



November 23, 2020

Via Electronic Mail

Judicial Council of the Ninth Circuit
c/o The Honorable Sidney R. Thomas, Chair

Re: Objection to Proposed Jury Plan for Southern District of California

Dear Honorable Members of the Judicial Council,

We write to object to the new, proposed Jury Selection Plan submitted to the Ninth Circuit by the United States District Court, Southern District of California. *See* Attachment A. Because we believe that the single-source method for identifying potential jurors in the proposed plan fails to comply with the Jury Selection and Service Act of 1968 as well as the fair cross-section and equal protection guarantees of the U.S. Constitution, we respectfully ask the Council to encourage the Southern District to reconsider it. *See* 28 U.S.C. § 1863 (“The panel shall examine the plan to ascertain that it complies with the provisions of this title.”). Our objection lies in the decades-long underrepresentation of African Americans on the master and qualified wheels from which the Southern District draws its jurors.

Background of this objection.

In the fall of 2017, a coalition of ten diverse Bar Associations—together with the Federal Defenders of San Diego, Inc.—wrote to the Southern District of California federal district court with a request to expand the source list from which the court selects its jurors. *See* Attachment B. This coalition expressed concern that the Southern District’s practice of using voter rolls exclusively to identify potential federal jurors was contrary to the Jury Act’s promise that “all citizens shall have the opportunity to be considered for service on grand and petit juries” (28 U.S.C. § 1861). *Id.* The signatories therefore requested that the court expand its source list. *See id.*

Since 2004, the Ninth Circuit’s Jury Trial Improvement Committee has recommended that all district courts supplement voter registration lists “to increase inclusiveness and to provide better representation of the adult citizen population who are qualified to serve as jurors.” *See* Attachment C. *See also* AMERICAN BAR

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ASSOCIATION, *Principles for Juries and Jury Trials*, Principle 10(A)(1) (“The names of potential jurors should be drawn from a jury source list compiled from two or more regularly maintained source lists of persons residing in the jurisdiction.”). Today, all federal district courts in California—except the Southern District—use supplemented source lists.¹ Additionally, the district courts in Washington, Idaho, Montana, and Hawaii use supplemented lists.² Unbeknownst to the 2017 letter’s signatories at the time of drafting, the Ninth Circuit’s Jury Trial Improvement Committee had also recommended that same year that the Southern District consider supplementing its juror source list. *See* Attachment D.

In response to the 2017 letter described above, the Southern District asked for input from the United States Attorney’s Office for the Southern District. *See* Attachment E. The United States Attorney’s Office recommended a “fuller statistical analysis of the actual impact supplementation would have” in the Southern District before making any changes. *See* Attachment F. The court never changed its exclusive reliance on voter lists to identify jurors and—despite an offer from Federal Defenders and the diverse bar associations to “research jury plans and recommend improvements to our current jury procedures to further enhance citizen participation in our local federal courts”—the court never responded to the offer to collaborate.

Instead, without notice and without seeking comment from the organizations who had previously indicated interest in this issue, the Southern District posted a new Jury Plan to its website last month. The Plan directs the continued, exclusive use of voter lists as the sole source to identify potential jurors.

¹ E.D. Cal. Jury Plan, *available at*

[http://www.caed.uscourts.gov/caednew/assets/File/GO%20569\(1\).pdf](http://www.caed.uscourts.gov/caednew/assets/File/GO%20569(1).pdf); N.D. Cal. Jury Plan, *available at* https://www.cand.uscourts.gov/wp-content/uploads/general-orders/GO_06_8-7-2017.pdf; C.D. Cal Jury Plan, *available at* <https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2019-07.pdf>.

² E.D. Wa. Jury Plan, *available at*

<https://www.waed.uscourts.gov/sites/default/files/jury/JuryPlan.pdf>; W.D. Wa. Jury Plan, *available at* <https://www.wawd.uscourts.gov/sites/wawd/files/LocalJuryPlan.pdf>; D. Id. Jury Plan, *available at* https://www.id.uscourts.gov/Content_Fetcher/index.cfm/District_of_Idaho_Jury_Plan_2769.pdf?Content_ID=2769; D. Mont. Jury Plan, *available at* <https://www.mtd.uscourts.gov/sites/mtd/files/Jury%20plan%20-%2002-2019%20-%20Signed.pdf>; D. Haw. Jury Plan, *available at* https://www.hid.uscourts.gov/files/order341/2017_02_28_jury_Approved%202017%20Jury%20Plan.pdf.

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Two decades of known, persistent underrepresentation of Southern District communities is enough.

The proposed Jury Plan for the Southern District asserts that the “Court finds that county voter registration lists represent a fair cross section of the citizens residing within the communities in the Southern District of California.” *See* Attachment A. The problem with this finding is that it is undermined by twenty years of the court’s own data. The Jury Selection and Service Act requires the court to report on its jury selection process. *See* 28 U.S.C. § 1863(a). The district court evaluates its jury wheel representativeness through reports called “AO-12s.” The Southern District’s own AO-12s for the years 1999 through 2019 show persistent, significant underrepresentation of African Americans. *See* Attachment G.

According to the Southern District’s AO-12s, the proportion of African American citizens in its jury wheel samples is consistently far lower than the Southern District’s own calculation of the proportion of African American citizens in the district. African American citizens’ representation in the jury wheels, based on the known proportion of that community in the district, is never remotely achieved. Additionally, the magnitude of this underrepresentation is consistently far greater than, for example, the jury wheels’ ability to accurately capture White citizen representation. This disparity is troubling, to say the least.

From 1999 to 2019, the Southern District’s single-source method for jury pool selection has resulted in—at best—62.2% of the expected African American citizen representation in the jury wheel. *See infra* Chart 1. For several years, the African American citizen representation in the Southern District jury wheel has been *less than half* of what it would be if the wheel were truly representative. On average, over the last 20+ years, the Southern District’s method of selecting jurors solely from voter lists has resulted in the representation of African American citizens in its jury wheel being just 53.3% of what would be expected based on the proportion of that population in the District. *See id.*

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Chart 1.³

Jury Wheel	Percent of African Americans citizens in Jury Wheel Sample ⁴	Percent of African Americans citizens in the S.D. Cal. community	Percent of African American citizen population in Jury Wheel Sample compared to what would be expected based on their representation in the community
February 2019 Wheel	3.33	5.5	60.5
February 2017 Wheel	3.06	5.5	55.6
February 2015 Wheel	3.24	5.4	60
March 2013 Wheel	3.36	5.4	62.2
February 2011 Wheel	3.05	5.4	56.5
March 2009 Wheel	2.84	5.9	48.1
March 2007 Wheel	2.51	5.9	42.5
January 2005 Wheel	2.63	5.9	44.6
February 2003 Wheel	2.8	5.9	47.5
February 2001 Wheel	3.1	5.9	52.5

³ This chart was compiled using data from the Southern District’s AO-12s in Attachment G. Some years, the Southern District issued multiple AO-12s at different intervals (e.g., a few months from the filling of the wheel, a year from the filling of the wheel, more than a year from the filling of the wheel). Additionally, for some years, the Southern District calculated representativeness for both the master and qualified wheels. For those years with multiple AO-12s, the data most *favorable* to the Southern District’s current methodology (in terms of achieving representativeness of African Americans on its wheels) was selected for the above chart.

⁴ For some years, the court provided the percent of the sample “with unknowns removed.” Where available, that data is presented in Charts 1 & 2—again, as it is most *favorable* to the Southern District’s current methodology.

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February 1999 Wheel	3.21	5.7	56.3
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In contrast, the White citizen population represented in the Southern District’s jury wheels has never been less than 85.7% of what would be expected.⁵ *See infra* Chart 2. The jury wheel has even slightly *overrepresented* the White citizen population (i.e., in 2013, 75.98% of the jury wheel were White citizens when White citizens only made up 74.9% of the community). *See id.* Overall, the proportion of White citizens in the Southern District jury wheels since 1999 is 91.6% of what would be expected based on the percentage of that population in the community (compared to just 53.3% for African Americans). *See id.*

Chart 2.⁶

Jury Wheel	Percent of White citizens in Jury Wheel Sample	Percent of White citizens in S.D. Cal. community	Percent of White citizen population in Jury Wheel Sample compared to what would be expected based on their representation in the community
February 2019 Wheel	67.82	74.2	91.4
February 2017 Wheel	68.42	74.2	92.2
February 2015 Wheel	69.16	74.9	92.3
March 2013 Wheel	75.98	74.9	101.4
February 2011 Wheel	64.18	74.9	85.7
March 2009 Wheel	64.85	74	87.6
March 2007 Wheel	64.43	74	87

⁵ It appears that the large numbers of potential jurors selecting their race as “other” has led to some racial groups appearing to be somewhat regularly underrepresented. But no group is underrepresented as regularly—or by as large a degree—as African Americans.

⁶ This chart was compiled using data from the Southern District’s AO-12s in Attachment G.

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January 2005 Wheel	66.13	74	89.4
February 2003 Wheel	65.5	74	88.5
February 2001 Wheel	70.59	74	95.4
February 1999 Wheel	75.26	77.4	97.2

These charts, compiling twenty years of the Southern District’s own data, undermine the District’s “find[ing]” in the proposed Jury Selection Plan that voter lists “represent a fair cross section of the citizens residing within the communities in the Southern District of California.” We urge this Council to evaluate whether the Southern District’s proposed plan of continuing single-source jury wheels fulfills the Jury Act’s guarantee that “all citizens shall have the opportunity to be considered for service on grand and petit juries.” *See* 28 U.S.C. § 1861. We make this plea not only as members of the bar, but also as members of the Southern District community committed to advocating for equal justice under law. *Cf. Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“Community 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.”). Thank you for considering our objection as you review the proposed Jury Selection Plan for approval under 28 U.S.C. § 1863.

Respectfully,

geneviève l. jones-wright

GENEVIÈVE JONES-WRIGHT

President

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Attachments

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