

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE
(Filed Electronically)**

**CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA,**

PLAINTIFF,

vs.

STEVEN D. GREEN,

DEFENDANT.

**MOTION FOR DISCOVERY OF JURY RECORDS, TO STAY JURY SELECTION
PENDING INSPECTION OF RECORDS AND EVIDENTIARY HEARING AND
PRELIMINARY MOTION TO DISMISS INDICTMENT AND/OR ORDER
COMPLIANCE WITH THE JURY SELECTION AND SERVICE ACT AND THE
CONSTITUTION IN SELECTING THE PETIT JURY**

Comes the defendant, Steven Dale Green, by counsel and pursuant to the Jury Selection and Service Act of 1968("JSSA") (28 U.S.C. 1861 et seq.), and the Fifth and Sixth Amendments to the United States Constitution, hereby moves the Court to (1) compel the production of jury records; (2) stay jury selection pending inspection of the records and an evidentiary hearing to determine substantial compliance with the JSSA and the Fifth and Sixth Amendment due process, equal protection and fair cross section requirements; and, (3) preliminary motion to dismiss the indictment and compel compliance with the JSSA and the Fifth and Sixth Amendments.

In support, the defendant notes the following:

1. A criminal complaint against Steven Dale Green was filed in the Western District of Kentucky on June 30, 2006. Thereafter, on November 7, 2006, a federal grand jury returned an indictment against Steven Dale Green. The indictment contained "special findings" making Mr.

Green eligible for the federal death penalty.¹ On information and belief, it is believed that the grand jury was sitting in Louisville, Kentucky and was drawn from the master jury wheel drawn between January 1 and May 1, 2005. *See* Section 2.03, General Order 2005-02 “Plan for the Qualification and Random Selection of Grand and Petit Jurors” (received and approved by Judicial Council of the Sixth Circuit, April 12, 2005, hereinafter “Jury Plan”, a copy of which is attached to this Motion as Exhibit A) (“Unless otherwise ordered by the Court, the Clerk is directed to empty and refill the divisional master jury wheels between January 1, and May 1 in years subsequent to presidential elections....”).²

2. At Mr. Green’s initial appearance on the complaint, the parties agreed that the Paducah Division was the appropriate jury division for the trial of this matter. [Dkt. 6, Minute Order, July 7, 2006]. The Paducah Division is comprised of the following counties: Ballard, Caldwell, Calloway, Carlisle, Christian, Crittenden, Fulton, Graves, Hickman, Livingston, Lyon, McCracken, Marshall, Trigg. *See* Jury Plan, section 2.01.

3. According to the 2000 census data, 8.89 to 8.84% of the population of the Paducah Division counties is African American.³

4. Supplemental jury questionnaires were sent to 500 potential petit jurors in this case. Of those, 331 were returned. Of the 330 potential jurors who identified their race, 13, or 3.9%, identified themselves as African American. This represents an absolute disparity of 4.9% under representation; and, a comparative disparity of 56% under representation. It also represents 3.1 standard deviations

¹ The government’s subsequent notice of intent to seek the death penalty was filed July 3, 2007.

² Counsel is not aware of any applications to the Chief Judge for additional time to empty and refill the divisional jury wheels. *See* “Jury Plan”, section 2.03.

³ The figure increases slightly to 9.03 to 9.08% when multi-racial/African Americans are included.

below what would be expected by chance. In other words, the chance that we would randomly draw 13 African Americans in pool of 331 from a population that is 8.8% African American would be less than 0.5%. This makes it clear that the under representation is not the product of an “unlucky” draw, but is rather the result of a systemic problem. Some factor other than chance is at work.

5. Thus, the data obtained from a review of the potential pool of jurors identified for this case indicates a statistically significant under representation of African Americans, and a substantial failure to comply with the JSSA and the Fifth and Sixth Amendments to the U.S. Constitution.

6. As a result of this determination of substantial failure to obtain a fair representation of African Americans in the pool actually selected for this case, counsel seeks to inspect the jury records (in computerized format where available) from which the grand jurors who returned the November 2007 indictment and these 500 potential petit jurors (hereinafter the “relevant Master or Qualified Wheels”) were selected including but not limited to:

DISCOVERY REQUESTED

a. Identification of the relevant Master and Qualified Wheels, from which the grand jurors who returned the November 2006 indictment against Mr. Green were selected, and from which the 500 potential petit jurors were selected, who received the supplemental juror questionnaires and in regard to those Wheels, the following:

b. All voter registration lists and any other lists used to create the relevant Master Wheels, including all available information on said individuals, including but not limited to name, address (or county and division), race, gender, date of birth and voter registration date; all correspondence with voter registration official regarding the relevant Master Wheels; any and all records (logs, time sheets, documents or writings of any kind) reflecting the dates individuals were put on or added to the relevant Master Wheels.

c. In regard to the relevant Master Wheels, all available information on the persons on each Master Wheels, e.g., name, address, race, gender, participant number or other code used to identify the individual in the Jury Management System, and date each individual was added to each Master Wheel; for each individual on the relevant Master Wheels:

1. whether the individual was disqualified from jury service and why;
2. whether the address listed for the individual was determined to be undeliverable;
3. whether the individual was added to the Qualified Wheel and the date the individual was added;
4. whether the individual was summoned for jury duty and the date summoned;
5. whether the individual appeared for jury duty and the date appeared;
6. whether the individual was chosen for jury duty and the date chosen; and,
7. whether the individual requested a deferral or excuse, the date any request was made, the basis for the request and whether the individual was granted a deferral or excuse and the date that request was granted or denied.

d. In regard to the relevant Qualified Wheels, all available information on the persons on each Qualified Wheel, e.g., name, address, race, gender, participant number or other code used to identify the individual in the Jury Management System, and the date each individual was added to each Qualified Wheel.

e. All members of the relevant Qualified Wheels for whom mail was returned undeliverable, including the type of mail sent, the date the mail was sent, the date the mail was returned, and any efforts to identify a new address and resend the mail to a new address.

f. All request by members of the relevant Master and Qualified Wheels for excuses and/or deferrals, the dates of those requests, and all responses or actions taken with regard to such requests,

including the date of the response.

g. All available information on the grand jury or grand juries who indicted or where asked to indict Steven Dale Green, and all available information regarding the selection of these grand jurors, including but not limited to the names, race, gender, date of birth and other biographical information regarding the individuals who were summoned, who were selected and/or served as foreperson on any grand jury; and any and all requests for excusal or deferral by the individuals summoned and the responses to the requests and dates of said responses; and any disqualifications or excusals or requests for disqualifications or excusals from the grand jury, the reason for such disqualifications or excusals, any action on requests for disqualifications or excusals and the date any such action was taken; any and all information relating to the preparation of any lists of potential grand jurors to be summoned, and any and all information reflecting whether or not these individuals were previously summoned for any petit or grand jury, deferred as to any petit or grand jury, excused as to any petit or grand jury, or excused as to any petit or grand jury.

h. All qualification questionnaires and supplemental qualification questionnaires sent and received during the use of the relevant Master Wheels.

i. Any and all correspondence or other documentation reflecting any efforts to address the problem of undeliverable addresses.

j. Any and all reports, documentation, or data reflecting the racial and gender composition of (1) the relevant Master and Qualified Wheels; (2) all petit juries chosen from the relevant Qualified Wheels by date chosen, including name and participant number or other identifying numbers or other identifying information; (3) all grand juries chosen from the relevant Qualified Wheel by date chosen, including name and participant number or other identifying numbers or other identifying information.

k. Any and all JS-12 reports and/or any other reports or documentation of any kind prepared

and/or filed reflecting the race, gender or composition of the relevant Master and Qualified Wheels, any grand or petit juries selected from those wheels.

l. Any and all documents, correspondence, memoranda, notes, or writings of any kind reflecting recognition of or efforts to address the under-representation of African Americans or any other cognizable group in the relevant Master and Qualified Wheels, or any grand or petit jury selected from those Wheels.

m. In regard to any data or information furnished by or in conjunction with ACS Services in Vancouver, British Columbia (or any designated representative of ACS Services), counsel requests that documentation for all data items located in the files named “voters”, “pool”, “part_hist”, “appears”, “trial”, and any other files used to administer the jury selection process be produced in an expedited fashion at the earliest possible date so that counsel has sufficient time to make specific data requests to produce adequate and useable computerized data files.

n. All documentation, correspondence, notes, and other items, describing or otherwise indicating the reasons that 168 supplemental juror questionnaires were not returned, including whether or not any were returned as undeliverable, whether excuses were granted and the follow up on those questionnaires as well as those not returned as undeliverable.⁴

ARGUMENT AND AUTHORITIES

(1) The Requested Discovery Must Be Produced.

Section 1867 of the JSSA (28 U.S.C. §1861 et seq.) provides the procedures for challenging a grand or petit jury under the JSSA:

⁴ On January 14, 2009, the defendant filed a “Motion to Preserve Data and Records Regarding Petit Jury Selection Process”, specifically requesting records regarding “undeliverables”, as well as reasons for disqualification or excusal of jurors. [Dkt. 190]. The Government did not respond to the Motion.

In criminal cases, before voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of due diligence, the grounds therefore, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

When a defendant has filed or is preparing to file a motion under §1867(a), subsection (f) of §1867 provides for broad access to records or papers of the jury clerk, to be used in preparation or presentation of the motion. Section 1867(f) provides:

The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or an may be necessary in the preparation or presentation of a motion under subsection (a),(b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b)(4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than \$1,000 or imprisoned not more than one year, or both.

In *Test v. United States*, 420 U.S. 28 (1975), the United States Supreme Court held that §1867(f) “makes clear that a litigant has essentially an unqualified right to inspect jury lists. It grants access in order to aid parties in the ‘preparation’ of motions challenging jury-selection procedures.” *Id.* At 30. In *Test*, the district court had denied a defendant access to the jury records to prepare his jury challenge. The Supreme Court remanded the case to allow the defendant to discover the jury records and attempt to support his jury challenge. In so holding the Court relied on the plain language of the statute and further reasoned:

[W]ithout inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain text of the statute, but also by the statute’s overall purpose of

insuring ‘grand petit juries selected at random from a fair cross section of the community.’ 28 U.S.C. §1861.

(3) Preliminary Motion to Dismiss the Indictment And/or Order Compliance with the Jssa and the Fifth and Sixth Amendments in Identifying the Potential Petit Jurors for this Case

Steven Green, by counsel, files this preliminary motion to dismiss the indictment and/or strike the petit jury panel and order compliance with the JSSA and the Fifth and Sixth Amendments in selection of the potential petit jurors for the trial of this case. As can be seen from the data currently available – 331 supplemental juror questionnaires of those selected for potential service in this case – the pool of African American jurors is significantly under-represented. Indeed, the likelihood that the small number of African Americans in the actual pool drawn for Mr. Green’s case would be drawn by chance is less than 0.5%. Looked at another way, the actual pool is missing 56% of the group that would have been expected had the pool mirrored the population. The under representation is significant, and cannot be explained by an “unlucky draw.”

The Jury Service and Selection Act (“JSSA”), 28 U.S.C. §§1861-1879, provides that, “[e]ach United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title.” As noted above, the Western District of Kentucky adopted the current Jury Plan in 2005 (Exhibit A, attached).

Section 1861 of 28 U.S.C. requires that both grand and petit jurors be selected at random from a *fair cross section* of the community in the applicable district of division:

[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when

summonsed for that purpose.

Section 1862 of 28 U.S.C. also prohibits discrimination in jury selection:

[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.

Section 1867(a) permits a party to move to dismiss or stay on the ground of *substantial failure to comply* with the JSSA in selecting the grand or petit jury:

In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

In *Duren v. Missouri*, 439 U.S. 357 (1979), the Supreme Court held that a defendant may establish a *prima facie* fair cross section violation by showing:

(1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury selection process.”

Id. At 364. The Sixth Circuit has adopted essentially this same test in determining whether there has been a substantial failure to comply with the JSSA. See *United States v. Allen*, 160 F.3d 1096, 1102-1103 (6th Cir. 1998) (referring to the *Duren* test as “essentially identical” , the court adopted First Circuit’s test to determine compliance with JSSA).⁵

⁵ In *United States v. Savides*, 787 F.2d 751, 754 (1st Cir. 1986), the First Circuit found that “[i]n order to demonstrate a violation of the statutory “fair cross section” standard, a defendant must show that a “distinctive” group, that is, a “cognizable” group, was excluded from the jury selection process; that such group was “systematically excluded”; and that because of such exclusion the jury pool failed to be “reasonably representative” of the community.

Arbitrary exclusion from jury selection and service of an identifiable segment of the community also violates the Fifth Amendment right to due process. *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163 (1972). Although the Justices did not clearly agree on a comprehensive statement of this rule, the case seems to establish these elements for a due process challenge: (1) a jury procedure (2) which arbitrarily excludes from jury service (3) a large and identifiable segment of the community:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have an unsuspected importance in any case that may be presented.

92 S.Ct. at 2168. Accordingly, the Court held that “whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.” 92 S.Ct. at 2169. In *Peters*, the Court found a prima facie case of a due process violation without identifying or discussing the particular number of African Americans in the community, or the amount of statistical disparity between the community and the jury lists, or the causes for the limitations. Thus, by implication, the particular benchmark of the population and the extent of the under-representation are not required for a Due Process challenge.

The three part test for violation of the Fifth Amendment Equal Protection Clause is: (1) the group alleged to be excluded is one which is distinct and recognizable, and capable of being singled out for discriminatory treatment; (2) members of the group are substantially under-represented; and (3) the selection procedure is susceptible to abuse and provides an opportunity for discrimination. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977). The primary difference between the Equal

Protection challenge and the fair cross section challenge is the focus is on whether the disparity results from discriminatory purpose.

There can be no dispute that Mr. Green satisfies the first prong of the *Duren* test.⁶ African Americans are unquestionably a distinctive group for the purposes of a fair cross section analysis. *Peters v. Kiff*, 407 U.S. 493 (1972). With regard to the second prong, various courts have weighed different mathematical measures to determine the second prong of *Duren* (though apparently not required for a due process violation, see *supra*). Mr. Green can provide further briefing on mathematical measures after discovery is provided and complete figures can be analyzed; however, having a potential pool of 3.9% African Americans when 9% of the relevant population are African Americans is not a fair and reasonable representation, and is of such statistical significance that it would not have occurred by chance. As a result, the third prong – under representation as a result of systematic exclusion – is met, warranting an evidentiary hearing.

(2) A Stay must Be Granted to Obtain and Review the Requested Discovery, and to Hold an Evidentiary Hearing on Substantial Compliance with the Jssa and the Fifth and Sixth Amendments.

Section 1867 (d) of the JSSA provides:

Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

⁶As a result, he also meets the Due Process and Equal Protection tests.

The evidence produced at this point indicates a substantial failure to comply with the JSSA, *see attached Declaration of Patrick Bouldin* (attached as Exhibit B), requiring a stay of proceedings to permit discovery, analyses of the complete data, an evidentiary hearing, and briefing on the full merits of the motion.

CONCLUSION

For the foregoing reasons, this Court should order production of discovery as requested herein, and stay the proceedings pending an evidentiary hearing and full briefing on the merits of Defendant's preliminary motion to dismiss the indictment and/or order compliance with the JSSA and the Fifth and Sixth amendments in identifying the potential petit jurors for this case.

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Certificate of Service

I hereby certify that on March 31, 2009, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney.

/s/ Patrick J. Bouldin

GENERAL ORDER
2005-02

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

**PLAN FOR THE QUALIFICATION AND
RANDOM SELECTION OF
GRAND AND PETIT JURORS**

SECTION ONE

GENERAL POLICY MATTERS

SECTION 1.01 — ADOPTION AND IMPLEMENTATION:

In accordance with 28 U.S.C. § 1863, the Court adopts the following amended Plan for the Qualification and Random Selection of Grand and Petit Jurors.

This plan, as amended, shall become effective on the date approved by proper order of the Circuit Council of the United States Court of Appeals for the Sixth Circuit, provided, however, that nothing in the amended plan shall affect the composition of the existing master or qualified jury wheels nor affect the composition or preclude the service of any jury impaneled on or before the next scheduled refilling of such wheels after the 2004 general election as hereinbefore provided in this plan.

SECTION 1.03 — USE OF NON-COURT PERSONNEL:

The Court finds that it may also be necessary or appropriate for the Clerk to utilize the services of non-court personnel to assist in the juror management process. For purposes of this plan, the phrase "*non-court personnel*" may include, but is not limited to:

- County or Commonwealth of Kentucky officials and their employees or agents, who are responsible for custody and maintenance of the source lists identified in Section 2.04 of this Plan.
- Owners, employees, operators and/or agents of computer or data processing centers, bar-coding facilities, mail handling centers, and optical scanning facilities.

- Other administrative or clerical persons whose services may be necessary to select, process, and/or mail the various documents and records involved in the juror management process.

In the event that the Clerk elects to utilize the services of non-court personnel, he shall issue written instructions to the individual(s) describing the operations or activities to be conducted and shall require them to execute an affidavit, under penalty of perjury, certifying compliance with the written instructions.

SECTION 1.04 — SUPERVISION OF THE JUROR MANAGEMENT PROCESS:

The Clerk shall manage the jury selection process under the supervision and control of the Chief Judge. 28 U.S.C. § 1863(b)(1).

SECTION 1.05 — DELEGATION OF THE CLERK'S MANAGEMENT RESPONSIBILITIES:

The Clerk may delegate responsibility for the day-to-day operations of the jury selection process to any authorized deputy clerk or other authorized non-court person or agency. 28 U.S.C. §§ 1863(b)(1) and 1869(e).

SECTION TWO
ESTABLISHMENT OF JURY DIVISIONS
AND MASTER JURY WHEELS

SECTION 2.01 — JURY DIVISIONS:

In accordance with 28 U.S.C. § 1869(e), and unless otherwise directed by the court, the following counties shall comprise the jury divisions indicated below:

JURY DIVISION	COUNTIES
Louisville	Breckinridge, Bullitt, Hardin, Jefferson, Larue, Marion, Meade, Nelson, Oldham, Spencer, Washington
Bowling Green	Adair, Allen, Barren, Butler, Casey, Clinton, Cumberland, Edmonson, Green, Hart, Logan, Metcalf, Monroe, Russell, Simpson, Taylor, Todd, Warren
Owensboro	Daviess, Grayson, Hancock, Henderson, Hopkins, McLean, Muhlenberg, Ohio, Union, Webster
Paducah	Ballard, Caldwell, Calloway, Carlisle, Christian, Crittenden, Fulton, Graves, Hickman, Livingston, Lyon, McCracken, Marshall, Trigg

SECTION 2.02 — MASTER JURY WHEELS:

The Clerk shall establish and maintain a master jury wheel for each jury division established pursuant to Section 2.01 of this Plan. 28 U.S.C. §1863(b)(4).

SECTION 2.03 — EMPTYING AND REFILLING THE MASTER JURY WHEELS:

Unless otherwise ordered by the Court, the Clerk is directed to empty and refill the divisional master jury wheels between January 1, and May 1 in years subsequent to presidential elections. Upon application to the Chief Judge, the Court may grant additional time to empty and refill the divisional jury wheels as needed.

SECTION 2.04.— SOURCE LISTS:

The Court finds that voter registration lists represent a fair cross-section of the community within the Western District of Kentucky. Therefore, the primary source list for

randomly selecting names to be placed into a master jury wheel shall be the voter registration lists for each county. 28 U.S.C. § 1863(b)(2).

SECTION 2.05 — FILLING THE MASTER JURY WHEELS:

The Clerk shall initially fill the divisional master jury wheels with at least the minimum number of names indicated below. The number of names placed in the master jury wheels shall be a minimum of 0.5 percent of the total number of names on the source list. The number of names to be placed in the divisional master jury wheels shall be apportioned among the counties in each of the divisions based upon the approximate ratio that the approximate number of registered voters in each of said counties bears to the approximate total of registered voters in the entire jury division. 28 U.S.C. § 1863(b)(4).

Jury divisions shall bear the name of the places of holding court in the district, and the names and counties assigned to each division. The number of names selected initially for the master jury wheel, to be apportioned among the counties are:

Louisville Division Master Jury Wheel	24,000 names
Bowling Green Division Master Jury Wheel	9,000 names
Owensboro Division Master Jury Wheel	9,000 names
Paducah Division Master Jury Wheel	18,000 names

SECTION 2.06 — ADDITION OF NAMES TO THE MASTER JURY WHEELS:

It may be necessary to place additional names into one or more of the master jury wheels. Should such a need arise, either the Chief Judge or the divisional supervising judge will direct the Clerk to obtain additional names from the source lists identified in Section 2.04 of this Plan. 28 U.S.C. § 1863(b)(4).

SECTION 2.07 — METHOD AND MANNER OF RANDOM SELECTION:

Unless otherwise approved by the Court, the Clerk may elect to use either of the two

random selection procedures in order to ensure both proportional representation and random selection of names from the various county source lists identified in Section 2.04 of this Plan:

(a) **Computerized Random Selection Programs:**

At the Clerk's option, and after consultation with the Court, the selection of names from complete source list databases in electronic media for the master jury wheel may be accomplished by a purely randomized process through routines approved by the National Institute of Standards and Technology (NIST).

Similarly, at the option of the Clerk and after consultation with the Court, a properly programmed electronic data processing system for pure randomized selection may be used to select names from the master wheel for the purpose of determining qualification for jury service, and from the qualified wheel for summoning persons to serve as grand or petit jurors. Such random selections of names from the source list for inclusion in the master wheel by data computer personnel must insure that each county within the jury division is substantially proportionally represented in the master jury wheel in accordance with 28 U.S. C. § 1863(b)(3). The selections of names from the source list, the master wheel, and the qualified wheel must also insure that the mathematical odds of any single name being picked are substantially equal.

(b) **Alternate Random Selection Procedures:** In the event that the Clerk elects not to use a computerized random selection program to select names from one or more of the county source lists, then the Clerk shall employ the "interval and starting number" selection process set forth in Appendix (1) of this Plan.

SECTION 2.08 — PLACING NAMES INTO THE MASTER JURY WHEELS:

Each name selected pursuant to Section 2.07 of this Plan shall be placed into the appropriate divisional master jury wheel.

SECTION 2.09 — DRAWING OF NAMES FROM THE MASTER JURY WHEELS:

The Clerk or his designee shall publicly draw at random from the master jury wheels the names of as many persons as may be required for jury service. 28 U.S.C. § 1864(a).

SECTION 2.10 — MAILING OF JUROR QUALIFICATION QUESTIONNAIRES:

The Clerk or his designee shall mail a juror qualification questionnaire to every person whose name is drawn from a master jury wheel. 28 U.S.C. § 1864(a).

SECTION THREE

QUALIFYING GRAND AND PETIT JURORS

SECTION 3.01 — QUALIFICATIONS FOR JURY SERVICE:

Every person is qualified for jury service unless that person:

- (a) Is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;
- (b) Is unable to read, write, and understand the English language with a degree of proficiency sufficient to satisfactorily fill out the juror qualification questionnaire;
- (c) Is unable to speak the English language;
- (d) Is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or
- (e) Has a charge pending against him or her for the commission of, or has been

convicted in a State or Federal Court of record of, a crime punishable by imprisonment for more than one year, and that his or her civil rights have not been restored. 28 U.S.C. § 1865(b).

SECTION 3.02 — EXEMPTION FROM JURY SERVICE:

The following persons shall be exempt from jury service in this Court:

1. Members in active service of the Armed Forces of the United States;
2. Member of any governmental police or regular fire department (not including volunteer or non-governmental departments); and
3. Public official of the United States, state, or local government who is elected to public office or directly appointed by one elected to office.

SECTION 3.03 — PERSONS WHO SHALL BE EXCUSED FROM JURY SERVICE:

(1) The Court finds that jury service by members of the occupational classes or groups of persons set out below would entail undue hardship or extreme inconvenience to the members thereof, and that excuse of members thereof would not be inconsistent with Sections 1861 and 1862 of Title 28, United States Code. Accordingly, members of such classes or groups shall, upon individual request therefore, be excused from jury service:

- (a) All persons over seventy (70) years of age;
- (b) A person who has served as a grand or petit juror within the past two years;
- (c) A person who serves without compensation as a volunteer firefighter or a member of a rescue squad or ambulance crew; and
- (d) All Full-time students.

(2) **Persons Who May be Excused from Jury Service:**

- (a) A person having active care and custody of a person whose health and/or safety would be jeopardized if required to be absent for jury service; and
- (b) A person whose services are so essential to the operation of a business, commercial or agricultural enterprise that it must close or cease to function if they are required to perform jury duty.

(3) **Temporary Excuse upon Individual Requests:** The Court may temporarily excuse any qualified juror from jury service upon application showing undue hardship or extreme inconvenience. Unless otherwise directed by the Court, those individuals temporarily excused from jury service should have their names reinserted into the qualified jury wheel, or deferred until another date for service. 28 U.S.C. § 1866(c)(1).

SECTION 3.04—DETERMINATION OF QUALIFICATION FOR JURY SERVICE.

In accordance with 28 U.S.C. § 1865(a) and (b), the chief judge of the district court, or any other district judge or magistrate judge of the district, or the clerk under supervision of the court, is authorized to determine whether a person is qualified for, or exempt, or to be excused from jury service.

SECTION FOUR

QUALIFIED JUROR WHEEL ESTABLISHMENT AND SUMMONING PROCEDURES

SECTION 4.01 — QUALIFIED JUROR WHEELS:

The Clerk or designee shall establish and maintain a qualified jury wheel. Qualified juror

wheels for the respective jury divisions may be maintained, at the discretion of the Clerk, in the main office in the district or in the respective jury divisional offices. The Clerk or designee, after review of the qualification forms, shall place in the qualified jury wheel for each of the jury divisions the names of persons determined to be qualified for jury service. 28 U.S.C. § 1866(a).

~~The qualified jury wheels shall continue to be used during the master wheel emptying~~
and refilling process. Upon the completion of the master wheel process the qualified wheels will be emptied and refilled with the names of qualified persons from the newly refilled master wheel.

SECTION 4.02 — DRAWING AND SUMMONING OF JURY PANELS:

From time to time, after reasonable public notice, the Clerk, either at the main office or the particular jury divisional office, shall publicly draw from the respective jury division qualified jury wheel such number of names of persons as directed by the Court for service as grand or petit jurors for that respective jury division.

The Clerk shall issue a jury summons for each person so drawn and issue such summons by first class mail, unless the Court directs otherwise.

SECTION FIVE

DISCLOSURE OF JURY RECORDS

SECTION 5.01 — DISCLOSURE OF GRAND JUROR INFORMATION:

Grand Juror Information: In accordance with 28 U.S. C. § 1863(b)(7), the names and information relating to any summoned or serving grand juror or grand jury panel shall be

confidential and not disclosed to any litigant or member of the public except upon written order of the District Court. Furthermore, the impanelment of every regular special grand jury shall not be conducted in open court or within public view. Applications for disclosure of grand juror information must be made by motion to the Chief Judge and must show exceptional and compelling circumstances why disclosure should be allowed.

SECTION 5.02 — DISCLOSURE OF PETIT JURY PANEL INFORMATION:

In accordance with 28 U.S.C. § 1863(b)(7), the names of persons assigned to individual petit jury panels may upon request to the Clerk of Court or designee, be disclosed to the parties seven days prior to the trial date unless otherwise ordered by the court and to the public when ordered by the court. Notwithstanding this general policy, the District Court may order the Clerk to keep these names confidential in any case where the interests of justice so require.

SECTION 5.03 — DISCLOSURE OF JURY RECORDS GENERALLY:

- (a) **Release of Jury Plan Information:** Upon request, the Clerk is authorized to provide a copy of this plan to any person requesting information about the juror qualification process.
- (b) **Release of Master Jury Wheel Information:** Any list prepared pursuant to 28 U.S.C. § 1864(a) shall not be disclosed to any person except upon written order of the District Court, except pursuant to 28 U.S.C. § 1867.
- (c) **Release of Juror Management Records:** In accordance with 28 U.S.C. § 1867(f), the contents of juror information forms may be disclosed to the parties seven days prior to trial unless otherwise ordered by the court. All other records and papers used in connection with the juror qualification and selection process

shall not be disclosed, except upon written order of the District Court, unless otherwise provided for in Sections 5.02 and 5.03(a) of this plan. Parties desiring to prepare or present a motion pursuant to 28 U.S.C. § 1867 shall make written application for disclosure to the District Court and tender an appropriate order therewith.

- (d) **Retention of Juror Management Records:** In accordance with 28 U.S.C. § 1868, the Clerk shall keep all records and papers relating to the juror management process for four years following the emptying and refilling of the master jury wheels, or for such longer period of time as the Court may require. Upon written request to the Chief Judge, the Court may direct that the Clerk make selected juror management records available for public inspection for the purpose of determining the validity of the selection of any jury.

IT IS SO ORDERED this _____ day of _____, 2005, in Louisville, Kentucky, on behalf of the Judges of the United States District Court, Western District of Kentucky.

John G. Heyburn II
Chief Judge

APPENDIX (1) — ALTERNATE RANDOM SELECTION PROCEDURES

Unless otherwise directed by the Court, in the event that the Clerk elects not to use a form of computerized random selection, the following “starting number and interval” selection process should be employed:

- STEP (1) Identify the local, state, or federal official who has responsibility for, and custody of, the source list for each county in a particular jury division.
- STEP (2) Communicate with the custodian to determine the total number of names contained on the source lists of the most recent general election; or in the event that a particular county intends to purge its source list information following a general election, then on a date to be specified by the Clerk.
- STEP (3) After determining the total number of names for each county, segregate the counties into the jury divisions defined in Section 2.01 of this plan.
- STEP (4) Calculate the total number of names for all of the counties within a particular jury division.
- STEP (5) Divide the total number of names contained on all of the source lists in a particular jury division by the total number of names required to be placed in that jury division’s master jury wheel in accordance with Section 2.06 of this plan. The numerical value produced by this calculation shall be referred to as the interval number, which represents the interval between selected names on the county source lists, e.g.:

Assume [1] that there are 660,000 names on the combined source lists for the counties comprising a particular jury division; and [2] that the total number of names to be placed into that division’s master jury wheel is 6,000.

Given these assumptions, the clerk would divide 660,000 by 6,000. The result of this calculation would produce an interval number of 110.

STEP (6) After calculating the interval number for each jury division, the Clerk should then publicly draw at random for each jury division a **starting number**, to ensure that every name in each of the intervals has an equal chance of being chosen. This starting number shall be selected from a range of numbers which includes the number one through the interval number for each jury division. The selected starting number represents the first name to be selected from each county's source list.

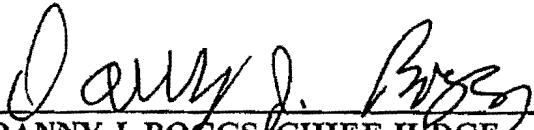
STEP (7) After calculating the interval and starting numbers, the Clerk shall arrange to select the first name from each county's source list which corresponds to the starting number, and thereafter, shall select every subsequent name throughout the remainder of the source list which corresponds to the interval number, e.g.:

Assuming that the starting number for a particular jury division was 10, and the interval number for that jury division was 110, the clerk would arrange that the tenth name from each county's source list be selected, and thereafter every 110th name throughout the remainder of the source lists for each county be selected, e.g. 10, 120, 230, 340, etc.

CERTIFICATE OF APPROVAL

This is to certify that, in accordance with 28 U.S.C. Section 1863(a), the foregoing amendment to the Plan of the United States District Court for the Western District of Kentucky for the Random Selection of Grand and Petit Jurors, has been duly received and approved as complying with the law by a reviewing panel consisting of the members of the Judicial Council of the Sixth Circuit of the United States.

This 12th day of APRIL, 2005



DANNY J. BOGGS, CHIEF JUDGE
United States Court of Appeals
for the Sixth Circuit

EXHIBIT B

1. My name is Patrick Bouldin. I am an attorney of record for Steven Dale Green, the defendant in *United States v. Steven D. Green*, Crim. No. 06-19, now pending in federal court in the Western District of Kentucky. I am duly licensed to practice law in the state of Kentucky, and before the United States District Court for the Western District of Kentucky. I make this declaration pursuant to 28 U.S.C. §1746.

2. This declaration is filed under 28 U.S.C. §1867(d) and in support of the attached “Motion for Discovery of Jury Records, to Stay Jury Selection Pending Inspection of Records and Evidentiary Hearing and Preliminary Motion to Dismiss Indictment And/or Order Compliance with the Jury Selection and Service Act and the Constitution in Selecting the Petit Jury” (“Motion”).

3. I declare that the facts set forth in the “Motion” are true and correct to the best of my information and belief.

4. The racial data compiled from the returned supplemental jury questionnaires, that is that 13 of the potential jurors represented that they are African was provided to Jeffrey Martin, an expert and consultant on jury pools and statistical analysis. Mr. Martin obtained and reviewed relevant data from the Census Bureau for the counties within the Paducah Division, and provided the under representation figures contained in the Motion.


5. Jeffrey Martin has an undergraduate degree in Mathematics and Economics from Vanderbilt University. He has a master's degree in Economics from the University of Chicago. He has been qualified as an expert in Federal Courts in Georgia, Michigan and Alabama

6. Based on the information obtained from the supplemental jury questionnaires in this case, and the data and analysis provided by Mr. Martin, I have a good faith belief and substantial

reasons to conclude that there has been a substantial failure to comply with the requirements of the Jury Selection and Service Act, 28 U.S.C. §1861 et seq. The racial data contained in the supplemental jury questionnaires, i.e., 13 African Americans of a pool of 330, represents an absolute disparity of 4.9% under representation; and, a comparative disparity of 56% under representation. It also represents 3.1 standard deviations below what would be expected by chance. In other words, the chance that we would randomly draw 13 African Americans in pool of 331 from a population that is 8.8% African American would be less than 0.5%. This makes it clear that the under representation is not the product of an "unlucky" draw, but is rather the result of a systemic problem.

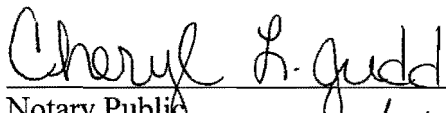
I declare under penalty of perjury that the foregoing is true and correct.

Executed March 31, 2009.



Patrick Bouldin

Subscribed to and sworn before me
this 31st day of March, 2009.



Notary Public
My commission expires: 8/2/09