 10.

Six years later, the First Circuit again recognized that the issues of

underrepresentation remained:

> Yet, there is asssuredly cause for concern, as this court said six years ago,
> *Royal*, 174 F.3d at 12, where…the proportion of blacks who return jury
> questionnaires is half the percentage to be expected from their presence in
> the division of the district concerned.

In re United States, 426 U.S. at 9. In that case the district court had found that African-

Americans were over 6% of the Eastern Division population in the several preceding

years but only just over 3% of those who returned questionnaires and identified race. The

average absolute disparity for 2001-2003 was 3.66% *See id.* at 3.[6]

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[6] In *Green*, the court noted that the JSSA had been amended in 1992 to provide for the
use of resident lists rather than voter lists in Massachusetts "because of serious concerns
about the racial composition of jury pools drawn from voter lists." 389 F.Supp.2d at 42.

In both cases the First Circuit applied an absolute disparity test to the data and found the disparity insufficient to establish constitutionally meaningful under-representation.

Tsarnaev recognizes that the absolute disparity of 1.89% derived from the petit jury data analyzed here will not be deemed sufficient to establish constitutionally meaningful under-representation in this case under current First Circuit law and raises the following to preserve the issue of whether the under-representation of African-Americans in the jury wheel violates the constitutional and statutory fair cross section requirements for appellate review.   He submits that absolute disparity is an analysis that will never be found sufficient where the population of the group alleged to be underrepresented is small, and should not be the analysis used to determine whether African-Americans are under-represented in the qualified jury wheel. As the Martin declaration explains (par. 25), since absolute disparity is simply the arithmetic difference between the percentage of a group on the jury list and the percentage of the same group in the population, where the population of a group is under 10% all of that group could be excluded and no unconstitutional under-representation would be found if the standard for unconstitutional under-representation is 10%. Given the limitations of an absolute disparity analysis for evaluating small populations, Tsarnaev suggests that a comparative disparity analysis should be used. This analysis measures the rate at which a distinctive group is represented (Martin declaration, par.27). Comparative disparity analysis shows a 30.73% under-representation of African-Americans on the jury list or that "over a quarter of the African-Americans are missing from the Qualified Jury Wheel." (Martin declaration

par.10). This under-representation, he submits, is constitutionally significant. Analyzing

the under-representation of African-Americans using standard deviation analysis, impact

analysis and disparity of risk analysis confirms the significance of the under-

representation of African-Americans (*see* Martin declaration, pars. 30-37).

Applying absolute disparity analysis to the representation of persons over the age

of 70 in the jury wheel shows an under-representation of 13.67%. Applying comparative

disparity analysis shows under-representation of 93.63% (Martin declaration, par.11).

Tsarnaev submits that this under-representation of older persons is constitutionally

meaningful.

(3) Systematic Exclusion

The systematic exclusion required to establish a violation of the fair cross section

requirement under the Sixth Amendment and the JSSA does not require proof of

discrimination or intent. Rather, the disparity must be caused by some sort of official

action or inaction. In *Taylor* the practice of excluding women unless they chose to

register (an opt-in system) was held to constitute systematic exclusion. In *Duren*, the

practice of giving women the option for an automatic exemption upon request (an opt-out

system) was held to constitute systematic exclusion. *See Duren*, 439 U.S. at 366-367.

As in *Duren*, the Plan for the District of Massachusetts provides an opt-out system

for persons over the age of 70 (section 9c). As in *Duren,* this constitutes systematic

exclusion.

As explained in the prior motion, the largest number of African-Americans among

the cities and towns of the Eastern Division resides in Boston and 22.49% of Boston's

population is African-American (the third highest percentage of African-Americans in the

Eastern Division and well above the Division's overall percentage of 6.14%). However,

Boston is under-represented in the municipal resident lists used to create the master jury

wheel. This under-representation in municipal resident lists is attributable to some form

of official action or inaction in the jury selection process and is, therefore systemic

exclusion. *See e.g. United States v. Jackman*, 46 F.3d 1240 (2nd Cir. 1995). This

systematic exclusion is a contributing factor to the under-representation of African-

Americans in the jury wheel.

CONCLUSION

For the foregoing reasons, it is requested that the Court dismiss the indictment

returned in this case, and stay further proceedings pending reconstitution of the jury

wheel to conform with the Jury Selection and Service Act, 28 U.S.C §1861 et seq. and

the Jury Selection Plan for the District of Massachusetts and the fair cross-section

requirement of the United States Constitution.

Respectfully Submitted,

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Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 26, 2015.

/s/ William Fick

DECLARATION OF JEFFREY O'NEAL MARTIN

QUALIFICATIONS AND INTRODUCTION

1.

My name is Jeffrey O'Neal Martin. I graduated from public school in DeKalb County Georgia, hold a Bachelor's degree in Mathematics and Economics from Vanderbilt University and a Master's degree in Economics from the University of Chicago. I am employed as a consultant on jury pool analysis, a consultant on actuarial issues, and as a consultant to political campaigns on issues related to voting data and projections. My academic research and current work involves the use of computers and statistical procedures to analyze data including Census data and voter registration data. I have been qualified as an expert witness on the procedures used to produce jury pools in Superior Courts in Georgia and South Carolina and in Federal Courts in Georgia, Alabama and Michigan. I previously supplied a declaration in this case.

DATA

2.

I have been asked by counsel for Dzhokhar Tsarnaev to review data and documents concerning the Master, Supplemental and Qualified Jury Wheels in the Eastern Division of the District of Massachusetts that were used to summons potential Trial Jurors in this case.

3.

The data included statistical analyses of the jury wheels, data from the Office of the Jury Clerk, data on the jurors who comprise the Master and Supplemental Jury Wheels and data on the jurors who were summoned over the years 2014 and 2015. Personally identifiable information was not supplied in the data.

4.

The data was carefully organized and was made electronically accessible.

SUMMARY OF FINDINGS

5.

In the data supplied, the pool used to summons potential Trial Jurors in this case is pool "101150101". This pool is different from all other pools in the data in that a second ordering, or "re-ordering" number is supplied besides the original random pool sequence number. If the re-ordering merely re-ordered the potential jurors within groups of 200 or so without the introduction of any non-random factor such as arrival time, then, on average, there would not be any systematic effects on the randomness of the order. Some potential jurors would move up a few positions while others would move back a few positions causing the average move to even out to neither moving up nor moving back in position. However, certain potential jurors have moved from group to group causing the re-ordering to be non-random and the effect on cognizable groups to not be neutral.

6.

On average, the re-ordering has caused potential African-American jurors to move back 43 positions while potential White jurors have remained essentially the same by moving 3 positions up in order. Potential jurors from Boston have moved back 25 positions. Potential jurors who are younger than 30 have moved back 13 positions.

7.

Comparing the re-ordering to the original ordering, in the first 94 qualified jurors, there are zero potential African-American jurors in the re-ordering but there would have been 5 potential African-American jurors in the original ordering.

8.

The pool for potential Trial Jurors in this case has the highest rate of disqualification for all pools in the data for years 2014 and 2015 at 11.14% compared to the average in the other pools of 6.51%. Within the reasons for disqualification, this pool has the highest percentage of "Disqualified – Not Resident of Massachusetts" at 45.10% compared to the average in the other pools of 31.03%.

9.

The Plan for Random Selection of Jurors (Effective March 3, 2009) for the District of Massachusetts states in 8a that "For each summons returned by the United States Postal Service to the Court as "undeliverable," the Clerk shall draw at random from the Supplemental Jury Wheel the name of a resident who lives in the same zip code area to which the undeliverable summons had been sent and prepare and cause to be mailed to such resident a new one-step juror summons/qualification form." However, the jury pool which was used to summons Grand Jurors in this case had undeliverable summonses but no replacement summonses were mailed. Unlike the Grand Jury pool, in the Petit Jury pool for this case, most of the summonses which were undeliverable were replaced with another summons from the Supplemental Jury Wheel. In some cases the undeliverable summonses were replaced by another summons which was also undeliverable but which was again replaced by another summons. The use of replacement summonses as required by the jury plan increased the percentage of African-Americans in the group of potential jurors from 4.49% to 4.58%.

10.

In the most current Census data, African-Americans make up 6.14% of the Eastern Division jury eligible population. African-Americans make up 4.25% of the current Qualified Jury Wheel. The absolute disparity for African-Americans shows 1.89% under representation. The comparative disparity shows 30.73% under representation or that over a quarter of the African-Americans are missing from the Qualified Jury Wheel. The under representation of African-Americans is statistically significant.

11.

The Plan for Random Selection of Jurors (Effective March 3, 2009) for the District of Massachusetts states in 9c that "The Clerk, upon individual request, shall excuse the following classes of persons: i. any person over the age of 70 years old…" Of the jurors who met the age 70 requirement and who were not disqualified, 94.31% or nearly all chose their personal preference to not serve in the years 2014 and 2015. Likewise, 95.96% of persons age 70 and over summoned as potential Trial Jurors in this case chose their personal preference to not serve. Persons over the age of 70

make up 14.60% of the population, while persons over age 70 who choose to serve make up 0.86% of the Qualified Jury Wheel. This represents under representation of persons age 70 and over of 13.67% on an absolute disparity basis and 93.63% on a comparative disparity basis.

12.

While Suffolk County is part of the Eastern Division, it is different demographically than the Eastern Division as a whole. The Eastern Division is 6.14% African-American while Suffolk County is 20.31% African-American.

13.

Persons who are members of the Millennial Generation, those born before 2000 but who are age 18, are under represented in the Qualified Jury Wheel. While the Millennial Generation makes up 25.59% of the Eastern Division, they make up 22.91% of the Qualified Jury Wheel for the years 2014 and 2015. This represents an absolute disparity under representation of 2.67% and a comparative disparity under representation of 10.45% meaning that a tenth of the group is missing.

STATISTICAL AND DATA ANALYSIS

14.

The data supplied included records of the summonses for 20 different pools. 3 of the pools were for Grand Juries and 17 of the pools were for Petit Juries including the potential Trial Jurors in this case. In total there were 20,908 summonses.

15.

Each summons was identified as "Completed", "Deferred", "Disqualified", "Excused", "Juror", "Panel", "Reassigned", "Responded", "Summoned" and "Undeliverable".   Each summons identified if the summons was a replacement summons from the Supplemental Wheel and which "Undeliverable" summons it replaced.

16.

Each summons that is identified as "Excused" also includes a description of the excusal. One of the descriptions is "Over the age of 70". Since there were no complete dates associated with each pool in the data, persons over the age of 70 were defined to be persons born in 1944 or earlier. There were 2,849 persons over the age of 70 who were summoned in the years 2013 and 2014. Of the 2,849 persons, 2,354 were qualified as jurors. Of the 2,354 qualified jurors over the age of 70, 2,220 or 94.31% took the personal preference of not serving as a juror.

17.

The Petit Jury in this case is identified as pool "101150101" and includes 3,206 summonses. There were 488 summonses in this pool for persons age 70 or over. Of the 488 persons, 396 were qualified as jurors. Of the 396 qualified jurors over the age of 70, 380 or 95.96% of the persons over age 70 took the personal preference of not serving as a juror.

18.

The jury eligible population is defined to be the population that is age 18 years and older who are citizens of the United States. While there are other requirements to serve as a juror besides age and citizenship, this definition is standard for the analysis of jury lists. The 2010 decennial census is not updated annually and includes persons who are not United States citizens. Therefore, the Federal Courts use population numbers published by the United States Census Bureau under the American Community Survey (ACS). These population numbers are used on Form AO-12. The most current Census Bureau numbers are the American Community Survey (ACS) 5-Year estimates as of 2013.

19.

The most current American Community Survey (ACS) 5-Year estimates as of 2013 show the jury eligible population for the Eastern Division is 0.17% American Indian/Alaska Native, 4.30% Asian, 6.14% African-American, 1.65% Multi-Race, 0.02% Native Hawaiian/Pacific Island, 84.98% White and 2.74% of other races.

20.

The most current American Community Survey (ACS) 5-Year estimates as of 2013 show the jury eligible population for Suffolk County is 0.28% American Indian/Alaska Native, 6.44% Asian, 20.31% African-American, 3.04% Multi-Race, 0.03% Native Hawaiian/Pacific Island, 64.62% White and 5.28% of other races.

21.

The Pew Research Center has delineated generations for the purpose of studies of traits and attitudes. The generations used in this analysis are the Millennial Generation (those born before 2000 but in this analysis who are also over age 18), Generation X (born in 1965 through 1980), the Baby Boomer Generation (born in 1946 through 1964) and the Silent Generation (born before 1946).

22.

While the Census Bureau does not provide jury eligible population numbers for single ages that would allow the calculation of the population in each generation, the Census Bureau does provide single age population numbers in the 2010 decennial census that include non-United States citizens. The Millennial Generation makes up 25.59% of the population of the Eastern Division, Generation X makes up 26.25%, the Baby Boomer Generation makes up 31.43% and the Silent Generation makes up 16.74%. Most of the persons in the Silent Generation are age 70 and over. Persons age 70 and over make up 14.60% of the population.

23.

There are six standard statistical analyses used to determine the under representation of a distinctive group. The most common and easiest to calculate is the Absolute Disparity. The other standard statistical analyses are Comparative Disparity, Standard Deviations from Expected, Impact Analysis, and Disparity of Risk on an Absolute and Comparative basis.

24.

Absolute Disparity is simply the arithmetic difference between the percentage of a distinctive group on the jury list and the percentage of the same distinctive group in the population. In this analysis, the Absolute Disparity for African-Americans on the Qualified Jury Wheel is 1.89% (the difference between 6.14% and 4.25%).

25.

While there is no scientific basis for a particular threshold of acceptable Absolute Disparity other than more disparity means worse representation, a threshold of 10% has been put forth as a standard. The facts of this analysis points out the main objections to the sole use of a set threshold such as 10% for Absolute Disparity. In the Eastern Division, African-Americans can be entirely excluded and the Absolute Disparity would still be below 10%. In short, a 10% threshold for acceptable Absolute Disparity is much harsher on smaller populations than on larger populations. Indeed if Absolute Disparities of up to 10.00% were acceptable, then there would be no need to include any African-Americans in the Qualified Jury Wheel for the Eastern Division.

26.

In response to the limitations of relying solely on Absolute Disparity, statisticians have also considered Comparative Disparity. Comparative Disparity by formula is the Absolute Disparity for a distinctive group divided by the population percentage of that distinctive group. Note that, mathematically, since the population percentage of a distinctive group can never be greater than 100% or 1.00, Comparative Disparity which is divided by something less than or equal to 1.00, will always be greater than Absolute Disparity. In this analysis the Comparative Disparity for African-Americans reflects 30.73% under representation.

27.

Unlike Absolute Disparity, Comparative Disparity is mathematically a rate. That is, Comparative Disparity shows the rate at which a distinctive group is represented. In this way, Comparative Disparity means the same thing for a larger group than it does for a smaller group. A 50% Comparative Disparity means that half of the distinctive group expected is excluded whether that group is 85% of the population or 6% of the population. In this analysis, the

Comparative Disparity of 30.73% means that something more than a quarter of the African-Americans we would have expected to be represented on the jury list are missing.

28.

Once again, while there is no scientific basis for a particular threshold of acceptable Comparative Disparity, a Comparative Disparity of over a quarter is a sizeable part of the African-American potential jurors.

29.

As a statistician, given the limitations of both Absolute Disparity and Comparative Disparity, it has been recommended that the disparity analysis should not rely solely on either Absolute Disparity or Comparative Disparity but with regards to the two in combination. In this analysis, the combination of Absolute Disparity and Comparative Disparity describes under representation of African-Americans as a proportionately sizeable under representation of a relatively smaller group of potential jurors.

30.

Standard Deviation analysis allows statisticians to determine if the under representation of a distinctive group is statistically significant or not. That is, in any group drawn from the population such as a jury list, there are random factors that mean that the demographics of the jury list drawn from the population will not match the population demographics exactly because of "luck of the draw". However, standard deviations allow statisticians to scientifically determine whether the demographics of the jury list diverge substantially enough from the population demographics that the difference is not the product of chance but is systematic. Statisticians use a standard of 2 or 3 standard deviations to determine statistical significance. If there is no systematic under or over representation of a distinctive group, the divergence of demographics should exceed 2 standard deviations only approximately 5% of the time while the divergence of demographics should exceed 3 standard deviations only approximately 0.5% of the time.

31.

In this analysis, the percent of African-Americans on the Qualified Jury Wheel differs from the percent of African-Americans in the population by 9 standard deviations. The difference of 9 standard deviations is statistically significant. In other words, the under representation of African-Americans on the Qualified Jury Wheel is not the result of random factors or luck, but is the result of a systematic process that under represents African-Americans.

32.

Comparing the expected number of African-Americans that would be drawn from the Qualified Jury Wheel in a draw of 12 jurors versus the expected number of African-Americans that would be drawn from the jury eligible population in a draw of 12 jurors gives the impact of any under representation of African-Americans on the Qualified Jury Wheel. Since jurors cannot be split in half, the analysis uses only whole jurors.

33.

The impact is calculated by considering the chance that the result of independent draws from the Qualified Jury Wheel and from the jury eligible population would result in the same number of African-American jurors drawn from each, 1 less African-American juror, 1 more African-American juror, 2 less African-American jurors, 2 more African-American jurors and so on until the very small chances of 23 more African-American jurors or 23 less African-American jurors are considered.

34.

The most likely result of a draw of 12 jurors from the Qualified Jury Wheel would have the same number of African-American jurors than the same draw from the jury eligible population. This result would statistically happen 40.43% of the time.

35.

Impact analysis also looks at any skew that the under representation of African-Americans on the Qualified Jury List has. The chance that a draw of 12 jurors from the Qualified Jury Wheel would have the same number of African-Americans as a draw from the jury eligible population would be 40.43%. The chance that a draw of 12 jurors from the Qualified Jury Wheel

would over represent African-Americans by 1 or more jurors is 22.47%. However, the chance that a draw of 12 jurors from the Qualified Jury Wheel would under represent African-Americans by 1 or more jurors is 37.10%. The impact is skewed towards under representation of African-Americans.

<div align="center">36.</div>

Similar to the Impact analysis, the Disparity of Risk analysis calculates the chance that the jury will under represent a distinctive group. Using the whole value of the expected number from that distinctive group if the jury were perfectly representative of the jury eligible population, the Disparity of Risk is calculated as the difference between the chance that a draw from the jury list under represents that distinctive group and the chance that a draw from the jury eligible population, by chance, would under represent that distinctive group. The Absolute Disparity of Risk takes the arithmetic difference between these two probabilities and the Comparative Disparity of Risk takes the relative difference between the two probabilities.

<div align="center">37.</div>

In this analysis, the expected number of African-American jurors in a draw of 12 from the jury eligible population would be 1 African-American juror. The chance that there would be zero African-American jurors drawn from the Qualified Jury Wheel is 59.38%. The chance that there would be zero African-American jurors drawn from the jury eligible population would be 46.77%. The absolute difference between these two probabilities is 12.61% (the difference between 59.38% and 46.77%) and the comparative difference is 21.23% (12.61% divided by 59.31%). That is, the chance that the jury under represents African-Americans is increased by 12.61% absolutely and by over a fifth relatively when using the Qualified Jury Wheel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _Februry 25th 2015_

_____
Jeffrey O'Neal Martin