

Jury Composition

The Indian Civil Rights Act (ICRA) requires that no tribe shall “deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.”¹ In addition, the Special Domestic Violence Criminal Jurisdiction (SDVCJ) of the 2013 Violence Against Women Act (VAWA) requires “an impartial jury that is drawn from sources that reflect a fair cross-section of the community; and do not systematically exclude any distinctive group in the community, including non-Indians.”² This requirement exists in cases where imprisonment of any length of time is possible.

The language of the SDVCJ statute draws on two concepts from the Sixth Amendment of the U.S. Constitution. Because tribal governments are sovereign entities, the U. S. Constitution does not apply to limit or regulate tribal governments, including tribal courts. However, when the language of a statutory requirement applicable to tribal governments uses the same or similar language as that employed in the U.S. Constitution or federal statutes, federal courts tend to interpret them consistently. The fair cross section requirement derives principally from the Sixth Amendment right to “a speedy and public trial by an impartial jury,” which prohibits the systematic exclusion of minority groups from the jury pool.

In *Duren v. Missouri*, 439 U.S. 357 (1979), the U.S. Supreme Court described three criteria that a criminal defendant must satisfy to show a prima facie violation of the fair cross section requirement. First, the group alleged to be excluded from the jury pool must be a “distinctive” group in the community. A distinctive group for fair cross section purposes generally refers to groups that see themselves as distinct from other groups, are seen by others as a distinctive group, and hold values that are not necessarily held by other groups. In most cases, distinctive groups are defined by race, ethnicity, or gender. SDVCJ explicitly identifies “non-Indians” as a distinctive group that cannot be excluded from the jury pool in SDVCJ trials.

Second, the group’s representation in the jury pool is not fair and reasonable given the group’s representation in the community. For this prong of *Duren*, federal and state courts have employed a variety of statistical tests to assess the degree of underrepresentation in the jury pool as compared to their population in the community. The two most common statistical measures are absolute disparity and comparative disparity. Absolute disparity measures the numerical difference between the representation of the distinctive group in the jury pool and their representation in the population of the community. Comparative disparity measures the percentage by which the number of distinctive group members falls short of their number in the community. The formula for calculating comparative disparity is the absolute disparity divided by the percentage of the distinctive group in the jury-eligible community. In *Berghuis v. Smith*, 559 U.S. 314 (2010), the U.S. Supreme Court expressly declined to articulate a numerical threshold for absolute and comparative disparity. Most cases that discuss absolute disparity in detail tend to cite values of 10% to 12% absolute disparity as sufficient to establish a prima facie

¹ The Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(10).

² The Indian Civil Rights Act of 1968, 25 U.S.C. § 1304(d)(3).

violation of the fair cross section requirement while the threshold level for comparative disparity is generally cited as 40% to 50%.

An important complication for SDVCJ trials involves the problem of defining the “community” against which the representation of a distinctive group in the jury pool can be compared. In state and federal courts, the community is defined as the jury-eligible population residing within the boundaries of the geographic area served by the court. The most common source of prospective juror names and addresses in state and federal courts are the lists of registered voters, licensed drivers, and state identification card holders who reside within the geographic area served by the court, which typically include 90% or more of the adult population.

For many tribal courts, however, communities are not wholly or even primarily confined within geographic boundaries. They often include enrolled members of the tribe regardless of where they reside. For some tribes, Indian country consists of a patchwork of communally held properties and individual parcels of land distributed across multiple counties or states in which large numbers of non-Indians reside with little or no relationship to the tribal community. For tribes implementing SDVCJ, the challenge of satisfying the second prong of *Duren* involves defining the pool of prospective jurors in terms of both tribal members and non-Indians who have a sufficiently significant relationship to the tribe (e.g., marriage, employment, residency, or other legally cognizable relationship) to be included as part of the “community.” The most common source of non-Indians for SDVCJ jury pools are residents or lessees of tribal property (16 tribes) or tribal employees (11 tribes). Other sources listed in tribal codes include non-Indian spouses of tribal members (Pasqua Yaqui and Standing Rock Sioux Tribes); taxpayers (Seminole Nation); voters (Muscogee Creek Nation); and persons who volunteer for jury service (Choctaw Nation and Seminole Nation). Although some tribal codes limit eligibility for jury service to tribal members living within specific geographic areas (e.g., Sault Ste. Marie Tribe of Chippewa), none do so with respect to non-Indians.

The third criteria of the *Duren* test is that underrepresentation of the distinctive group results from systematic exclusion. Systematic exclusion is not necessarily intentional; it must only be inherent in the procedures employed by the court to select juries, including the source of names used to create the master jury list; the automation used to randomly select names; and the qualification criteria for jury service. A crucial step for tribes exercising SDVCJ is to identify an accurate source of names and address records for non-Indians that can be merged with the list of tribal members to create a master jury list.

For some tribes, including non-Indians for the first time presented a logistical challenge, since a list of non-Indian tribal residents may be difficult to obtain. The Fort Peck Tribes were able to obtain a list through the 15th Judicial District of Montana, which luckily comprises 98 percent of the Reservation. However, for some tribes, including non-Indian employees or tribal housing residents was the more efficient course of action given the availability of that information. Including non-Indian employees often required tribes to rewrite provisions of their corporation’s employee handbooks or revisit tribal employee leave policies. In addition, tribes that relied on lists of casino employees as the source of non-Indians for their jury pool had to update the master jury list records before summoning jurors because most employees were furloughed during casino closures during the covid-19 pandemic.

Tribal courts whose jurisdiction extends across multiple counties also face the challenge of specifying reasonable geographic boundaries for the purpose of summoning non-Indian jurors. The logistical difficulty of securing source lists from state courts or government agencies increases with every additional state or county entity whose cooperation is necessary. Practical concerns about the burden imposed on prospective jurors who would need to travel long distances to the tribal courthouse may require tribes to include non-Indians from the closest adjacent townships rather than from the entire county. Finally, in states where parcels of tribal land are widely dispersed across multiple counties, the non-Indian population may greatly exceed the number of enrolled tribal members. Randomly selecting non-Indians from state and county source lists could ultimately erode tribal confidence in the legitimacy of SDVCJ trials by over-representing non-Indians, many of whom would have little or no formal connection to the tribe in the jury pool.

As a practical matter, the *Duren* test presents a high hurdle for criminal defendants to bring fair cross section challenges in state and federal courts, and they are rarely successful when they arise. The degree of underrepresentation of a distinctive group must be substantial to satisfy the second prong of *Duren* and the most common factors leading to underrepresentation (underinclusive master jury lists, undeliverable summonses, and nonresponse and failure to appear rates) have generally been ruled nonsystematic exclusion. There are no known cases in which SDVCJ defendants have formally raised a fair cross section challenge, or even a serious threat of a challenge. Consequently, it is unclear how a federal court might view the jury plans developed by tribes that have implemented SDVCJ, particularly with respect to the manner in which they defined their respective communities and identified source lists to include non-Indians in the jury pool.

Other than the composition of the jury pool, the SDVCJ does not explicitly describe how tribal courts must conduct jury trials, but it does include the proviso that tribes exercising SDVCJ must guarantee “all other rights whose protection is necessary under the Constitution of the United States...”³ Minimum jury size and unanimous verdicts are two rights that likely fall within this catchall provision. In 1978, for example, the U.S. Supreme Court held in *Ballew v. Georgia* that six is the minimum number of jurors necessary to convict a defendant in a criminal case.⁴ One year later it held in *Burch v. Louisiana* that 6-person juries must be unanimous to convict.⁵ In 2020, the Court extended the unanimity requirement to 12-person juries in *Ramos v. Louisiana*.⁶ Jury procedures for tribes exercising SDVCJ are consistent with these requirements. With the exception of the Pascua Yaqui tribe, which empanels 7-person juries, and the Little Traverse Bay Band of Odawa Indians in Michigan, which empanels 12-person juries for cases in which the potential sentence exceeds one year, all tribes use 6-person juries for SDVCJ trials. All verdicts must be unanimous to convict.

Since publication of the 2013 report, eleven additional tribes have indicated their intention to exercise SDVCJ over non-Indian defendants in domestic violence cases. Although tribes continued to pursue some steps toward implementation, including revisions to tribal codes, the

³ The Indian Civil Rights Act of 1968, 25 USC 1304(d)(4).

⁴ *Ballew v. Georgia*, 435 US 223 (1978).

⁵ *Burch v. Louisiana*, 441 US 130 (1979).

⁶ *Ramos v. Louisiana*, 590 US ____ (2020).

global COVID-19 pandemic caused major disruptions to this process. In-person court hearings, including jury trials, were suspended in tribal courts as well as state and federal courts for most of 2020 and much of 2021. Without the incentive of a firm trial date, many tribal courts are experiencing criminal backlogs, including SDVCJ cases. As the pandemic abates and tribal courts resume normal operations, the exercising tribes expect to accelerate efforts for full implementation.

Some tribes included non-Indians in their jury pools prior to the passage of VAWA 2013. For the other tribes, implementation of VAWA 2013 required them to change their tribal codes and procedures to include non-Indians in their jury pools for SDVCJ trials. Some tribes include non-Indians in the jury pool for all jury trials.⁷ Other tribes have pursued a bifurcated approach in which non-Indians are included in the jury pool for SDVCJ trials, but not for jury trials involving tribal members as defendants.⁸ Early in the SDVCJ implementation process, some concerns were raised about whether such a bifurcated approach would violate the equal protection guarantee of the Indian Civil Rights Act. In 2014, the National Congress of American Indians (NCAI) drafted a legal memorandum to the U.S. Department of Justice in December 2014 addressing these concerns and concluding that a bifurcated approach would meet equal protection standards because there are no similarly situated groups being treated differently under the law, there is no suspect class, no fundamental right is violated, and principles of tribal self-government provide a rational basis for this approach.⁹ To date there have been no formal legal challenges to bifurcated jury pools for SDVCJ and non-SDVCJ cases.

Tribes who are thinking about implementing SDVCJ have routinely asked how they can ensure non-Indians comply with a jury summons given their limited authority over non-Indians. In practice, this has not been a problem. Tribes who have called a SDVCJ jury have anecdotally reported that non-Indians report for jury duty at higher rates than Indians. In one recent jury trial at Fort Peck, the entire jury was composed of non-Indians. In educational programs and one-on-one technical assistance, the National Center for State Courts has shared techniques for addressing nonresponse and failure-to-appear rates, especially timely and consistent follow-up to ensure that both Indian and non-Indian jurors understand the importance of compliance with jury summons. Education and public outreach to tribal members about jury service in SDVCJ trials should also be pursued, especially by tribes that do not have a long history with jury trials.

⁷ See, e.g., the Alabama-Coushatta Tribe of Texas; Choctaw Nation in Oklahoma; Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in Oregon; Eastern Band of Cherokee Indians in North Carolina; Kickapoo Tribe of Oklahoma; Little Traverse Bay Band of Odawa Indians in Michigan; Lower Elwha Klallam Tribe in Washington; Muscogee (Creek) Nation in Oklahoma; Nottawaseppi Huron Band of Potawatomi in Michigan; Pascua Yaqui Tribe in Arizona; Port Gamble S'Klallam Tribe in Washington; Sac and Fox Nation in Oklahoma; Seminole Nation in Oklahoma; and the Tulalip Tribes in Washington.

⁸ See, e.g., Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation in Montana; Cherokee Nation of Oklahoma; Chitimacha Tribe of Louisiana; Confederate Tribes of the Chehalis Reservation; Gila River Indian Community in Arizona; Grand Traverse Band of Ottawa and Chippewa Indians; Sault Ste. Marie Tribe of Chippewa in Michigan; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North and South Dakota; Standing Rock Sioux Tribe in North and South Dakota; and the Suquamish Tribe in Washington.

⁹ NCAI Memorandum regarding Equal Protection, Juries, and Tribal Codes to Implement SDVCJ (Dec. 22, 2014).

Single or Bifurcated Jury Pools		
Non-Indians in Jury Pool only for SDVCJ cases	Additional Population of Non-Indians in Jury Pool for any Non-Indian Cases (including civil)	Same Jury Pool for <i>all</i> cases
Sisseton ¹⁰	Nottawaseppi ¹¹ (Tribal Government Employees)	Pascua Yaqui ¹²
Fort Peck ¹³	Kickapoo ¹⁴ (Casino Employees)	Tulalip ¹⁵
Muscogee ¹⁶		CTUIR ¹⁷
Standing Rock ¹⁸		LTBB ^{19,20}
Sault Ste. Marie ²¹		AL Coushatta ²²
Chitimacha ²³		Choctaw ²⁴
Suquamish		EBCI ²⁵
Grand Traverse Band		Lower Elwha ²⁶
Chehalis		Seminole ²⁷
Gila River Indian Community		Sac and Fox ²⁸
Cherokee Nation		Port Gamble

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

¹¹ 8 NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE § 8.20

¹² PASCUA YAQUI TRIBAL CODE, tit. 3, §§ 2-1-160, 2-2-440.

¹³ FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE, tit. 6, § 507.

¹⁴ KICKAPOO TRIBE OF OKLAHOMA CRIMINAL PROCEDURE, ch. 3, § 301; KICKAPOO TRIBE OF OKLAHOMA CIVIL PROCEDURE, ch. 6, § 601.

¹⁵ TULALIP TRIBAL CODES, tit. 2, ch. 2.05, § 2.05.110.

¹⁶ MUSCOGEE CODE, tit. 14, ch. 1, §1-501, tit. 27, ch. 2, § 2-111, tit. 27, app. 1, Rule 13.

¹⁷ CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE, ch. 3, pt. V, § 3.19.

¹⁸ STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. III, ch. 5, § 3-507.

¹⁹ WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. IX, ch. 1, §9.706.

²⁰ This jury pool is used only for Domestic Violence cases, Indians and non-Indians.

²¹ SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 70, § 70.126.

²² ALABAMA-COUSHATTA TRIBE OF TEXAS COMPREHENSIVE CODES OF JUSTICE, tit. IV, ch. 1, § 125.

²³ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. II, § 509.

²⁴ CHOCTAW NATION JUROR CODE, §§ 3, 11.

²⁵ THE CHEROKEE CODE OF THE EASTERN BAND OF THE CHEROKEE NATION, pt. II, ch. 1, art. IV, § 1-31.

²⁶ LOWER ELWHA KLALLAM CODE, art. III, § 16.03.08(6).

²⁷ SEMINOLE NATION CODE OF LAWS, tit. 3, ch. 6, tit. 7, ch. 1, §102, ch. 3, § 302.

²⁸ SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.

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Non-Indians Included in Jury Pool							
	Tribe	Reservati on Residents	Tribal Employe es	Tribal Member Spouses or Family	Taxpayer s	Tribal Land Lessees or Housing Recipien ts	Volunt ary Registr ants
Same Jury Pool for <i>all</i> cases	Pascua Yaqui ²⁹	X	X	X			
	Tulalip ³⁰	X	x ³¹				
	CTUIR ³²	X					
	LTBB ³³		X	x ³⁴			
	AL Coushatta ³⁵		X				
	Choctaw ³⁶	X					
	EBCI ³⁷	X					
	Seminole ³⁸		x ³⁹		x ⁴⁰	X	x
	Sac & Fox ⁴¹		x ⁴²		x ⁴³	X	x
Port Gamble							
Additional Population of Non- Indians in Jury Pool for SDVCJ or Non- Indian Cases	Kickapoo ⁴⁴		x ⁴⁵		x ⁴⁶	X	x
	Nottawaseppi ⁴⁷	X	X			X	
Non- Indians in Jury Pool <i>only</i> for SDVCJ cases	Fort Peck ⁴⁸	X					
	Sisseton ⁴⁹	X	X			X	
	Muscogee ⁵⁰		X				
	Standing Rock ⁵¹	X					
	Sault Ste. Marie ⁵²	X	X			X	
	Chitimacha ⁵³	X	X				
	Suquamish						
	GTB						
	Chehalis						
	GRIC						

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- ²⁹ PASCUA YAQUI TRIBAL CODE, tit. 3, § 2-1-160(B).
- ³⁰ TULALIP TRIBAL CODES, tit. 2, ch. 2.05, § 2.05.110.
- ³¹ Employees must have been employed by the Tribe for at least one continuous year prior to being called as juror.
- ³² CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION CRIM. CODE, ch. 3, pt. V, § 3.19.
- ³³ WAGANAKISING ODAWA TRIBAL CODE OF LAW, tit. IX, ch. 1, § 9.706(B).
- ³⁴ Eligible jurors must also live within the tribe's territorial jurisdiction.
- ³⁵ ALABAMA-COUSHATTA TRIBE OF TEXAS COMPREHENSIVE CODES OF JUSTICE, tit. IV, ch. 1, § 125
- ³⁶ CHOCTAW NATION JUROR CODE, §§ 3, 11.
- ³⁷ THE CHEROKEE CODE OF THE EASTERN BAND OF THE CHEROKEE NATION, pt. II, ch. 1, art. IV, § 1-31.
- ³⁸ SEMINOLE NATION CODE OF LAWS, tit. 3, ch. 6, tit. 7, ch. 1, § 102, ch. 3, § 302.
- ³⁹ Employees must have been employed by the Tribe for at least one continuous year prior to being called as juror.
- ⁴⁰ Taxpayers must also be residents of the tribal jurisdiction.
- ⁴¹ SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.
- ⁴² The tribe only includes Casino employees for non-tribal member trials. SAC AND FOX NATION CODE OF LAWS, tit. 11, ch. 3, tit. 6, ch. 6.
- ⁴³ Taxpayers must also be residents of the tribal jurisdiction.
- ⁴⁴ KICKAPOO TRIBE OF OKLAHOMA CRIMINAL PROCEDURE, ch. 3, § 301; KICKAPOO TRIBE OF OKLAHOMA CIVIL PROCEDURE, ch. 6, § 601.
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- ⁴⁷ 8 NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE § 8.20
- ⁴⁸ FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE, tit. 6, § 507.
- ⁴⁹ SISSETON-WAHPETON OYATE CODES OF LAW, ch. 23, §§ 23-10-02—23-10-4.
- ⁵⁰ MUSCOGEE CODE, tit. 14, ch. 1, § 1-501, tit. 27, ch. 2, § 2-111, tit. 27, app. 1, Rule 13.
- ⁵¹ STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE, tit. III, ch. 5, § 3-507.
- ⁵² SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE, ch. 70, § 70.126.
- ⁵³ CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, tit. II, §§ 509-510.