

The left side of the slide features a decorative design consisting of several vertical stripes in shades of light blue and teal. Overlaid on these stripes are several circles of varying sizes, also in shades of teal and blue. One of the larger circles contains the number '1'.

# **DEVELOPING AN EFFECTIVE AND DEFENSIBLE JURY PLAN FOR TRIBAL COURTS**

**January 26, 2018**

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# 25 USC § 1304(d) – RIGHTS OF DEFENDANTS

- In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant

...

3. the right to a trial by an impartial jury that is drawn from sources that
  - A. reflect a fair cross section of the community; and
  - B. do not systematically exclude any distinctive group in the community, including non-Indians; and

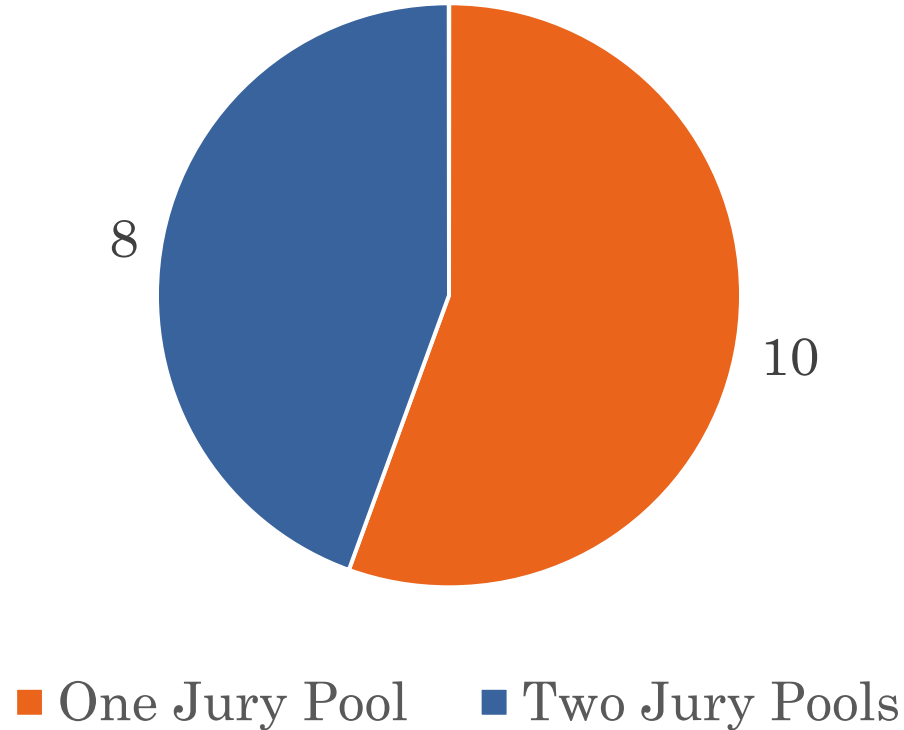
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# PROFILE OF A DIVERSE GROUP OF SDVCJ IMPLEMENTING TRIBES' JURY POOLS

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# COMPARISON OF IMPLEMENTING TRIBE JURY POOLS

Jury Pool Structure



# COMPARISON OF IMPLEMENTING TRIBE JURY POOLS

Non-Indians in Jury Pool <i>only</i> for SDVCJ cases	Additional Population of Non-Indians in Jury Pool for SDVCJ or Non-Indian Cases	Same Jury Pool for <i>all</i> cases
Sisseton	Nottawaseppi - Tribal Gov. Employees	Pascua Yaqui
Ft. Peck	Kickapoo - Casino Employees	Tulalip
Muscogee		CTUIR
		Sac and Fox
Standing Rock		LTBB
Sault Ste. Marie		AL Coushatta
Chitimacha		Choctaw
		EBCI
		Lower Elwha
		Seminole

[1] The tribe only includes Casino employees for non-Indian trials. Sac and Fox Nation Code of Laws, tit. 11, ch. 3, tit. 6, ch. 6.

[2] This jury pool is used only for Domestic Violence cases, Indians and non-Indians.

# NON-INDIANS INCLUDED IN JURY POOLS

Non-Indians Included in Jury Pool						
Tribe	Reservation Residents	Tribal Employees	Tribal Member Spouses or Family	Taxpayers	Tribal Land Lessees or Housing Recipients	Voluntary Registrants
<b>Same Jury Pool for all cases</b>						
Pascua Yaqui	x	x	x			
Tulalip	x	x				
CTUIR	x					
LTBB		x	x			
ALCoushatta		x				
Choctaw	x					
EBCI	x					
Seminole		x		x	x	x
Sac & Fox		x		x	x	x
<b>Additional Population of Non-Indians in Jury Pool for SDVCJ or Non-Indian Cases</b>						
Kickapoo		x		x	x	x
Nottawaseppi	x	x			x	
<b>Non-Indians in Jury Pool only for SDVCJ cases</b>						
Ft. Peck	x					
Sisseton	x	x			x	
Muscogee		x				
Standing Rock	x					
Sault Ste. Marie	x	x			x	
Chitimacha	x	x				

- i Sisseton-Wahpeton Oyate Codes of Law, ch. 23, §§ 23-08-02, 23-10-2, 23-10-03.
- ii Pascua Yaqui Tribal Code, tit. 3, §§ 2-1-160, 2-2-440.
- iii Ft. Peck Tribes Comprehensive Code of Justice, tit. 6, § 507.
- iv Kickapoo Tribe of Oklahoma Criminal Procedure, ch. 3, § 301; Kickapoo Tribe of Oklahoma Civil Procedure, ch. 6, § 601.
- v Tulalip Tribal Codes, tit. 2, ch. 2.05, § 2.05.110.
- vi Muscogee Code, tit. 14, ch. 1, §1-501, tit. 27, ch. 2, § 2-111, tit. 27, app. 1, Rule 13.
- vii 8 Nottawaseppi Huron Band of the Potawatomi Tribal Code § 8.20
- viii Confederated Tribes of the Umatilla Indian Reservation Crim. Code, ch. 3, pt. V, § 3.19.
- ix Standing Rock Sioux Tribal Code of Justice, tit. III, ch. 5, § 3-507.
- x Waganakising Odawa Tribal Code of Law, tit. IX, ch. 1, §9.106.
- xi Sault Ste. Marie Tribe of Chippewa Indians Tribal Code, ch. 70, § 70.126.
- xii Alabama-Coushatta Tribe of Texas Comprehensive Codes of Justice, tit. IV, ch. 1, § 125.
- xiii Chitimacha Comprehensive Codes of Justice, tit. II, § 509.
- xiv Choctaw Nation Juror Code, §§ 3, 11.
- xv The Cherokee Code of The Eastern Band Of The Cherokee Nation, pt. II, ch. 1, art. IV, § 1-31.
- xvi Lower Elwha Klallam Code, art. III, § 16.03.08(6).
- xvii Seminole Nation Code of Laws, tit. 3, ch. 6, tit. 7, ch. 1, §102, ch. 3, § 302.



# PASCUA YAQUI TRIBE

## Same jury pool for all crimes

- Jury Pool Composed of:
  - Enrolled members
  - Spouses of enrolled members
  - Tribal employees
  - Permanent residents of reservation
- Draws from Tribal Census Roll, Housing and Human Resources Dep'ts

*Source:* PASCUA YAQUI TRIBAL CODE, tit. 3, §§ 2-1-160, 2-2-440.





# SAC AND FOX

## Same jury pool for all crimes

- Jury Pool Composed of:
  - Enrolled and Resident Tribal Members (Tribal Secretary)
  - Taxpayers (Tribal Tax Director)
  - Tribal Housing Tenants and members of their household (Director of Tribal Housing Authority)
  - Those Registered for Jury Service (Court Clerk)
  - Tribal Employees (HR)
  - Casino Employees (HR)

*Source:* SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.

# EASTERN BAND OF CHEROKEE INDIANS

## Same jury pool for all crimes

- Jury Pool Composed of:
  - Reservation Residents

*Source:* THE CHEROKEE CODE OF THE EASTERN  
BAND OF THE CHEROKEE NATION, pt. II, ch. 1, art.  
IV, § 1-31.



# SISSETON-WAHPETON OYATE

## Two separate jury pools

- Non-SDVCJ cases
  - Resident tribal members only
- SDVCJ sources:
  - Enrolled members
  - Residents w/in boundaries of reservation
  - Tribal employees
  - Lessees of tribal land

*Each voting district of reservation represented on SDVCJ juror list*

*Source:* SISSETON-WAHPETON OYATE CODES OF LAW, ch. 23, §§ 23-08-02, 23-10-2, 23-10-03.

# STANDING ROCK SIOUX TRIBE

## Two separate jury pools

- Non-SDVCJ cases
  - Resident SRST enrolled members only (tribal voting lists)
- SDVCJ sources:
  - All residents of SRST reservation
    - Available to all charged Defendants, Indians & non-Indians

SRST does not have a system in place for selecting non-Indian jurors in SDVCJ cases

SRST has had only 1 case in 3 years.

*Source:* SRST Code of Justice: §'s: 1-508 (Public Defender must be appointed to represent non-Indian); 3-201.1 (Elements of offense involving non-Indians. Tribe must prove Defendant is non-Indian); 3-507 (Jury pool requirements); and, Title IV, Chapter 17 Domestic Violence Code  
Entire SRST Code of Justice available on line @ [standingrock.org](http://standingrock.org)

# SAULT STE. MARIE

## Two separate jury pools

- Non-SDVCJ cases
  - Tribal Member  
Residing in Chippewa  
County
- SDVCJ sources:
  - Enrolled members
  - Residents w/in boundaries  
of reservation, who are  
lessees, reside in Chippewa  
county and are 18-69
  - Full-Time Tribal employees  
or employees of tribal  
entities who have  
completed probationary  
term

*Source:* SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 70, § 70.126.

# CHITIMACHA

## Two separate jury pools

- Non-SDVCJ cases requirements:
  - Tribal Member
  - Over 18
  - Of Sound Mind and Discretion
  - Not guilty of certain crimes
  - Does not hold certain offices or employment within Chitimacha
- SDVCJ sources:
  - Same as non-SDVCJ except no tribal member requirement.
  - Fair cross section language

*Source:* Chitimacha Comprehensive Codes of Justice, tit. II, § 509.

# CHOCTAW

## Same jury pool for all crimes

- Jury Pool Composed of:
  - Tribal Citizens & U. S. Citizens who have resided on Choctaw Nation for 30+ days
  - Exceptions:
    - Certain tribal employees
    - Licensed attorneys
    - People Convicted of Certain Crimes
    - Federal of State elected or appointed officials
- *Source:* Choctaw Nation Juror Code, §§ 3, 11.



# LITTLE TRAVERSE BAY BAND

## Same jury pool for all crimes

- Jury Pool Composed of:
  - Tribal Citizens who live within LTBB
  - Family members of LTBB Citizens who live within LTBB
  - Employees of LTBB or its entities
  - Exceptions:
    - Legal disability
    - People Convicted of Certain Crimes
- *Source:* Waganakising Odawa Tribal Code of Law, tit. IX, ch. 1, §9.706.





# LOWER ELWHA

**Same jury pool for all crimes**

## *DUREN V. MISSOURI*, 439 U.S. 357 (1979)

- Three-pronged test to establish a prima facie violation of the fair cross section requirement of the Sixth Amendment
  1. The group excluded is a “**distinctive group**”
  2. Representation of the distinctive group is **not fair and reasonable** in relation to the number of persons in the community;
  3. Under-representation is due to “**systematic exclusion.**”
- If the defendant establishes a prima facie violation, the burden shifts to the State to demonstrate a compelling reason for the exclusionary practice.
- States retain broad discretion to define qualification and exemption criteria for jury service.

# IMPORTANT TERMS

- Distinctive Group
  - Generally “heightened scrutiny” classifications under the Equal Protection Clause of the 14<sup>th</sup> Amendment (gender, race, ethnicity)
  - Statutory provisions may specify other classifications (e.g., non-Indian, color, national origin, religion, economic status, political orientation)
- Not Fair and Reasonable Representation
  - No clear numerical thresholds
- Systematic Exclusion
  - Does not have to be intentional (Equal Protection), just inherent in the jury selection process

# WHAT IS A JURY PLAN?

- Detailed documentation of the procedures used to summon and qualify prospective jurors for trial.
- Usually adopted by the court as a formal expression of court policy.
- Essential Components
  - Statutory and regulatory authority
  - Jurisdictional authority of the court
  - Creation of the Master Jury List including description of the source list(s), criteria for identifying and removing duplicate records, suppression files, randomization methods
  - Jury Size
  - Verdict decision rules (unanimous or non-unanimous verdicts)
  - Qualification and exemption criteria
  - Excusal/deferral policy
  - Delegation of authority to determine eligibility, excusals?
  - Terms of service, compensation/expense reimbursement
  - Responsibility for jury system integrity including summons enforcement methods

# BASIC PROCEDURES

- Identify and obtain juror source list(s)
- If using two or more lists, merge and identify/remove duplicate records
- Randomize the Master Jury List
- 2-Step or 1-Step Summoning/Qualification Process?
- Mail jury summons/qualification questionnaire
- Review summons/questionnaire responses for eligibility and availability to serve
- Jurors call in to learn whether to report for service

# CHARACTERISTICS OF AN EFFECTIVE MASTER JURY LIST ...

- ***Inclusive*** of the jury-eligible population;
  - Includes the largest possible number of jury-eligible persons within the jurisdiction
- ***Representative*** of the jury-eligible population;
  - Proportionately reflects the demographic characteristics and geographic distribution of the jury-eligible population within the jurisdiction
- ***Accurate*** address records.
  - Jury-related mailings will be delivered to the addressee.

# POTENTIAL SOURCE LISTS

- Tribal membership
- Residents on tribal land
- Tribal employees
- Registered voters
- Licensed drivers/state identification card holders
  
- Consider requesting the master jury list from the local county court or from the state Administrative Office of the Courts.
  
- **BE SURE TO OBTAIN BOTH MAILING AND STREET ADDRESSES**
  
- **WARNING:** there is a direct correlation between the number of source lists used to create the master jury list and the degree of complexity in creating the list. Consider whether the benefits of adding another list outweigh the challenges it will cause to the list creation process.

# DUPLICATE MATCHING CRITERIA

- Standardize the records
- Specify on what basis the system will determine that two records reflect the same person
  - Surname, first name (or initial)
  - DOB or SSN
  - Address?
  - Missing information
- Specify the list priority



# SUPPRESSION FILES

- Used to remove/suppress records of individuals who are ineligible for jury service:
  - Deceased persons
  - Permanently excused for medical hardship
  - Previous jury service
  - Undeliverable at that address
- **USE SUPPRESSION FILES WITH GREAT CAUTION!!!**

# RANDOM SELECTION

- “Any selection method may be used, manual or automated, that provides each eligible and available person with an *equal probability of selection*”

*ABA Principles for Juries and Jury Trials,*  
Principle 10(B)(1).

- Generate a random number and assign to each record on the Master Jury List;
- Order the Master Jury List by the random number.

# JURY SIZE

- *Ballew v. Georgia*, 425 U.S. 223 (1978)
  - U.S. Supreme Court rules that the minimum size for a criminal jury is 6 persons.
- Federal court: jury size for criminal trials is 12.
- State court: jury size for criminal trials ranges from 6 to 12.
  - 6-person jury (non-capital felony): Connecticut, Florida
  - 7-person jury (misdemeanor): Virginia
  - 8-person jury (non-capital felony): Arizona, Utah

# VERDICT DECISION RULES

- *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972)
  - U.S. Supreme Court rules that Sixth and 14th Amendments do not require unanimity in state court jury trials.
- Only Oregon and Louisiana have non-unanimous verdict rules
  - Both require super-majorities to convict
  - Louisiana: 10/2 rule, Oregon: 11/1 rule
- *Burch v. Louisiana*, 441 U.S. 130 (1979)
  - Juries comprised of only 6 persons must use a unanimous verdict rule in criminal cases.

## 2-STEP OR 1-STEP JURY PROCESS

### ○ 2-Step Process:

- Randomly select names from the Master Jury List to receive a qualification questionnaire for jury service;
- Place names of qualified jurors on a Qualified Jury List;
- Randomly select names from the Qualified Jury List to receive a summons for jury service.

### ○ 1-Step Process:

- Randomly select names from the Master Jury List to receive BOTH a qualification questionnaire and summons for jury service.

# QUALIFICATION AND EXEMPTION CRITERIA

- Under *Duren*, states/tribes have great discretion to determine the qualification and exemption criteria for jury service;
  - If those criteria systematically exclude a distinctive group, the tribe must provide a compelling justification for the criteria.
- Common qualification criteria in state/federal courts:
  - US citizenship, residency, age 18 and over, English fluency, criminal history
- Common exemption criteria in state/federal courts:
  - Previous jury service, age (e.g., 70 and over), occupational and status-related exemptions

# EXCUSAL / DEFERRAL POLICIES

- Can the authority to excuse prospective jurors be delegated?
- Excusal criteria
  - Medical hardship, financial hardship, extreme inconvenience
- Excusal/deferral policies should be neutral so that distinctive groups are not disproportionately excused from service.

# TERMS OF SERVICE

- What is the maximum period of time that prospective jurors must be available for jury service?
  - Number of days, number of trial days, number of trials
- What is the compensation policy for jury service?
  - No mandatory minimum fee required
  - Flat or graduated juror fee
  - Mileage reimbursement
  - Childcare reimbursement
  - Other “out-of-pocket” expenses (parking, lunch, etc.)



# SUMMONS ENFORCEMENT

- Fair cross section depends on consistent, even-handed enforcement of the jury summons/qualification questionnaire
- Authority to enforce summons is an inherent power of the court
- Enforcement Programs
  - An ounce of prevention: reminders ...
  - Second notice/summons approach
  - Order to Show Cause
  - Capias (Bench) Warrant
  - Fines/Fees

# QUESTIONS AND ANSWERS