

CHAPTER 3

CHALLENGING JURY SELECTION SYSTEM

Table of Contents

I. INTRODUCTION / PRACTICE TIPS	1
A. JURY RULES	1
B. OVERVIEW	1
1. Voter registration lists – discriminatory?	1
2. Accepting the jury waives any error	1
3. Consider Batson challenge	1
4. Why bother?	2
C. PRACTICE TIPS	2
1. Preliminary steps	2
2. Determine how the local system selects jurors	2
3. Motions practice	2
(a) File challenge/discovery motion to inspect and copy records	2
(b) Supplemental motion and affidavit	3
(c) Hearing	3
II. CHALLENGING STATUTORY COMPLIANCE	3
A. WRITTEN PLAN FOR JURY SELECTION PROCESS	3
B. JURY ADMINISTRATOR’S PROCEDURAL NONCOMPLIANCE	3
1. “Substantial compliance” standard of proof	3
(a) Prejudice to defendant’s rights	4
(b) Effect of noncompliance with procedural technicalities	4
(c) Waiver	4
2. Appointment of administrators	4
3. Constitutional analysis	4
4. Sources for prospective jurors	5
(a) Exclusive voter registration lists	5
(b) Property tax lists	5
(c) Householder lists	5
(d) Supplemental lists	5
5. Computerized jury selection	5
C. CLERK’S NONCOMPLIANCE WITH PROCEDURE FOR DRAWING JURORS	6
1. Test for noncompliance	6
2. Effect of lack of substantial compliance	6
3. Waiver	6
D. EQUAL PROTECTION CHALLENGES	6
1. Purposeful discrimination based on race or class	6
(a) Standing	7
(b) Timing	7
2. Defendant’s initial burden	7
(a) Two-part prima facie showing:	7
(2) causal link: exclusion of recognizable group flowed from intentional or deliberate discrimination.	7
(b) Substantial under-representation infers discrimination	7
(c) Large disparity	8
(d) Subjective criteria plus statistical disparity	8

(e) Persons appearing for duty vs. persons selected	8
(f) Presumption of discrimination	9
3. State must rebut presumption	9
E. FAIR CROSS SECTION REQUIREMENT	9
1. Systematic exclusion	9
(a) All defendants have standing	9
(b) Where fair cross section challenges appropriate	10
2. Standard of proof	10
(a) Need not show discriminatory purpose	10
3. Prima facie violation	10
(a) “Distinctive” group	11
(b) Under-representation of group	12
(c) Systematic exclusion	13
4. State must justify infringement	14
III. SELECTION PROCEDURES	14
A. GOAL	14
1. Features of process	14
(a) Random	14
(b) Proportionate to intra-district population	14
(c) No specific composition requirement	15
B. PROCEDURES AND REQUIREMENTS	15
1. Frequency of selections	15
2. Number of prospective jurors called	15
3. Term of jury service	15
IV. ALTERNATE JURORS	16
A. SELECTION PROCEDURE	16
1. Usually selected after regular jurors selected	16
2. Alternates considered “juror” for some purposes	16
(a) Alternate juror is outside influence	16
B. COURT’S DISCRETION TO REPLACE JUROR WITH ALTERNATE	16
C. ORDER OF SEATING	17
D. CIRCUMSTANCES WHERE SUBSTITUTION WARRANTED	17
1. Personal knowledge of material fact or unable to perform duties	17
2. Juror about to be arrested and prosecuted	17
3. Socializing with witnesses	17
(a) Mistrial if contact enhances credibility of State’s witness	18
4. Sleeping	19
E. REVERSIBLE ERROR ONLY WHERE ACCUSED PLACED IN SUBSTANTIAL PERIL	19
1. Must object	19
F. DISCHARGED AFTER JURY BRINGS IN VERDICT	19
G. MAY RETIRE TO JURY ROOM IF PROPER INSTRUCTION GIVEN	19
V. SPECIAL CIRCUMSTANCES	19
A. CHANGE OF VENUE OF VENIRE PANEL	19
1. Court’s discretion	19
(a) Prejudicial publicity	19
B. ANONYMOUS JURIES	20
1. Used only in limited circumstances	20
(a) Balance interests	20
(b) Factors	20
2. Defendant’s rights	21

- (a) Right to jury of known individuals 21
 - (b) Right to fair trial and impartial jury 21
- 3. If court insists on empaneling anonymous jury..... 21
 - (a) Argue for more extensive voir dire..... 21
 - (b) Instructions..... 21

CHAPTER 3

CHALLENGING JURY SELECTION SYSTEM

I. INTRODUCTION / PRACTICE TIPS

A. JURY RULES

Indiana jury rules do not necessarily overrule the applicable statutory sections, but in situations where they would conflict, the rules promulgated by the Supreme Court would render the conflicting statute a nullity on that point. McEwen v. State, 695 N.E.2d 79 (Ind. 1998) (where rules of evidence and statute address same subject matter, rule controls under separation of powers doctrine); see also Ind. Code § 34-8-1-3 (codifying doctrine that rules of court practice and procedure fall within judicial authority, instructing “all laws in conflict with the supreme court’s rules have no further force or effect”).

Practice Pointer: Although the court-ordered Rules control, counsel should be aware of the statutory law to the extent that it supplements or contradicts the Rules and determine whether the county in question follows the procedure of Ind. Code § 33-28-5.

B. OVERVIEW

Challenging the jury selection system is tedious and time-consuming, but sometimes fruitful. This chapter references statutes and cases defining how to show purposeful exclusion of certain groups.

1. Voter registration lists – discriminatory?

There is a general trend toward using sources other than voter registration lists because of the discriminatory tendencies of such lists. Indiana now requires jury administrators to use lists approved by the Supreme Court that may be used to select prospective jurors. Jury Rule 2. Lawyers should direct efforts to force the courts to make use of approved alternative sources to supplement the lists (utility registrations, property taxpayers, motor vehicle registration information – including identification cards, etc.).

2. Accepting the jury waives any error

If a challenge is made to the selection procedure, acceptance of the jury during trial waives any error for appeal. If necessary, to acknowledge acceptance of the jury, do so only subject to the objection made concerning the selection process.

3. Consider Batson challenge

Minor irregularities in compliance with statutes directing selection and calling of juror do not constitute reversible error. Consider filing a Batson challenge where local system of notifying prospective jurors of service, excusing them, or granting a delay of service results in elimination of disparate number of members of identifiable group.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) (shifting burden of proof to challenged party to provide neutral explanation of peremptory challenge where party objecting to challenge sets out a prima facie case of discrimination, showing that the juror is a member of a cognizable racial group, other party has exercised challenges to remove members of that group, and circumstances of case raises an inference that exclusion was based on race).

4. Why bother?

Although chance of successfully challenging the array is slim, a judge who hears of deficiencies in selection system and under-representation of a group may be more receptive to change of venue or to expand voir dire as basis for challenges to individual jurors. See Ginger, *Jury Selection in Civil and Criminal Trials*, Section 6.6 (2d Ed. 1984).

C. PRACTICE TIPS

1. Preliminary steps

Excerpts from Jurywork, section 6.2. National Jury Project. Reprinted with permission.

- (1) obtain jury selection statutes and rules (see Jury Rules and Ind. Code § 33-28-5);
- (2) ascertain process by which population is reduced to venire;
- (3) include sources of names, person who conducts each stage of process, standards for qualification process, procedure for challenging compliance, discern which records are public;
- (4) determine proportions of population in various groups believed to be underrepresented:
 - Census figures should be modified to account for changes since last census and undercounts; Census data describing an area's population is readily available at <http://www.census.gov>.
 - for data on voting lists consult voting registrar, universities, political parties and candidates, and civic and community organizations;
- (5) use social scientist or statistician to compile and analyze data; indigent defendant should file motion for funds to secure expert sociologist and statistician;
- (6) obtain venire list of jurors from recent past to use as random sample of pool; and
- (7) obtain affidavits of other lawyers as to representativeness of system.

2. Determine how the local system selects jurors

Initial steps in selection process are relatively unsupervised by courts, and certain customary practices may have developed that diverge from proper procedure. Call the secretary or assistant in the office who actually does the selecting or knows how it is done. Officials responsible for the process who know how it should be done may try and cover up any shortcuts that may have been implemented.

- (1) interview local selection officials to find out what discretion is exercised, what standards applied, numbers of jurors called and excused, what records kept, and what reports compiled;
- (2) investigate how process works in reality;
- (3) look for statutory and constitutional violations.

3. Motions practice

(a) File challenge/discovery motion to inspect and copy records

File preliminary challenge motion, leaving open as many avenues of attack as possible. File in conjunction with discovery motion requesting inspection and copying of all

records and materials, including specifically designated records identified during initial investigation.

Without inspection, party almost invariably unable to determine whether he has potentially meritorious jury challenge. Test v. United States, 420 U.S. 28, 30, 95 S.Ct. 749 (1975).

(b) Supplemental motion and affidavit

File motion and affidavit after analyzing data and evidence of *bona fide* showing of substantial under-representation. Integrate applicable law and propose method for correcting problem, e.g. reselecting with strict adherence to statute, or supplementing list used with census data, welfare rolls, drivers' license records, etc. See generally, Ginger, *Jury Selection in Civil and Criminal Trials*, Chapter 6; *Jurywork*, Chapter 5.

(c) Hearing

Present testimony as to disparities between jury list and population. Include statisticians, sociologists, social scientists, and if appropriate jury selection officials.

II. CHALLENGING STATUTORY COMPLIANCE

Note: Although the Jury Rules should be presumed to control, also consider whether the county you are practicing in has chosen to follow the procedure laid out in Ind. Code § 33-28-5, with more specific procedural requirements.

A. WRITTEN PLAN FOR JURY SELECTION PROCESS

Ind. Code § 33-28-5-12 requires trial courts to develop a “plan” for the jury selection process which is to be kept on file in the jury administrators’ office. The statute specifies a number of matters that must be included in the plan, provides that the plan must be approved by the supervising trial court judge, and requires the plan to be kept on file in the office of the jury administrator. Id.

Ward v. State, 903 N.E.2d 946 (Ind. 2009), *adhered to on reh’g*, 908 N.E.2d 595 (Ind. 2009) (failure of county to prepare a written plan for the jury selection process was harmless error because defendant failed to show what procedural detail might have been included in the written plan that was not already covered in the applicable statutory provisions and Indiana Jury Rules).

B. JURY ADMINISTRATOR’S PROCEDURAL NONCOMPLIANCE

Jury administrators are vested with certain amount of discretion, and substantial following of statutory requirements will suffice. Major requirement for selection of grand jury should be that system of selection is not arbitrary and complete impartiality should be sought. Wireman v. State, 432 N.E.2d 1343, 1348 (Ind. 1982).

1. “Substantial compliance” standard of proof

Accused is entitled to insist upon substantial compliance with statutory provisions governing selection of jurors. If there is a showing of a lack of substantial compliance, the defendant need not show actual prejudice. Rogers v. State, 428 N.E.2d 70 (Ind. Ct. App. 1981) and Azania v. State, 778 N.E.2d 1253, 1259-60 (Ind. 2002).

Cross v. State, 272 Ind. 223, 226, 397 N.E.2d 265, 267 (1979) (selection procedure did not substantially comply with Ind. Code § 33-4-5-2 [now Ind. Code § 33-28-5-13] since jury commissioners: (1) selected every 10th name from voter registration records; and (2)

placed names on list in alphabetical and some geographical order; court reasoned that process met neither letter of law nor spirit of randomization).

(a) Prejudice to defendant's rights

If defendant fails to show lack of substantial compliance, then he is required to show prejudice to his rights. Cross v. State, 272 Ind. 223, 226, 397 N.E.2d 265 (1979), citing Shack v. State, 259 Ind. 450, 288 N.E.2d 155 (1972).

Fadell v. State, 450 N.E.2d 109, 119 (Ind. Ct. App. 1983) (jury commissioner admitted animosity toward defendant but record showed he was only minimally involved in jury pool's selection; defendant failed to show how commissioner improperly influenced jury selection process or denied him fair trial).

(b) Effect of noncompliance with procedural technicalities

In absence of purposeful, non-random exclusion of prospective jurors, and with no showing of harm to defendant, any technical noncompliance with statutory requirements for jury selection does not amount to reversible error. Lowery v. State, 640 N.E.2d 1031, 1039 (Ind. 1994).

Daugherty v. State, 466 N.E.2d 46 (Ind. Ct. App. 1984) (appointing commissioners in December when Ind. Code § 33-4-5-1 specifies appointment during month of November is merely technical defect and not grounds for reversal without showing of prejudice by defendant).

(c) Waiver

Defendant's failure to examine public records and acceptance of jury may constitute waiver.

Fenwick v. State, 197 Ind. 572, 150 N.E. 764 (1926) (waiver of right to question irregularities by jury commissioners where defendant claimed ignorance of irregularities until after trial; examination of records in clerk's office between arrest and trial would have disclosed irregularities, and defendant accepted jury).

(1) Exception: Acceptance of jury not deemed waiver where records of county clerk do not reveal irregularities. Cross v. State, 272 Ind. 223, 397 N.E.2d 265 (1979). See also Thomas v. State, 459 N.E.2d 373, 375 (Ind. 1984).

2. Appointment of administrators

Trial judges may appoint clerical personnel to aid in the administration of the jury system. Any person appointed to administer the jury assembly process is a jury administrator. Jury Rule 2.

3. Constitutional analysis

To succeed on a claim that jury selection procedures violate Equal Protection Clause of 14th Amendment, defendant must show purposeful discrimination. Smith v. State, 658 N.E.2d 910 (Ind. Ct. App. 1995).

Peoples v. State, 649 N.E.2d 638 (Ind. Ct. App. 1995) (defendant did not show county's practice of drawing names exclusively from voter registration lists resulted in deliberate exclusion of certain groups). See also Griffin v. State, 695 N.E.2d 1010, 1014 (Ind. Ct. App. 1998).

4. Sources for prospective jurors

Jury Rule 2 requires the jury pool to be compiled annually by selecting names from lists approved by the Supreme Court. In compiling the jury pool, the jury administrator shall avoid duplication of names.

Ind. Code § 33-28-5-13 requires the compilation and maintenance of a master list consisting of lists approved by the Supreme Court that may be used to select prospective jurors. In compiling the master list, the administrator shall make a reasonable effort to avoid duplication of names.

(a) Exclusive voter registration lists

Indiana Supreme Court approved system relying only upon voter registration lists. Bradley v. State, 649 N.E.2d 100, 103 (Ind. 1995).

Lambert v. State, 643 N.E.2d 349 (Ind. 1994) (no showing that property owners as a group were excluded from jury panel made up exclusively from voter registration lists).

(b) Property tax lists

Property tax rolls are appropriate sources and do not deny defendant the right to fair cross section of community. Thomas v. State, 443 N.E.2d 1197 (Ind. 1983).

However, the court of appeals has expressly disapproved of practice of selecting jury members solely from real property tax rolls. Moore v. State, 427 N.E.2d 1135 (Ind. Ct. App. 1981).

(1) Exception: Property tax lists are an invalid source where: (1) reasonable cross section not represented; and (2) deliberate attempt made to exclude certain groups. Smith v. State, 475 N.E.2d 1139, 1143 (Ind. 1985).

Turner v. Fouche, 396 U.S. 346, 90 S.Ct. 532 (1970) (freeholder requirement invalid as due process violation, absent compelling state interest).

(c) Householder lists

Limit to “householders” is not discriminatory. Statute setting forth jury qualifications as that of freeholder or householder is status classification based on maturity; thus, statute is not unreasonable and unconstitutional *per se*, and is within power of General Assembly to prescribe. Wooten v. State, 418 N.E.2d 538 (Ind. Ct. App. 1981).

(d) Supplemental lists

In 1989, supplemental sources became available; where there is no constitutional violation, supplemental sources are options, not a mandate. Bradley v. State, 649 N.E.2d 100, 103-04 (Ind. 1995).

Examples include lists of: (1) utility customers; (2) property taxpayers; (3) persons filing income tax returns; (4) motor vehicle registrations; (5) city directories; (6) telephone directories; and (7) driver’s licenses.

5. Computerized jury selection

Ind. Code § 33-28-5-10 permits computerized jury selection, as long as the system provides for the impartial and random selection of prospective jurors.

Bradley v. State, 649 N.E.2d 100 (Ind. 1995) (court affirmed use of automated computer system that randomly selects potential jurors using only voter registration list).

C. CLERK'S NONCOMPLIANCE WITH PROCEDURE FOR DRAWING JURORS

The jury administrator shall randomly draw names from the jury pool at least one time each year and as needed for jury selection; prospective jurors may not be drawn from bystanders or from any source other than the jury pool. See Jury Rules 2-4; Ind. Code § 33-28-5-14; and Ind. Code § 33-28-5-20.

1. Test for noncompliance

Accused, regardless of guilt or innocence, has the right to insist there be substantial compliance with the statute. Rudd v. State, 231 Ind. 105, 111-13, 107 N.E.2d 168, 170 (1952).

Noncompliance with statute in drawing jurors occurs where: (1) either in bad faith or objected to promptly upon discovery; and (2) probably harmful to substantial rights of objecting party.

Ind. Code 33-28-5-14(f) provides:

This section shall be construed liberally, to the effect that no indictment shall be quashed, and no trial, judgment, order or proceeding may be reversed or held invalid on the ground that the terms of this section have not been followed—unless it appears that the noncompliance was either in bad faith or was objected to promptly upon discovery and was probably harmful to the substantial rights of the objecting party.

2. Effect of lack of substantial compliance

When a party alleges a failure to comply with the jury selection procedures, the court that “finds substantial failure to comply” is required to stay the proceedings and may dismiss the indictment or grant other relief as appropriate. Ind. Code § 33-28-5-21(c).

“The only way this court has to enforce substantial compliance with the statutes on juries is to reverse when the issue is properly presented in the trial court and here.” Rudd v. State, 231 Ind. 105, 111-13, 107 N.E.2d 168, 170-71 (1952).

Facts of Rudd v. State: Clerk disregarded statutory provisions concerning selection and placing of names in jury box by: 1) keeping jury box locked, 2) drawing of names for jury service, and 3) calling of such persons. Defendant promptly objected to violations, substantial rights harmed, even though Clerk did not act in bad faith.

3. Waiver

To prevent waiver, the defendant must challenge or object before trial. Swinehart v. State, 174 Ind.App. 588, 372 N.E.2d 1244 (1978).

Souerdike v. State, 214 Ind. 523, 15 N.E.2d 379 (1938) (waiver where defendant objected to improper procedure at time of drawing of names but proceeded to trial without challenging array or making objection to any juror called to serve). See also Cross v. State, 397 N.E.2d 265, 268, 272 Ind. 223, 228 (Ind. 1979) (dissent).

D. EQUAL PROTECTION CHALLENGES

1. Purposeful discrimination based on race or class

Equal Protection Clause of Fourteenth Amendment prohibits purposeful racial discrimination in selection of grand juries and petit juries. Strauder v. West Virginia, 100 U.S. 303 (1880);

Hernandez v. Texas, 347 U.S. 475, 477, 74 S.Ct. 667, 670 (1954) (denial of equal protection of laws to try defendant of particular race or color under indictment issued by

jury from which all persons of his race or color have been excluded by State solely because of his or her race).

Vasquez v. Hillary, 474 U.S. 254, 106 S.Ct. 617 (1986) (grand jury that excluded Black people was illegally constituted and all indictments returned were void even if trial was fair on merits).

Bradley v. State, 649 N.E.2d 100, 103 (Ind. 1995) (statutory venire selection process must comport with constitutional considerations relating to equal protection and right to trial by impartial jury).

(a) Standing

Defendant need not be a member of the excluded class in order to bring an Equal Protection challenge to jury selection. Duren v. Missouri, 439 U.S. 357, 359 n.199 S.Ct. 664 (1979); Taylor v. Louisiana, 419 U.S. 522, 528, 95 S.Ct. 692 (1975).

(b) Timing

An Equal Protection argument under the 14th Amendment can be used to challenge all stages of jury selection, including: (1) development of master list by jury commissioner; (2) jury venire; and (3) ultimate 12-person jury panel. Smith v. State, 658 N.E.2d 910 (Ind. Ct. App. 1995).

2. Defendant's initial burden

Defendant must show purposeful discrimination exists. Smith v. State, 658 N.E.2d 910 (Ind. Ct. App. 1995). Purposeful discrimination exists where there are significant, unexplained disparities. Sanders v. State, 284 N.E.2d 751, 756 (Ind. 1972).

(a) Two-part prima facie showing:

- (1) standard: jury selection procedure employed resulted in substantial under-representation of a race or other identifiable group; and
- (2) causal link: exclusion of recognizable group flowed from intentional or deliberate discrimination.

Castaneda v. Partida, 430 U.S. 482 (1977).

(b) Substantial under-representation infers discrimination

Defendant makes *prima facie* case of discriminatory purpose by showing substantial underrepresentation of group. Cassell v. Texas, 339 U.S. 282 (1950). Must establish: (1) group is recognizable, distinct class, singled out for different treatment under laws, as written or as applied; and (2) degree of under-representation must be proved by comparing, over a significant time period, the proportion of group in total population to proportion called to serve as jurors. Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 1280 (1977); Hernandez v. Texas, 347 U.S. 475, 477 (1954).

Burgans v. State, 500 N.E.2d 183 (Ind. 1986) (to establish a prima facie violation of fair cross section requirement regarding jury selection, defendant must show that a group alleged to be excluded is a distinctive group in community, that group is under represented in the panel from which juries are selected and not fair and reasonable in relationship to number of such persons in community, and that under representation is due to systematic exclusion of group in jury selection process).

(c) Large disparity

Defendant can shift the burden of disproving discrimination to the State by showing that a significant, unexplained disparity exists between the composition of the jury pool and that of the community. Sanders v. State, 259 Ind. 43, 53, 284 N.E.2d 751, 756 (1972).

If disparity sufficiently large, then improbable it is due solely to chance or accident. In absence of evidence to contrary, must conclude racial or other class-related factors entered into selection process. Castaneda v. Partida, 430 U.S. 497, 97 S.Ct. 1272, 1280 n. 13, 51 L.Ed.2d 498 (1977).

A jury selection process which results in noticeable discrimination against a minority race is a denial of due process and equal protection of the laws. Piwowar v. Washington Lumber & Coal Co., 405 N.E.2d 576 (Ind. Ct. App. 1980).

Dixon v. State, 224 Ind. 327, 67 N.E.2d 138 (1946) (defendant denied equal protection of law where: (1) more than 2,000 Black people qualified for jury service; (2) over period of years none were drawn for jury service and were arbitrarily excluded because of their race or color; and (3) State contended such fact merely coincidental or for no particular reason).

(d) Subjective criteria plus statistical disparity

Prima facie case most promising if under-representation: (1) occurs at stage where jury selection officials apply subjective criteria (because it provides some opportunity for discrimination); and (2) is coupled with a significant statistical disparity. Washington v. Davis, 426 U.S. 229, 241, 96 S.Ct. 2040, 2048 (1976).

Examples:

- *Prima facie* case made by showing: (1) 60% of county population was African American; (2) only 37% of jury list were African Americans; (3) that 171 of 178 persons disqualified for lack of intelligence or uprightness were African Americans; and (4) disparity originated, at least in part, at point in selection process where jury commissioners invoked their subjective judgment rather than objective criteria. Turner v. Fouche, 396 U.S. 346 (1970).
- *Prima facie* case made where: (1) 21% of population African American; (2) jury questionnaires with racial designation on them were returned by 7,000 persons, 14% of whom were African American; and (3) pool then reduced to 400, of which 7% were African American. Alexander v. Louisiana, 405 U.S. 625 (1972).

Practice Pointer: Conduct thorough statistical study for period going back at least ten years. Compare proportion of minority individuals in general population of county (as reflected in latest federal census figures) with proportions of minority individuals: (1) who are on jury roles; and (2) who have actually served as jurors. In the event jury records do not contain racial identifications, consult voter registration or driver's license lists.

(e) Persons appearing for duty vs. persons selected

Where only evidence on issue of discriminatory practices in jury selection dealt with persons appearing for duty rather than persons selected on original panel, court would not invalidate jury selection process. Sanders v. State, 259 Ind. 43, 284 N.E.2d 751, 757 (1972).

(f) Presumption of discrimination

Selection procedure susceptible to abuse or not racially neutral supports presumption of discrimination raised by statistical showing. Castaneda v. Partida, 430 U.S. 482, 493, 97 S.Ct. 1272, 1279, 51 L.Ed.2d 498 (1977) (prima facie case where defendant showed population 79% Mexican American but over 11-year period only 39% of persons summoned for jury service were Mexican American).

3. State must rebut presumption

Significant disparities raise an inference of discrimination. Once the inference is raised, the State's failure or inability to demonstrate disparities are not product of discrimination confirms the inference and invalidates the jury pool. Sanders v. State, 259 Ind. 43, 53, 284 N.E.2d 751, 756 (1972).

Once a prima facie case is established, the burden shifts to the State to rebut the presumption of unconstitutional action by showing: (1) permissible racially neutral selection criteria; and (2) procedures have produced a monochromatic result. Alexander v. Louisiana, 405 U.S. 625, 632, 92 S.Ct. 1221, 1226 (1972).

E. FAIR CROSS SECTION REQUIREMENT

Criminal defendant in state court guaranteed an "impartial jury" by the Sixth Amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968); Holt v. State, 266 Ind. 586, 590, 365 N.E.2d 1209, 1211 (1977); Smith v. State, 658 N.E.2d 910 (Ind. Ct. App. 1995). See also Ind. Code § 35-37-1-5.

Jury selection systems required to draw prospective jurors from a fair cross-section of the community. However, jurors need not be mathematically proportioned to the character of the community. There is no requirement that any particular class be represented on every jury. Daniels v. State, 408 N.E.2d 1244 (Ind. 1980).

Williams v. State, 877 N.E.2d 845 (Ind. Ct. App. 2007) (primary concern is that juror selection is not arbitrary).

1. Systematic exclusion

Jury selection systems must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. Taylor v. Louisiana, 419 U.S. 522, 538 95 S.Ct. 692, 702 (1975).

Valentine v. State, 135 Nev. 463 (2019) (holding as matter of first impression that evidentiary hearing was warranted on defendant's challenge to fair cross section when defendant made specific allegations that, if true, would establish prima facie violation of fair cross section requirement).

Garcia-Dorantes v. Warren, 978 F.Supp.2d 815 (E.D. Mich. 2013) (systematic underrepresentation of minorities that occurred due to computer glitch in selecting jury pools violated fair cross section requirement).

(a) All defendants have standing

The Fair Cross Section requirement is a right common to all defendants, regardless of whether they are members of an excluded group.

Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163 (1972) (White male entitled to claim that Black people had been systematically excluded).

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 695 (1975) (male defendant had standing to claim that women had been excluded from jury service).

(b) Where fair cross section challenges appropriate

Objections to jury selection process based on Fair Cross-Section requirement applies to: (1) development of a master list by the jury commissioner; and (2) jury venire.

Such an objection may not be used to challenge the ultimate twelve-person jury, however. Smith v. State, 658 N.E.2d 910 (Ind. Ct. App. 1995). For this purpose, wager an Equal Protection challenge, discussed in section I.C. on page 6.

2. Standard of proof

Systematic disproportion demonstrates infringement of defendant's fair cross section interest. The challenger need only prove systematic discrimination (discrimination inherent in particular jury-selection process utilized). Bradley v. State, 649 N.E.2d 100, 104 n.4 (Ind. 1995).

Williams v. State, 877 N.E.2d 845 (Ind. Ct. App. 2007) (defense counsel's statement that "...there is no hard evidence, but it seems that it is a pattern that continues to be repeated and it's noted by people who make observations of these things" falls far short of proving systematic exclusion; moreover, defendant failed to provide any evidence or explanation as to how St. Joseph County currently selects prospective jurors).

(a) Need not show discriminatory purpose

Defendant need only show jury selection procedure systematically excludes and thereby fails to be reasonably representative. No finding of discriminatory purpose is required for a Sixth Amendment violation. Bradley v. State, 649 N.E.2d 100, 104 n.4 (Ind. 1995). See also Daniels v. State, 408 N.E.2d 1244 (Ind. 1980).

3. Prima facie violation

Elements: (1) group alleged to be excluded is "distinctive" group in community; (2) representation of group in jury pools from which juries selected not fair and reasonable in relation to number of such persons in community; and (3) under-representation due to systematic exclusion of group in jury-selection process. Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668 (1979); Wilder v. State, 813 N.E.2d 788, 791 (Ind. Ct. App. 2004), *overruled in part on other grounds*, Laux v. State, 821 N.E.2d 816, 820 n.4 (Ind. 2005).

Harvey v. State, 621 N.E.2d 362 (Ind. Ct. App. 1993) (defendant did not make prima facie case where: (1) venire did not have any Black persons; (2) record showed computer randomly selected jurors from county's registered voters; and (3) defendant did not substantiate his estimates that 7 to 10% of registered voters in county are Black; to establish Batson violation, defendant must show that allegedly excluded group is distinct group within community, that representation of group in jury venires is not fair and reasonable in relation to number of group members in community, and that this under-representation is due to systematic exclusion of group in jury selection process).

Breaston v. State, 893 N.E.2d 6 (Ind. Ct. App. 2008), *sum. aff'd* 907 N.E.2d 92 (Ind. 2009) (where defendant failed to present any evidence as to how county selects prospective jurors or the percentage of African Americans who were eligible for jury duty in the county, defendant failed to prove a Sixth Amendment violation despite there being no African Americans in jury panel in county with a 5.5% African American population).

(a) “Distinctive” group

There must be a common thread running through the excluded group. Exclusion must be such as to prevent juries from being made up of certain segment of population of community. Lambert v. State, 643 N.E.2d 349 (Ind. 1994).

Andrews v. State, 505 N.E.2d 815, 825 (Ind. Ct. App. 1987) (common thread running through excluded group is basic similarity of attitudes, ideas or experience among its members so that exclusion prevents juries from reflecting cross-section of community. Selection of jury from venire composed of registered voters did not deny defendant his right to impartial jury selection despite defendant’s assertion that over 30,000 adult residents were not registered voters and that voter registration lists underrepresented independent, third-party, low-income voters; defendant failed to prove existence of any common thread running through asserted excluded group and failed to demonstrate any deliberate attempt on part of trial court or State to exclude any particular type of group from jury participation).

Bradley v. State, 649 N.E.2d 100, 105 (Ind. 1995) (no relief where defendant did not allege non-voting population constitutes “distinctive group in the community,” but provided court only with percentage of Black jurors who appeared for his trial, without demonstrating Black people have been systematically excluded from selection process).

Wells v. State, 848 N.E.2d 1133 (Ind. Ct. App. 2006) (defendant failed to meet his burden of demonstrating that Indiana University students constitute a distinctive group within Monroe County community for purposes of a fair cross-section analysis).

(1) Race

Exclusion of African Americans from jury service contravenes purposes of fair cross section requirement. Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163 (1972).

Exclusion of Mexican Americans from jury service contravenes purposes of violation of fair cross section requirement. Castaneda v. Partida, 430 U.S. 482, 493, 97 S.Ct. 1272, 1279 (1977).

(2) Gender

Exclusion of women denies Sixth Amendment right to impartial jury from fair cross section of community. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975).

Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664 (1979) (violation of fair cross section requirement to exempt women upon request, resulting in less than 15% of women on venire; role of women as homemakers does not constitute grounds for automatic exclusion).

States are free to prescribe qualifications as long as result is fair cross section. Butler v. State, 249 Ind. 484, 229 N.E.2d 471 (1967).

(3) Age**(a) Young male minorities**

Concepcion v. State, 567 N.E.2d 784 (Ind. 1991) (no prima facie violation of fair cross section requirement absent showing allegedly excluded group was “distinctive” where 94 prospective jurors called from voter registration lists and

none were young male members of any minority race). See also Dye v. State, 717 N.E.2d 5, 20 (Ind. 1999).

(b) Young adults

Defendant demonstrated discrepancy between cross-sectional makeup of venires and population eligible for jury service where: (1) presented statistics that 18-24 year olds in county not generally homeowners appearing on property tax rolls; (2) showed actual number of 18-24 year olds and the number of jurors in that age group over 5-year period; and (3) no showing 18-24 year olds are distinct group having interests which cannot be adequately represented by other members of jury panel. Averhart v. State, 470 N.E.2d 666, 684 (Ind. 1984). See also Ewing v. State, 719 N.E.2d 1221, 1226 (Ind. 1999).

See generally, Zeigler, Young Adults As a Cognizable Group in Jury Selection, 76 MICH.L.REV. 1045 (1978); Age group underrepresentation in grand jury or petit jury venire, 62 A.L.R.4th 859, §34 (1988).

(c) Elderly

Indiana cases suggest exclusion of persons over 65 not discriminatory. See Baum v. State, 264 Ind. 421, 345 N.E.2d 831 (1976); Shack v. State, 259 Ind. 450, 288 N.E.2d 155, 162 (1972) HN 18; and Booth v. State, 416 N.E.2d 911, 912 (Ind. Ct. App. 1981).

Caveat: Undecided whether Baum and Shack good law after Vasquez v. Hillary, 474 U.S. 254, 106 S.Ct. 617 (1986).

(4) Low-income individuals

Group cognizable where 50% and 57% of population of two counties had incomes below government-designated poverty level and virtually no members of these groups were called for grand jury service over a ten-year period. Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners, 622 F.2d 807, 817-18 (5th Cir. 1980).

(b) Under-representation of group

Prong satisfied by: (1) making statistical presentation that demonstrates percentage of community made up of group alleged to be underrepresented; and (2) compare actual representation of group in venires from which juries selected to number of such persons in community. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975) (no evidence to show 1970 census data on which defendant relied distorted percentage of women in county at time of trial; venires containing approximately 15% women not reasonably representative of actual percentage of women in community where actual is 54%).

(1) Tests for determining whether disparity is minor or significant

Indiana statutory analysis is similar to Sixth Amendment analysis that provides two tests for determining if a jury pool adequately represents the community: (1) “absolute disparity test” measures difference between percentage of distinctive group eligible for jury duty and percentage in the pool; or (2) “comparative disparity test” calculated by dividing absolute disparity by percentage of group eligible for jury duty. Azania v. State, 778 N.E.2d 1253, 1259-60 (Ind. 2002), *clarified on rehearing*, 875 N.E.2d 701 (Ind. 2007).

Wilder v. State, 813 N.E.2d 788, 792-93 (Ind. Ct. App. 2004), *overruled in part on other grounds*, Laux v. State, 821 N.E.2d 816, 820 n.4 (Ind. 2005) (even

though defendant showed that one of 51 people in venire was African American—where county population was 10% African-American, there was a 8% actual disparity and 80% comparative disparity—and that county’s computer program selected jurors based on zip codes in a county where African Americans were concentrated in six of nineteen zip codes, defendant failed to show systematic exclusion in selection process).

Highler v. State, 834 N.E.2d 182 (Ind. Ct. App. 2005), *sum. aff’d* 854 N.E.2d 823 (Ind. 2006) (defendant was not denied a petit jury from representative cross-section of community where venire panel only included one Black individual who was struck; defendant asserted a 15.3% absolute disparity and an 88% comparative disparity between percentage of African Americans eligible for jury duty in Allen County and those actually present in his venire; however, he provided no evidence to suggest jury pools in county systematically exclude African Americans and there is no requirement that a particular group be represented on every jury as long as system used to choose jurors is impartial and not arbitrary).

(2) Higher Standard for Death Penalty Cases

Concerns over fairness and reliability of death sentences “require heightened sensitivity in a death penalty case in determining whether a jury selection is ‘random’ and ‘impartial’ as required by Indiana Law.” Azania v. State, 778 N.E.2d 1253, 1259-60 (Ind. 2002), *clarified on rehearing*, 875 N.E.2d 701 (Ind. 2007).

Azania v. State, *supra*, (comparative disparity of 48.2 % [African Americans had roughly half the chance of being selected for jury pool as truly random selection] may be adequate for normal jury pool, but it is not sufficiently random or impartial to support a jury recommendation of the death penalty).

Practice Pointer: Unsworn and unsupported statements do not lay any foundation for valid attack upon method followed in selecting panel. Use of list of registered voters to select prospective jurors did not violate Batson, even though it resulted in all White jury venire in prosecution of African American defendant, so long as voter registration list represented reasonable cross section of community and selection process did not purposefully and systematically exclude members of minority groups from panels of prospective jurors. Harvey v. State, 621 N.E.2d 362 (Ind. Ct. App. 1993).

(c) Systematic exclusion

Systematic disproportion itself demonstrates infringement of defendant’s fair cross section interest. Systematic does not mean intentional but simply “inherent in particular jury selection process utilized.” Bradley v. State, 649 N.E.2d 100, 104, n.4 (Ind. 1995).

Berghuis v. Smith, 130 S.Ct. 1832 (2010) (Michigan Supreme Court did not unreasonably apply federal law in denying Defendant’s habeas corpus petition, even though African Americans consisted of only 3-5% of venire panel, because Defendant failed to show that disparity resulted from juror assignment procedure).

Wilder v. State, 813 N.E.2d 788, 792-93 (Ind. Ct. App. 2004), *overruled in part on other grounds*, Laux v. State, 821 N.E.2d 816, 820 n.4 (Ind. 2005) (even showing of 80% comparative disparity and unusual use of zip codes as basis for selection of jurors does not show systematic exclusion).

But cf. Bond v. State, 925 N.E.2d 773, 777-78 (Ind. Ct. App. 2010) (courts should

consider shifting burden to State to disprove systematic exclusion because now the State, not the counties, compiles master lists; nonetheless, Court held that mere fact that jury venire contained no African Americans was insufficient to raise inference of systematic exclusion).

Practice Pointer: Wilder v. State, *supra*, shows the importance of providing sufficient figures and statistical analysis to support a claim of systematic exclusion. Wilder showed that St. Joseph County did not select the venire from the entire voter database, but rather chose different percentages from six subsets based on zip codes, and that African Americans in the county are highly concentrated in six of 19 zip codes. Though this created suspicions of race-based selection, Wilder did not show that white-majority zip codes were favored over African American zip codes, thus failing to fulfill the systematic exclusion prong.

4. State must justify infringement

Once *prima facie* case made, the State must demonstrate that “those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group” manifestly and primarily advance “a significant state interest.” Bradley v. State, 649 N.E.2d 100, 104 (Ind. 1995); Lee v. State, 689 N.E.2d 435, 440 (Ind. 1997); Wilder v. State, 813 N.E.2d 788, 792 (Ind. Ct. App. 2004), *overruled in part on other grounds*, Laux v. State, 821 N.E.2d 816, 820 n.4 (Ind. 2005).

Duren v. Missouri, 439 U.S. 357, 367-68, n.26, 99 S. Ct. 664, 670 (1979) (State bears burden of justifying infringement by showing fair cross section to be incompatible with significant State interest);

Taylor v. Louisiana, 419 U.S. 522, 535, 95 S.Ct. 692 (1975) (violation of representative cross-section by systematic exclusion of women from jury panels; State’s justification unavailing where it argued women serve distinctive role in society and jury service would substantially interfere with that function).

III. SELECTION PROCEDURES

A. GOAL

The goal of jury selection procedures to assure that a diverse group of citizens or fair cross-representation of community is chosen to sit on jury. State ex rel. Brune v. Vanderburgh Circuit Court, 255 Ind. 505, 265 N.E.2d 524 (1971); Smith v. State, 658 N.E.2d 910 (Ind. Ct. App. 1995).

1. Features of process

(a) Random

Complete impartiality in selection system should be sought and the more random the process, less will be appearance of arbitrariness. Wireman v. State, 432 N.E.2d 1343, 1348 (Ind. 1982); See also Jury Rule 3.

However, complete random selection of jurors is not required as long as the system used is impartial and not arbitrary. Azania v. State, 778 N.E.2d 1253, 1257 (Ind. 2002).

(b) Proportionate to intra-district population

Jurors need not be mathematically proportioned to character of the community. Daniels v. State, 274 Ind. 29, 408 N.E.2d 1244 (1980).

State ex rel Burns v. Sharp, 271 Ind. 344, 393 N.E.2d 127 (1979) (approved method of referring to U.S. census figures to determine ratio of prospective jurors from each district; completely random selection of jurors is not required so long as system used is impartial and not arbitrary).

(c) No specific composition requirement

No requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 702 (1975); See also Smith v. State, 658 N.E.2d 910, 917 (Ind. Ct. App. 1995).

There is no requirement that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community. The right to an impartial jury does not require that members of any particular group be represented in panel of prospective jurors. Burr v. State, 273 Ind. 280, 403 N.E.2d 343 (1980); Harvey v. State, 621 N.E.2d 362, 365 (Ind. Ct. App. 1993).

Smith v. State, 609 N.E.2d 1088 (Ind. 1993) (fact that no Black persons appeared on jury venire was not shown to be the result of any type of discrimination).

B. PROCEDURES AND REQUIREMENTS

1. Frequency of selections

Names must be drawn for the jury pool at least one time each year based on a calendar year commencing in January. Ind. Code § 33-28-5-14(a). Drawing of names for the first jury pool for a calendar year must be held during the last quarter of the calendar year preceding the calendar year for which names are being drawn, at a time and place prescribed by the jury administrator. Id. The number of names to be drawn are determined by the administrator in consultation with judges. Ind. Code § 33-28-5-14(b).

The frequency of the drawing of names to be summoned for jury service may be increased by the jury administrator if determined to be necessary for purposes of fairness, efficiency, or to ensure compliance with the statute. Ind. Code § 33-28-5-14(c).

2. Number of prospective jurors called

“[R]egular panel” refers to list of prospective jurors called; as many persons are to be summoned to serve on jury panel as trial court shall specify. Brown v. State, 266 Ind. 82, 360 N.E.2d 830, 834 (1977); Begley v. State, 416 N.E.2d 824, 827, 275 Ind. 235, 240 (Ind.1981).

Arbuckle v. State, 173 Ind.App. 529, 364 N.E.2d 772, *rev'd on other grounds*, 173 Ind.App. 529, 366 N.E.2d 200 (1977) (while jury panel which tries case can consist of only 12 jurors, panel from which they are chosen may consist of any number).

3. Term of jury service

A person who appears for service as a petit juror serves until the conclusion of the first trial in which the juror is sworn, regardless of the length of the trial or the manner in which the trial is disposed. Jury Rule 9(a). A person who appears for service by reporting to the courthouse and being recorded as present for jury service and not deferred but is not selected and sworn as a juror completes the person’s service when jury selection is completed; provided, however, jurors who are called for jury service are eligible to serve in any court in that county on the day summoned. Id.

A person who: (1) serves as a juror; or (2) serves until jury selection is completed but is not chosen to serve as a juror; may not be selected for another jury panel until all nonexempt persons in the jury pool for that year have been called for jury duty. Jury Rule 9(b).

IV. ALTERNATE JURORS

A. SELECTION PROCEDURE

Designation of alternate jurors usually part of impaneling process.

Trial Rule 47(B) provides:

The Court may direct that no more than three (3) jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury brings in its verdict. If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate.

1. Usually selected after regular jurors selected

Generally, alternates selected from voir dire panel after regular jurors selected. Selection procedures that depart from norm not prejudicial or harmful unless jury not qualified and not impartial.

Lowery v. State, 640 N.E.2d 1031, 1040-41 (Ind. 1994) (no prejudice or harm to jury qualifications and impartiality where 14 jurors impaneled and court did not designate alternates until conclusion of presentation of evidence, at which time court selected two alternates by drawing lots).

2. Alternates considered “juror” for some purposes

Should it become necessary to replace juror with alternate, the jury continues legally constituted. Sears v. State, 457 N.E.2d 192, 194 (Ind. 1983).

Alternate jurors have been accepted through voir dire examination and have been with jury throughout trial of case, receiving and observing various admonitions of trial judge as to jury behavior. Johnson v. State, 267 Ind. 256, 369 N.E.2d 623, 625 (1977).

(a) Alternate juror is outside influence

Alternate is not a member of the jury—and qualifies as outside influence—for purpose of whether jurors may testify to “outside influence” of deliberations under Ind. Evid. R. 606(b). Griffin v. State, 754 N.E.2d 899, 903 (Ind. 2001). However, where alternate only added “me, too” to collective voice of jury majority when asked about opinion, it was not gross misconduct and did not create probable harm so as to require reversal of conviction. Id.

B. COURT’S DISCRETION TO REPLACE JUROR WITH ALTERNATE

At any time during the trial proceeding, courts have broad discretion in determining whether to replace a juror with an alternate; the number of alternate jurors, up to a maximum of three (3), is left to the discretion of the trial court. Juror Rule 16(a) and Trial Rule 47(B).

Harris v. State, 659 N.E.2d 522 (Ind. 1995) (defendant not placed in substantial peril when court refused to replace juror with alternate because juror said she would like to think she could be objective but didn’t know for certain; trial court concluded she was kind of conscientious juror that courts want).

Hyppolite v. State, 774 N.E.2d 584 (Ind. Ct. App. 2002) (fact that juror failed to disclose during voir dire that her mother-in-law was employed at county jail did not require juror to be dismissed and replaced by alternate juror because the juror assured the court that she could continue to be a fair and impartial juror).

Blevins v. State, 259 Ind. 618, 291 N.E.2d 84, 87 (1973) (during trial juror had asthma attack; sufficient to immediately replace juror with alternate, if one has been provided).

C. ORDER OF SEATING

Ind. Trial Rule 47 (B) provides in pertinent part: “Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury returns its verdict, become or are found to be unable or disqualified to perform their duties.”

When the vacancy is filled from the jury pool, the challenging party must show purposeful exclusion or harm for reversible error.

Williams v. State, 555 N.E.2d 133, 137 (Ind. 1990) (no reversal because defendant showed neither purposeful exclusion nor harm; 14 prospective jurors called to box, two of which were designated as alternates, one of regular prospective jurors excused and vacancy filled from jury pool rather than by alternates).

D. CIRCUMSTANCES WHERE SUBSTITUTION WARRANTED

1. Personal knowledge of material fact or unable to perform duties

Substitution warranted where regular juror has personal knowledge of material fact, or otherwise becomes or found to be unable or disqualified to perform duties.

Unable to Perform Duties:

- Juror replaced who developed high state of anxiety and physical condition that rendered her unable to perform duties. Burtley v. State, 476 N.E.2d 835 (Ind. 1985).
- Juror replaced who had an adverse physical reaction to testimony about child abuse which produced hives on the juror’s neck and face. Barnett v. State, 916 N.E.2d 280 (Ind. Ct. App. 2009).

Personal Knowledge of Material Facts:

- Juror removed who advised trial court that he knew the victim of the rape in the earlier offense being proved to establish the serious violent offender charge. Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001).
- Juror removed who told other jurors during the trial that the defendant might have been involved in other murders; court also removed other juror who stated they cannot be impartial after hearing that comment. Hampton v. State, 873 N.E.2d 1074 (Ind. Ct. App. 2007).

For further discussion on this issue, see Chapter 13, § I.B.

2. Juror about to be arrested and prosecuted

Not abuse of discretion to replace juror who was about to be arrested and face prosecution by same prosecutor in case in which juror sitting. Ferry v. State, 453 N.E.2d 207, 213 (Ind. 1983).

3. Socializing with witnesses

Under certain circumstances, the extra-judicial juror conduct may be so harmful that it would be considered prima facie prejudicial to the defendant, irrespective of whether the

communication concerned a matter pending before the jury. Woods v. State, 119 N.E.2d 558 (Ind. 1958) and Kelley v. State, 555 N.E.2d 140 (Ind. 1990).

Woods v. State, 119 N.E.2d 558, 560 (Ind. 1958) (reversal was required where police officers serving as the State's witnesses were fraternizing with the jury during intermissions and recess, even without a showing that the case was discussed during these visits).

Kelley v. State, 555 N.E.2d 140 (Ind. 1990) (reversal required because State's only witness socialized with three of the six jurors during a lunch break).

May v. State, 716 N.E.2d 419, 420-23 (Ind. 1999) (trial court should have discharged juror who exchanged pleasantries with officer in restaurant during lunch recess, where officer had testified in morning and was to continue after lunch, and juror invited officer to visit juror's home to watch pay-per-view boxing match).

Presumption of prejudice can be overcome, such as where the contact between the jury and the witness are minimal or occur outside of the trial.

Driver v. State, 467 N.E.2d 1186, 1189 (Ind. 1984) (defendant did not show prejudice and not entitled to have entire jury panel dismissed where, prior to beginning of voir dire, State's witness sat among members of jury panel and stated that he was there as a witness, but he did not discuss defendant or any particulars of case).

Majors v. State, 773 N.E.2d 231 (Ind. 2002) (court did not err in denying defendant's post-verdict request to depose jurors, alternates, and bailiffs to explore further his allegations of juror misconduct related to jurors' alleged alcohol consumption on evening after third day of deliberations and fraternization with supervising law enforcement officers not involved in murder investigation; defendant failed to demonstrate defense interest sufficient to overcome interests of finality of verdicts and avoidance of juror harassment).

Buchanan v. State, 348 N.E.2d 70, 73 (Ind. 1976) (no harm demonstrated where State's witness made neutral or favorable remarks about defendant to jurors who were in women's restroom; judge questioned jurors separately and they replied their decision would not be influenced in any manner by communications from State's witness).

Holden v. State, 916 N.E.2d 223 (Ind. Ct. App. 2009) (trial court did not abuse its discretion in denying a mistrial where juror asked State's firearms expert a question (which had already been answered on direct examination) outside the courtroom during a recess in trial).

(a) Mistrial if contact enhances credibility of State's witness

If contact has probable persuasive effect on jury's ability to assess witness credibility, accused is in a position of grave peril. Defendant has burden of showing mistrial is necessary to remedy perilous situation in which he was placed.

Turner v. Louisiana, 379 U.S. 466, 473 (1965) (extreme prejudice inherent where two police witnesses ate with, conversed with, and performed errands for jurors during three-day trial).

Kelley v. State, 555 N.E.2d 140 (Ind. 1990) (during one-day trial, State's only witness had lunch with three out of six jurors, including the eventual foreman; where critical issue for jury was evaluation of credibility of that witness, court noted that "the enhancement of credibility of State's only witness seems highly probable, regardless of whether the jurors themselves realized it at the time.").

4. Sleeping

Trial court properly replaced juror with alternate when juror had fallen asleep fifteen or twenty times during the trial. Slate v. State, 798 N.E.2d 510 (Ind. Ct. App. 2003).

E. REVERSIBLE ERROR ONLY WHERE ACCUSED PLACED IN SUBSTANTIAL PERIL

An abuse of discretion occurs only if decision placed defendant in substantial peril. Harris v. State, 659 N.E.2d 522, 525 (Ind. 1995).

1. Must object

Must object at time juror is dismissed and show alternate prejudiced in order to preserve the error. Creek v. State, 523 N.E.2d 425, 427 (Ind. 1988).

Must object to selection of alternate during voir dire. Campbell v. State, 500 N.E.2d 174, 181 (Ind. 1986) (no abuse of discretion in excusing juror who became ill during second day of trial and replacing her with alternate, absent evidence alternate juror was partial or defendant objected to selection of alternate juror during voir dire).

F. DISCHARGED AFTER JURY BRINGS IN VERDICT

Trial Rule 47(B) provides in part: “An alternate juror who does not replace a regular juror shall be discharged after the jury brings in its verdict.” If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate.

G. MAY RETIRE TO JURY ROOM IF PROPER INSTRUCTION GIVEN

Alternate juror may retire with jury and listen to deliberations, if properly instructed not to participate in deliberations unless called upon to replace one of original jurors. Trial Rule 47(B).

Wilcoxon v. State, 619 N.E.2d 574 (Ind. 1993) (alternates could retire to jury room during deliberations without defendant’s consent so long as they were instructed not to participate).

Griffin v. State, 754 N.E.2d 899, 903 (Ind. 2001) (although alternate may not participate in deliberations, where alternate only added “me, too” to collective voice of jury majority when asked about opinion, it was not gross misconduct and did not create probable harm so as to require reversal of conviction).

Note: Indiana is one of few States allowing this procedure.

V. SPECIAL CIRCUMSTANCES**A. CHANGE OF VENUE OF VENIRE PANEL****1. Court’s discretion**

Trial court has discretion to change venue of venire panel. Bradley v. State, 649 N.E.2d 100, 108 (Ind. 1995).

To demonstrate abuse of discretion defendant must show: (1) prejudicial pretrial publicity; and (2) juror inability to render impartial decision. Owens v. State, 659 N.E.2d 466, 475 (Ind. 1995); Schweitzer v. State, 531 N.E.2d 1386, 1389 (Ind. 1989).

(a) Prejudicial publicity

Prejudicial publicity contains inflammatory material that would not be admissible at trial or contains misstatements or distortions of evidence given at trial. Evans v. State, 563 N.E.2d 1251, 1258 (Ind. 1990).

B. ANONYMOUS JURIES

1. Used only in limited circumstances

State may request court to empanel anonymous jury, which usually means jury referred to only by number. Certain identifying information, particularly jurors' names, is withheld from the public as well as from the parties themselves. Anonymous juries are permissible so long as: (a) trial court concludes that there is a strong reason to believe that the jury needs protection; and (b) it takes reasonable precautions to minimize the potential prejudice to defendant and ensure that his fundamental rights are protected.

Major v. State, 873 N.E.2d 1120 (Ind. Ct. App. 2007) (local rule allowing anonymous juries in all cases unconstitutional; however, due to overwhelming evidence against defendant and fact that parties received substantial biographical and background information during voir dire, error was harmless beyond a reasonable doubt).

United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995) (decision to empanel anonymous jury is drastic measure which should be undertaken only in limited and carefully delineated circumstances).

(a) Balance interests

Courts balance the defendant's interest in conducting meaningful voir dire and in maintaining presumption of innocence against the jury member's interest in remaining free from real or threatened violence and public interest in having jury render fair and impartial verdict. United States v. Amuso, 21 F.3d 1251, 1264 (2d Cir. 1994).

(b) Factors

Courts should consider: (1) defendant's involvement in organized crime; (2) defendant's participation in a group that would attempt to harm jurors; (3) defendant's past attempts to interfere with judicial process or witnesses; (4) potential that, if convicted, defendant will suffer lengthy incarceration and substantial monetary penalties; and (5) extensive publicity that could enhance possibility that jurors' names would become public and expose them to intimidation and harassment. United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995).

United States v. Mansoori, 304 F.3d 635, 650-52 (7th Cir. 2002) (something more than an organized crime label is required to justify anonymous jury—where district court made no finding of history or likelihood of intimidating witnesses or obstructing justice, nor of pattern of violence, it was an abuse of discretion to grant motion for anonymous jury; however, error was harmless due to careful, thorough voir dire and overwhelming evidence of guilt).

Brewington v. State, 981 N.E.2d 585 (Ind. Ct. App. 2013), *sum. aff'd* 7 N.E.3d 946 (Ind. 2014) (in granting State's request for anonymous jury, trial court appropriately considered very real prospect that defendant would publish jurors' personal information and expose them to ridicule, intimidation or harassment if outcome of trial was unfavorable to him; further, trial court left open possibility of disclosing jurors' information if necessary for fair trial).

United States v. DiDomenico, 78 F.3d 294, 301 (7th Cir. 1996) (fear of jurors being identified by Chicago Mob and danger of bribery of jurors justified anonymous jury, as intimidation and bribery of criminal justice system are "specialties of the Outfit").

United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995) (in multi-defendant, narcotic and murder criminal racketeering case, court approved of use of anonymous

jury because defendants charged with extraordinarily violent criminal enterprise, history of intimidation and murder of government witnesses, possibility of life sentences, and extensive trial publicity; “strong reason to believe jury needs protection” and “any prejudicial effects on defendant” minimized).

2. Defendant’s rights

(a) Right to jury of known individuals

Defendant has right to jury of known individuals because: (1) identifying information yields valuable clues for purposes of jury selection; and (2) verdict is both personalized and personified when rendered by 12 known fellow citizens. United States v. Sanchez, 74 F.3d 562, 563-64 (5th Cir. 1996).

(b) Right to fair trial and impartial jury

Anonymous jury may violate client’s due process right to fair trial and Sixth Amendment right to impartial jury.

Deprives client of presumption of innocence because jurors likely to conclude that if their identities must be kept secret, your client must be dangerous person, and guilty.

3. If court insists on empaneling anonymous jury

(a) Argue for more extensive voir dire

To overcome anonymity limitation, argue to be allowed to conduct more extensive voir dire and individual voir dire to elicit sufficient information to exercise peremptory challenges. United States v. Barnes, 604 F.2d 121, 137 (2d Cir. 1979).

United States v. Mansoori, 304 F.3d 635, 652 (7th Cir. 2002) (conscientious voir dire compensates for disadvantage of anonymous jury by rooting out bias).

(b) Instructions

Argue court must implement safeguards to reduce prejudice. The following instructions may or may not be beneficial:

- (1) instruction explaining need for anonymous jury that does not portray your client unfavorably.

United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991) (court explained jurors not to reveal names to protect them from the press).

- (2) court repeatedly reminds jurors that defendant enjoys presumption of innocence. See United States v. Edmond, 52 F.3d 1080, 1093 (D.C. Cir. 1995).

United States v. Mansoori, 304 F.3d 635, 650-51 (7th Cir. 2002) (extra cautionary instructions about presumption of innocence are appropriate, but issue is waived if defendant does not request them).