

FEDERAL DEFENDERS OF SAN DIEGO, INC.

THE COMMUNITY DEFENDER ORGANIZATION FOR THE SOUTHERN DISTRICT OF CALIFORNIA

December 30, 2020

John Morrill, Clerk of the Court
United States District Court
Southern District of California
333 West Broadway, Suite 420
San Diego, CA 92101

Re: Public Comment on Jury Plan, pursuant to General Order No. 147-I

Dear Clerk for the Southern District of California,

We write to you as attorneys who provide representation under the Criminal Justice Act Plan (“CJA Plan”) for the Southern District of California. The primary objective listed in the CJA Plan is to “attain the goal of equal justice under the law.” All of us believe modification of the Jury Selection Plan proposed in General Order 147-I is necessary to provide equal justice and to improve the diversity of jury pools in the District.

Diverse jury pools are critical to ensuring our clients’ rights to a jury drawn from a fair cross-section of the community under the Sixth Amendment and the Jury Selection and Service Act of 1968. But achieving the goal of diverse jury pools is not only important to criminal defendants. Diverse jury pools also encourage public confidence in the justice system, improve the quality of jury deliberations and provide all citizens an equal opportunity to serve as jurors.

We fully agree with the community organizations who wrote an objection to the Judicial Council of the Ninth Circuit. See Attachment A (letter without attachments). These organizations demonstrated that the District’s methods for identifying potential jurors has resulted in the decades-long underrepresentation of African Americans on the master and qualified wheels from which the Southern District draws its jurors.

We also fully agree with legal academics’ recommended modifications to the Plan. See Attachment B. Specifically, the Plan should be modified to:

- Designate source lists in addition to the voter registration list.
- Refill the jury wheel annually, rather than every two years.
- Direct the Clerk to regularly submit the names on the master and qualified wheels to the national change-of-address database of the United States Postal Service to be corrected.

- Direct a follow-up notice to be sent to potential jurors who fail to respond to the jury qualification notice or summons.
- Direct a replacement jury qualification form to be sent to the same zip code when a jury qualification notice or summons is returned as undeliverable or is not returned.
- Adopt a one-step summoning process by combining the jury summons and qualification form.
- Incorporate a reference to a litigant's entitlement to access jury selection records under the Jury Selection and Service Act of 1968.
- Direct the Clerk to conduct periodic examinations of racial and ethnic diversity in the jury pool.
- Specify which jury selection records will be preserved and made available to litigants preparing a motion challenging the composition of the jury pool.

The academics explain how these modifications will improve the Court's ability to assemble racially and ethnically diverse jury pools. The sources the academics rely upon also show that the modifications are consistent with jury selection procedures already followed by districts in this and other circuits, as well as the best practices recommended by the American Bar Association ("ABA") and the National Center for State Courts.

We write separately to emphasize the importance of abandoning a single-source list for the juror selection process, and to request two additional modifications not identified by the academics.

1. The Southern District should follow the lead of every other state and federal court in California and adopt a multi-source jury list.

The community groups and academics offer compelling reasons to abandon a single-source list. In addition to those reasons, this Court should consider that maintaining a single-source list would be inconsistent with other districts within the Circuit, and contrary to the California state legislature's recent finding that California's voter lists do not adequately represent the community.

Every other District within the State of California has a Jury Selection Plan that relies on multiple-source lists. Significantly, each of these multiple-source list plans were either recently reaffirmed or enacted. *See* United States District Court for the Eastern District of California, *Jury Management Plan*, Section 2.01 (Jan. 25, 2016); United States District Court for the Northern District of California, *Plan for the Random Selection of Grand and Petit Jurors*, Gen. Order No. 6, Part V (Aug. 7, 2017); *The Plan of the United States District Court, Central District of California, for the*

Random Selection of Grand and Petit Jurors, General Order No. 19-07, Part 4 at pg. 2, lines 23-25 (July 15, 2019). Because nothing suggests the Southern District is somehow immune from the problems of single-source lists, the Plan should be modified in accord with the other federal courts within the state.

Maintaining a single-source plan is also at odds with the California's continued expansion of multiple-source lists. The California legislature recently determined that voter lists, even when supplemented by DMV records, do not adequately represent the community. The legislative history explained that "significant evidence exists to demonstrate that jury pools skew whiter and richer than the population as a whole, likely due in part to the data sources [such as voter registration and DMV records] utilized by courts when summoning jurors." Assembly Floor Analysis, S.B. 592 at 1 (Cal. Aug. 24, 2020). Relying on recent research, legislators found that "the use of voter data in developing jury lists is likely to result in a significant underrepresentation of Latino jurors," and that "evidence suggests that minorities hold driver's licenses at rates that are far lower than their white peers." *Id.* at 2. The legislators concluded that "the data casts significant doubt as to whether minority litigants are truly able to obtain a jury of their peers under California's existing system" which relies only on voter registration and DMV records. *Id.* In light of those findings, the California legislature passed a law requiring all courts in the state to supplement their source lists with taxpayer records, rather than relying exclusively on voter registration lists or DMV records. See S. 592, 2020 Leg., Reg. Sess. (Cal. 2020).

These legislative findings cast grave doubt on the Southern District's determination that voter lists alone represent a fair cross-section of the community. They also show that California's "motor voter" law, which encourages DMV customers to become registered voters, will not solve the problem. Accordingly, the Southern District should supplement its voter-roll-based jury list with a second, more representative source.

2. The Southern District should strengthen its antidiscrimination policy and eliminate the hardship excuse that will disproportionately exclude Imperial County jurors.

We also believe the Plan's antidiscrimination policy, Section 1.06, should be expanded. The current recognition that citizens will not be excluded from service "on account of race, color, religion, sex, national origin, or economic status" is consistent with Model Jury Plan, U.S. Courts for the Ninth Circuit, § 1.05 (approved October 20, 2016). The Model Jury Plan notes, however, that "districts may choose to include prohibitions against discrimination based on additional classifications, such as disability, age, and sexual orientation." *Id.* The District should join other districts in recognizing that these additional classifications will not be excluded from service.

Finally, we believe the Plan’s provision permitting an excuse from service based on travel distance, Section 3.04(c)(2), should be deleted. Notably, the Plan’s statement that traveling a “great distance, either in miles or travel time, from the place of holding court” constitutes undue hardship or extreme inconvenience does not appear in the Ninth Circuit Model Jury Plan. See § 3.04(c). More importantly, because our district includes both San Diego and Imperial Counties, but virtually all jury trials take place in San Diego County, this excuse may disproportionately exclude Imperial County residents from our jury pool. Imperial County residents often live hours away from downtown San Diego. Moreover, Imperial County residents are 85% Hispanic or Latino;¹ this hardship rule may work to disproportionately exclude Latino jurors.

We hope that the Court adopts these recommendations, which will bring our District’s jury selection procedures in line with other federal districts. Collectively, we believe these measures will promote “the goal of equal justice under the law.”

Sincerely,

/s/ Kathy Nester

Kathy Nester
Executive Director
Federal Defenders of San Diego, Inc.

/s/ Jami Ferrara

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Criminal Justice Act Panel
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¹ See U.S. Census, Imperial County QuickFacts (2019), <https://www.census.gov/quickfacts/imperialcountycalifornia>.

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