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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA,

Plaintiff.

vs.

TARRON L. WOOTEN

Defendant.

CR2020-137586-002

MOTION FOR RULE 15.1 (g)
DISCLOSURE BY COURT ORDER/
DISCOVERY NECESSARY TO
LITIGATE FAIR CROSS SECTION
CLAIM UNDER DUREN v. MISSOURI

(Assigned to Hon. Michael Mandell)

(Oral Argument Requested)

Defendant, by his attorney, Dave Erlichman, Comeback Law P.C. having essentially an unqualified constitutional right to inspection of all jury selection materials relevant to a determination of whether his grand or petit jury are selected at random from a fair cross section of the community, pursuant to the Sixth and Fourteenth Amendments and pursuant to Rule 15.1 (g), Ariz. R. Crim P., moves the Court to order the Judicial Branch for Maricopa County to permit Defendant to inspect and or to be provided copies

1 of all written reports, records, data compilations, statistical summaries, and statistical
2 analysis of the following:

3
4 1. All actions taken by the Judicial Branch of Maricopa County to comply with its
5 mandatory obligation to periodically review and analyze the master jury list for racial
6 and ethnic representativeness and inclusiveness (from January 1, 2019 to the present),
7 including all actions taken to specifically comply with the Arizona Code of Judicial
8 Administration ("ACJA") Section 5-203 (J) (3), including "calculating disparities, and
9 running reports several times to examine juror demographics", as described in the
10 Minute Entry of the Presiding Criminal Judge of June 8, 2020 in CR-2019-005932-001.

11
12 *Exhibit A. p. 4*

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14 2. All actions taken by the Judicial Branch of Maricopa County (from January 1, 2019 to
15 the present, demonstrating the implementation of all changes and reforms with respect to
16 its prior official policy (as late as 2017), of systemically excluding non-English speakers
17 from the master jury list and excusing them from jury service.

18
19 3. All actions taken by the Judicial Branch of Maricopa County since January 1, 2019 to
20 the present, addressing deficiencies in its "Crystal Reports" software program which is
21 an "add-on" (sold by another vendor not part of its Agile Jury software approved by the
22 Arizona Supreme Court) used to prepare written reports containing statistical
23 demographic information with regards to the racial and ethnic composition of the jury
24 pools.
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27 4. The Report (including any and all emails) prepared in 2014 for the Judicial Branch for
28 Maricopa County by Ms. Paula Hannaford-Agor with respect to her being retained to

1 assess the jury selection system's demographic data to determine whether it was
2 representative. *See, Exhibit G, Deposition of Nicole Garcia, pp. 45-53.*

3
4 5. The Minutes and Reports of all meetings of the county's "Jury Advisory Committee"
5 (comprised of judges and commissioners who regularly meet to discuss jury issues) from
6 January 1, 2019 to the present. *See, Exhibit G, Deposition of Nicole Garcia, pp. 57-59.*

7 Facts

8 I. "White-wash:" Maricopa County's history of bias and systemic racism impacting its 9 jury selection system

10
11 1. In denying the *Martinez* jury selection system challenge in 2020 without permitting
12 oral argument, or conducting an evidentiary hearing, and by refusing to allow eleven
13 felony defendants (and their attorney) the right to participate and be heard in that
14 challenge, the Presiding Criminal Judge would disregard the pertinent expert witness
15 opinions of John R. Weeks Ph. D who had specifically cited the Court to the decision of
16 the Ninth Circuit Court of Appeals in *United States v. Hernandez-Estrada*, 749 P.3d
17 1154, 1164 (9th Cir. 2014) which decision supported Dr. Weeks' opinion that the Court's
18 exclusive reliance on absolute disparity to measure the underrepresentation of Hispanics
19 and Blacks from the jury pools was erroneous

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21 1. The Sixth Amendment to the U.S. Constitution guarantees criminal defendants an
22 impartial jury, and the Supreme Court has held that “an essential component” of this
23 guarantee is the “selection of a [trial] jury from a representative cross-section of the
24 community.” *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The Supreme Court
25 explained that “the broad representative character of the jury should be maintained,
26 partly as assurance of a diffused impartiality and partly because sharing in the
27 administration of justice is a phase of civic responsibility.” *Id.* at 530-31. The Supreme
28 Court also made it clear that not only must juries in criminal trials reflect a fair cross-
section of the community, but, so too, must civil juries and grand juries. *Id.*

1 2. The Supreme Court further explored the representative-cross-section guarantee a few
2 years after its decision in *Taylor*, in *Duren v. Missouri*, 439 U.S. 357 (1979), where it
3 provided a framework for determining whether a fair cross-section claim has been
4 established. The *Duren* framework requires the party making the fair-cross-section
5 challenge to satisfy each of three prongs in order to establish his or her prima facie case.
6 To make out the prima facie case, the party must show “[1] that the group alleged to be
7 excluded is a ‘distinctive’ group in the community; [2] that the representation of this
8 group in venires from which juries are selected is not fair and reasonable in relation to
9 the number of such persons in the community; and [3] that this underrepresentation is
10 due to the systematic exclusion of the group in the jury-selection process.” *Id.* Then, if
11 the prima facie case has been established, the burden shifts to the other party to prove
12 “that a significant state interest [is] manifestly and primarily advanced by those aspects
13 of the jury-selection process . . . that result in the disproportionate exclusion of a
14 distinctive group.” *Id.* at 367-68. *See, e.g., Berghuis v. Smith*, 559 U.S. 314 (2010).

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19 3. By Minute Entry of April 20, 2020, in *State v. Edward V. Martinez*, CR2017-150971-
20 001, the Superior Court's Presiding Criminal Judge had denied the defendants' 'Motion
21 Challenging Juror Selection Process', without allowing for any oral argument or
22 conducting any evidentiary hearing, and without permitting the participation of eleven
23 criminal defendants all represented by their privately retained attorney, Mr. Dave
24 Erlichman, Comeback Law P.C. 19. *See, Exhibit B.*

25
26
27 4. Three defendants represented by defense counsel, (Acord, Brooks and Hall) had been
28 granted partial consolidation in the *Martinez* jury challenge by Order of Judge John

1 Hannah of April 13, 2020. But the Presiding Criminal Judge was unaware of that
2 division's Order granting those defendants partial consolidation. The Presiding Criminal
3 Judge would then conclude that their status as participants in the *Martinez* jury challenge
4 did not require the three defendants to be heard from or allowed to appear in court on the
5 merits of that challenge. See, *Exhibit C*, Order of Hon. John Hannah, April 13, 2020 in
6 CR2019-005932-001. *Exhibits A & B*.

7
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9 5. As lead counsel in the *Martinez* murder case while employed as a deputy public
10 defender, defense counsel had initiated the jury challenge before being fired for doing
11 so. After returning to private practice, (and launching Comeback Law P.C.), defense
12 counsel moved to partially consolidate eleven privately retained felony clients' cases
13 with the *Martinez* jury challenge which was the first meaningful constitutional challenge
14 to the county's jury selection system in decades. Those motions would be all denied
15 without oral argument or hearing. *Exhibits A & B*.

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18 6. In her Minute Entry of April 20, 2020, (*Exhibit B*), the Presiding Criminal Judge
19 determined that the *Martinez* defendants had failed to prove that any statistically
20 significant underrepresentation of Blacks and Hispanics from the county's jury pool (as
21 determined by the defendants' expert witness, John R. Weeks Ph.D.) was unfair and
22 unreasonable in relation to the number of such persons in the community. In reaching its
23 conclusion (without permitting any oral argument or hearing), the Presiding Criminal
24 Judge relied exclusively upon "absolute disparity" as the sole means by which to
25 measure the fairness and reasonableness of any underrepresentation.
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1 7. The absolute disparity standard had been used over twenty-five years before by the
2 Arizona Court of Appeals in *State v. Sanderson*, 182 Ariz. 534, 538, (App. Div. 1995);
3 *rev. denied*, and over forty years before by the Arizona Supreme Court in *State v.*
4 *Gretzler*, 126 Ariz. 60, 77, 126 Ariz. 60 (1980).

6 8. But, by any standard of measurement, Maricopa County in 1980, and in 1995, was not
7 the diverse community it had become in 2020; times having changed dramatically with
8 respect to hundreds of thousands of Hispanics and Blacks having relocated to the county
9 from all over the country seeking a new start.

11 9. In *Sanderson*, the defendant had challenged the underrepresentation of Native
12 Americans in the jury selection system used in Apache County, in which the master jury
13 list at the time included just 1,000 names. *supra*, 182 Ariz. at 538. (In 1995, the county's
14 entire population was less than 70,000 persons).

16 10. In *Gretzler*, the defendant challenged the jury selection system used in Yavapai
17 County which in 1976, had an estimated population of just 50,700 persons, of which
18 87% were white. *supra*, 26 Ariz. 77 (1980).

20 11. By comparison, in 2017, the jury eligible population of Maricopa County consisted
21 of over 2,777,501 persons, with over 580,222 jury eligible Hispanics, and 146,098
22 Blacks. *Exhibit D, Declaration of John R. Weeks Ph.D. Exhibit E, CV of John R. Weeks*
23 *Ph.D.*

25 12. In his *Declaration*, Dr. Weeks had explained that disparity is typically measured by a
26 combination of absolute disparity, relative (or comparative disparity) and by the
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1 statistical significance of the disparity (sometimes called the "standard deviation test').

2 *Exhibit D. p. 6*

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4 13. In February 2019, Dr. Weeks, had been provided by Court Order with a list of the
5 surnames of 133,072 people who had been summoned to court during a three-month
6 period in August 2018, though October 2018, irrespective of whether they had appeared.

7
8 Dr. Weeks was also provided a demographic report showing the surnames of 27,277
9 petit jurors who had appeared for jury service. *Id.* pp. 3-4

10
11 14. In May 2019, Dr. Weeks received the Judicial Branch for Maricopa County's
12 "corrected" set of demographic data for 17,140 jurors who had appeared for jury duty
13 during that time-period. Dr. Weeks was informed that the original information provided
14 to him was incorrect and had included more than 10,000 duplicates with no clear
15 explanation provided for the serious error made. *Id.* pp. 3-5

16
17 15. Having analyzed jury questionnaires of prospective jurors for the months of August
18 2018 through October 2018, Dr. Weeks determined (using the measurement of relative
19 or comparative disparity) that Hispanics were 15% underrepresented in Maricopa
20 County's jury pool in 2018, and non-Hispanic Blacks were 25% underrepresented. *Id.*
21 pp. 6-9

22
23 16. As set forth in his *Declaration*, Dr. Weeks explained that in *Berghuis v. Smith*, 559
24 *U.S. 314 (2010)*, the U.S. Supreme Court had specifically declined to impose a particular
25 method or measure to address representativeness claims. *Id.* pp.5-6. Additionally, Dr.
26 Weeks cited the comment of the decision of the 9th Circuit Court of Appeals in *United*
27 *States v. Hernandez-Estrada*, 749 P.3d 1154, 1164 (9th Cir. 2014), in which the Court
28

1 recognized that imposing a particular test like absolute disparity where a minority group
2 is less than 7.7% of the population (as is the case of Blacks in Maricopa County) would
3 act to undermine any fair cross section challenge related to that population. *Id.* p. 6.

4
5 17. In his *Declaration*, **Dr. Weeks concluded that there exists a disproportionately**
6 **large and statistically significant underrepresentation of Hispanics and Blacks in**
7 **the pool of jurors in Maricopa County. He stated that there "is a very real threat of**
8 **the disparity worsening over time because of the fact that each successive younger**
9 **age group in Maricopa County has a higher fraction of the population that is**
10 **Hispanic."** [emphasis by boldface]. *Id.* pp.15-16

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13 18. According to Dr. Weeks; " among the current jury eligible population, only 10% of
14 the population aged 60 and older is Hispanic, but 38% of the jury-eligible population
15 under age 25 is Hispanic. If the disparities are not remedied soon, the issue will become
16 progressively more serious." *Id.* pp.15-16.

17
18 19. In his *Declaration*, Dr. Weeks (having reviewed the depositions taken in *Martinez* of
19 county jury officials) expressed his opinion on the lack of technical knowledge and
20 competency of the jury officials, and suggested remedies involving revisions to the way
21 the jury master list is created and using an oversampling of prospective jurors living in
22 zip codes with a high percentage of Hispanics and Blacks. *Id.* p. 11.

23
24 20. In *Hernandez-Estrada*, the Ninth Circuit wrote as follows: "[i]t is appropriate to
25 abandon the absolute disparity approach for determining whether a jury selection
26 process passes constitutional muster under the fair cross-section requirement.

27
28 Accordingly, the Ninth Circuit overrules the requirement, as set forth in *Rodriguez-Lara*,

1 421 F.3d 932, 943 (9th Cir. 2005) and its predecessor cases, that the absolute disparity
2 test be the exclusive analytical measure employed in fair cross-section challenges." *Id.*

3
4 21. In *Hernandez-Estrada*, the Court further wrote that:

5 "[t]he United States Supreme Court has declined to specify the method or test
6 courts must use to measure the representation of distinctive groups in jury pools. The
7 Ninth Circuit follows its lead and also declines to confine district courts to a particular
8 analytical method. The appropriate test or tests to employ will largely depend on the
9 particular circumstances of each case. Instead, courts may use one or more of a variety
10 of statistical methods to respond to the evidence presented. Allowing courts and
11 defendants to use a more robust set of analytical tools will ensure more accurate, and
12 narrowly tailored, responses to individual *Duren* challenges, which an appellate court
13 can then assess on a fully developed record specific to the circumstances presented. The
14 challenging party must establish not only statistical significance, but also legal
15 significance. The results of any statistical method must be examined in the context of the
likely, actual, real life impact on the jury pool at issue. The court looks to people not
percentages. In other words, if a statistical analysis shows underrepresentation, but the
underrepresentation does not substantially affect the representation of the group in the
actual jury pool, then the underrepresentation does not have legal significance in the fair
cross-section context. *Id.* ¶ 22.

16 22. As further stated in the *Hernandez- Estrada decision*," (which was cited in Dr.
17 Weeks' *Declaration* but disregarded by the Presiding Criminal Judge): "[t]he Ninth
18 **Circuit overrules its prior precedent which required courts to analyze challenges**
19 **exclusively by the use of the absolute disparity test. Rather, in determining whether**
20 **the defendant has satisfied the burden of establishing a prima facie case, courts**
21 **must consider the evidence proffered by the defendant, including expert testimony,**
22 **and employ the most appropriate method, or methods, applicable to the specific**
23 **challenge in the context of the particular jury pool at issue."** [emphasis by boldface
24 added] *Id.* 749 F.3d 1154, 1164 (9th Cir. 2014).
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1 II. The Presiding Criminal Judge's reliance on absolute disparity despite being cited to
2 the decision of the Ninth Circuit Court of Appeals in *Hernandez-Estrada*, and refusal to
3 allow for the participation of eleven felony defendants and their attorney from joining
4 the legal challenge to the county's jury selection system, was factually consistent with
5 the county's lengthy historical record of advancing and perpetuating systemic racism as a
6 matter of public policy and includes its deliberate lack of transparency in demonstrating
7 compliance with the mandatory requirements of the law pertaining to the
8 representativeness and inclusiveness of the jury selection system.

9 23. Arizona has a lengthy history with respect to the exclusion of distinctive groups
10 from the county and from the county's voting and juror lists. Prior to 1965, Arizona had
11 required English literacy for voting and jury duty. See, *Katie Krejci, Jury Pool Racial*
12 *and Ethnic Disparities Have Roots in Arizona's Jim Crow Laws*, For the Defense, p. 6
13 (July 2020). In the Voting Rights Act of 1965, Congress found that literacy tests had
14 been used to discriminate against voters based on race and ethnicity, and it temporarily
15 prohibited the use of literacy tests in all elections for five years. The Supreme Court
16 upheld this requirement in *Oregon v. Mitchell*, 400 U.S. 112, 1178, (1970). Arizona was
17 one of the parties in the *Oregon* case, and in response to the Supreme Court's decision in
18 *Oregon*, suspended its conflicting laws. *Krejci, supra*, at 6.

19 24. A.R.S. 21-201 provides that every juror, grand and trial, is required to be an elector,
20 but prior to 1993, non-English speakers were expressly excluded as electors. A.R.S. 16-
21 101.
22

23 25. The Supreme Court of Arizona had embraced the English-only requirement for
24 voting and for serving as a juror. *State v. Cordova*, 109 Ariz. 109 Ariz. 439, 441, 511
25 P.2d 621 (1973) ("the ability to read and write the English language has a vital relation
26 to the performance of the duties of a Grand Juror.)
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1 26. In 2003, the Legislature made the inability to speak English as a basis to excuse a
2 potential juror. *Krejci, supra* at 6, A.R.S. § 21-202 (B) (3). The Judicial Branch for
3 Maricopa County then resumed prescreening and excluding jurors for English language
4 abilities and continued doing so until 2017. *Krejci, supra* at 7.

6 27. In 2001, the Chief Justice of the Arizona Supreme Court had issued an
7 administrative order (No. 2001-69) creating a Committee to Study Jury Practices and
8 Procedures. The Committee issued its Report the following year. See, Final Report and
9 Recommendations of the Committee to Study Jury Practices and Procedures (2002).
10 *Exhibit F*. The Report recognized that "[o]ne of the biggest issues currently facing many
11 jury management offices statewide is getting adequate minority representation in the
12 jury pool." *Id.* p. 3. The proposal drafted by the Committee and adopted by the Supreme
13 Court included the requirement that:
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17 "The master jury list shall be as representative and as inclusive of the eligible
18 adult population in the jurisdiction as possible. The court should review and update the
19 master jury list periodically. A master jury list is representative of the population to the
20 extent the percentages of cognizable group membership in the list equals the
21 corresponding percentages in the population. A master jury list is inclusive of the
22 population to the extent it includes all eligible members of the entire population in the
23 jurisdiction."

24 *See, Id.*, App. C, § (B) (2) (a); Supreme Court Administrative Order 2003-34, ACJA § 5-
25 203 (B) (2) (a).

26 28. In 2007, the Arizona Supreme Court acting essentially in secret (without any debate
27 by the Arizona Judicial Council of the pertinent text to be deleted) demonstrated its bias
28 and indifference to the constitutional rights of Blacks and Hispanics and other
minorities, by deleting all of the previously enacted "fair cross section of the

1 community" language from Section 5-203 (as amended by Administrative Order 2007-
2 105, effective Jan. 1, 2008). The Court's action would delete the entire work of its own
3 'Committee to Study Jury Practices and Procedures', and renders the Supreme Court a
4 major actor in having perpetuated systemic racism in the state for decades.
5

6 29. The "fair cross section" of the community language had been inspired by the actions
7 of attorney Ruth Bader Ginsberg in the landmark case of *Duren v. Missouri*, 439 U.S.
8 357 (1979), and had been enacted upon the specific recommendations of the Supreme
9 Court's 'Committee to Study Jury Practices and Procedures'.
10

11 30. Consistent with the deep-rooted belief (then existing) that English should be the
12 exclusive language of the Court, the same Committee to Study Jury Practices and
13 Procedures, had recommended implementing a policy of excluding all non-English
14 speakers from the master jury list and excusing them from their civic duty of jury
15 service, on account of the belief that such people would only be excused by reason of
16 their financial hardship. ("The committee also discussed the possibility of adding other
17 lists such as welfare rolls, unemployment compensation or Arizona Health Care Cost
18 Containment System (AHCCCS) customers. Members agreed while these lists may add
19 a small increase, individuals on these lists typically will be excused for financial
20 hardship. The committee decided not to recommend that these lists be added to the
21 current jury source lists.") *See, Exhibit F*, p. 4.
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23 31. In 2019, the Judicial Branch for Maricopa County's Jury Administrator, Nicole
24 Garcia conceded that prior to her deposition in 2017, her Jury Office would excuse non-
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1 English speakers from having to serve on the jury. *See, Exhibit G, Deposition of Nicole*
2 *Garcia, Aug. 12, 2019 pp. 34-35*

3
4 32. The timing of the unilateral action by the Supreme Court in 2007, of eliminating all
5 of the fair cross section protection language from the ACJA, coincided with the
6 discriminatory public policy of Sheriff Joe Arpaio to keep Maricopa County and its
7 juries predominately white, by "rounding up" undocumented Hispanics for the purpose
8 of deporting them and keeping them off the voting rolls and master jury list.
9

10 III. The county's jury officials have abused the exclusive authority granted to them by
11 the Arizona Supreme Court by conducting their administration of the jury selection
12 system in secrecy, without any structured managerial controls, and without public
13 accountability or transparency of their actions; as evidenced by their intransigent refusal
14 to demonstrate their commitment to transparency (as a matter of public policy) and to
15 the representativeness and inclusiveness of the jury pool by complying with the
16 mandatory requirements of Section 5-203 (J) (3), ACJA, with the publishing of an
17 Annual Report of the demographic (racial and ethnic) statistics of the jury system

18 33. As evidenced by the replacement of the word "shall" for the word "may" in the text
19 of Section 5-203 (J) (3), ACJA, 'Monitoring the Jury System' (as amended by
20 Administrative Order 2007-105, effective January 1, 2008), the requirement for the
21 Superior Court to periodically review and analyze the master jury list to ensure its
22 representativeness and inclusiveness is mandatory.

23 34. Since 2003, the Judicial Branch for Maricopa County has failed to demonstrate its
24 compliance with Section 5-203 (J) (3) by publishing any 'Annual Statistical Report' (as it
25 did in 2003) and thereby report to the public the racial and ethnic breakdown of its jury
26 selection system in a transparent and accountable manner. The Judicial Branch for
27 Maricopa County's failure to publish its annual demographic statistics for its jury
28

1 selection system, raises a reasonable inference of the discriminatory intent of county jury
2 officials to conceal from the public evidence of the statistically significant
3 underrepresentation of Blacks and Hispanics from the county's jury pools.
4

5 35. With the explosive increase of Blacks and Hispanics moving to the Valley from all
6 over the country, the rapidly increasing statistical disparity of the jury pools will only get
7 more significant for Black and Hispanic residents of Maricopa County. *See, Exhibit D,*
8 *Declaration of John Weeks Ph.D.* pp. 15-16.
9

10 36. In the Court's Minute Entry of April 20, 2020 the Presiding Criminal Judge indicated
11 that the testimony of Nicole Garcia at her Deposition of August 12, 2019 showed that
12 the Court "had taken steps to comply with Section 5-203, including calculating
13 disparities, and running reports several times to examine juror demographics", *Exhibit B,*
14 *citing Exhibit G.* Transcript, pp. 38-46
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17 37. But, Ms. Garcia's testimony at her Deposition in 2019 does not provide any obvious
18 support for the Court's conclusion (which ruling was made without conducting oral
19 argument or conducting an evidentiary hearing). Instead, Ms. Garcia's entirely haphazard
20 approach to monitoring the jury system for representativeness and inclusiveness (as set
21 forth below) raises serious questions that needed to be addressed at an evidentiary
22 hearing.
23

24 38. At her Deposition in 2019, when asked how often she generates reports of juror
25 demographics Ms. Garcia replied; " There's not necessarily like a timetable of when its
26 done." *Exhibit G.* p. 38
27
28

1 39. When asked at her Deposition in 2019, how often such demographic reports are
2 created, Ms. Garcia stated " Since I became the administrator, I would say at least three
3 times. But Ms. Garcia conceded there was "no schedule" for her to do so. *Exhibit G. Id.*

4 40. Ms. Garcia further estimated (upon prompting) that she may have created such
5 demographic reports between three to seven times. *Exhibit G p. 39.*

6 41. Ms. Garcia testified that under Arizona case-law a problematic issue of
7 representativeness would occur with an absolute disparity of 11% or greater, and a
8 relative or comparative disparity of 40%. "If it was heading in the direction or
9 approaching 40%, I would certainly raise, or you know, consider that it's time to start
10 taking some action. *Exhibit G, pp. 40-42.*

11 42. Ms. Garcia testified that she had only calculated the absolute and relative disparity
12 once as a jury administrator. She was also unable to explain how she would go about
13 calculating relative disparity. *Exhibit G. p. 42*

14 43. Ms. Garcia conceded that there exists no policy document which lays out a test for
15 her to analyze, or to trigger any independent review or other action. *Exhibit G. p. 43.*

16 44. Ms. Garcia testified that "If I saw a number that was headed in my direction, or I'm
17 sorry in the direction of being, you know, close to exceeding or close to approaching the
18 disparity, I would elevate it to my superior. I would bring it to the jury advisory
19 committee." *Exhibit G, p. 43.*

20 45. When asked if a relative disparity of 15% would be a problem that would cause her
21 to elevate it to her superiors, Ms. Garcia answered, "No I wouldn't say so." *Exhibit G,*
22 *pp.44-45.*

1 46. Ms. Garcia testified that in 2014, an expert, Paula Hannaford-Agor, had been
2 retained to assist in assessing the demographics of the county's jury selection system, but
3 she was unaware of any report having been prepared, and had only heard about Ms.
4 Hannaford-Agor's assignment from what she had been told by a predecessor. *Exhibit G*
5 pp. 46-48. (No such Report was disclosed to the defendants in the *Martinez* jury
6 challenge and that Report is now being specifically requested).
7

8
9 47. Ms. Garcia testified that her office does not prepare any annual report of the racial
10 and ethnic demographics of the jury system. *Exhibit G*, pp. 67-68.
11

12 48. Ms. Garcia testified that she does keep written reports of the demographic reports
13 which she has prepared as jury administrator. (These reports are the subject of
14 Defendant's disclosure request) *Exhibit G*, p. 68.
15

16 49. With respect to a significant error made by her office in reporting the demographic
17 statistics from the three- month period in 2018 to Dr. Weeks, (the jury officials had
18 double-counted over 10,000 names) Ms. Garcia testified that "I believe it was an
19 oversight in not putting a strict enough parameter on the --when the court technology
20 services ran the query." *Exhibit G*. p 77. *Exhibit D*, pp.3-4
21

22 50. Ms. Garcia testified that she did not know whether the county Agile Jury jury
23 management software had the capability of automatically preparing demographic
24 reports. *Exhibit G*, p. 81.
25

26 IV. When ordered to do so, county jury officials couldn't accurately compile
27 demographic statistical summaries from their stand-alone software program used to
28 create reports called "Crystal Reports", which software is not a part of the Supreme
Court's approved 'Agile Jury' software management software but which the county

1 officials have chosen to utilize consistent with their deliberate policy decision not to
2 publish any Annual Statistical Report for the jury system since 2003

3 51. Further evidence of the county jury officials' haphazard (at best) approach to comply
4 with the mandatory requirements of Section 5-203 (J) (3), ACJA is shown by the
5 Judicial Branch for Maricopa County's use of its "Crystal Reports" software program.
6

7 52. The Presiding Criminal Judge had asserted in her Minute Entry of April 20, 2020 in
8 *Martinez*, that the county was using the jury management software program approved by
9 the Arizona Supreme Court. *Exhibit B*.
10

11 53. But the "Crystal Reports" software program used by the county to generate reports,
12 is a stand-alone software program obtained by the county by a different vendor than the
13 Supreme Court's approved jury management software "(Agile-Jury)" which has been
14 used by the county since 2001. *Exhibit H*, Deposition of Andrei Rojdestvenski, August
15 7, 2019, pp. 18-24
16

17 54. The "Crystal Reports" software program is used by the county's jury officials to
18 produce statistical demographic (racial and ethnic) reports but requires that software to
19 connect through a Microsoft SQL server to the data source of Agile Jury tables. *Id.* p. 20
20

21 55. The "Crystal Reports" software program requires the county jury officials to create
22 manual requests to produce such reports by connecting through SQL management tools
23 to the SQL server test database, and then enter search requests in the SQL language. *Id.*
24 pp. 21-24. *Exhibit G* pp. 73-75.
25

26 56. As the county jury officials are forced to create manual searches through the "Crystal
27 Reports" program to access the Agile Jury tables (and to prepare any demographic
28

1 statistical report of the jury selection system) errors can occur. *Id.*, p. 23. From the
2 perspective of Black and Hispanic and minority criminal defendants, such errors raise
3 serious structural issues pertaining to why automatic reporting features available in the
4 Agile-Jury software since 2001, have not been utilized, but apparently were utilized in
5 2003 (evidenced by that year's Annual Statistical Report); and whether that policy
6 decision evidences the continuing bias and systemic racism of the county's jury selection
7 system.
8

9
10 57. Upon reporting the demographic statistics of the 2018 disclosure to Dr. Weeks
11 Ph.D., the county jury officials made a significant computation error, allegedly double-
12 counting prospective jurors, after Dr. Weeks had made his statistical analysis of the
13 racial and ethnic break-down of the jury pools. The significant error (which reduced Dr.
14 Weeks' comparative disparity finding for Hispanics from 17% to 15%) was likely
15 committed by the jury officials own lack of experience producing such statistical
16 demographic reports, and or by their having to make manual entries and searches rather
17 than receiving automatic summaries prepared by automatic reporting features. *Exhibit D*,
18 pp. 3-46. As stated by Dr. Weeks in his Declaration, "it was not clear how this
19 happened." *Id.*
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21
22

23 Argument:

24
25 The Sixth and Fourteenth Amendments of the U.S. Constitution guarantee a
26 criminal defendant the right to be tried by an "impartial jury drawn from sources
27 reflecting a fair cross section of the community. *Berghuis v. Smith*, 559 U.S. 314, 319
28 (2010). This requires that the county's master jury list, from which juries are drawn

1 "must not systematically exclude distinctive groups in the community and thereby fail to
2 be reasonably representative thereof". *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979).

3
4 The standard for a Sixth Amendment fair cross section claim was established in
5 *Duren*, and reaffirmed in *Berghuis v. Smith* 559 U.S. 314, 319 (2010). A criminal
6 defendant has essentially an unqualified right to inspect all jury selection materials
7 relevant to a determination of whether a grand or petit jury has in fact been selected at
8 random from a fair cross section of the community. *Test v. United States*, 420 U.S. 28,
9 30, 42 L.Ed. 2d 786, 95 S.Ct. 749, (1975), (per curium) *United States v. Armstrong* 621
10 F. 2nd 951, 955 (9th Cir. 1980), *United State v. Studley*, 783 F.2d 934, 938 (9th Cir.
11 1986), *United States v. Bogard*, 846 F.2d 563, 1988 (9th Cir. 1988). The unqualified
12 nature of a criminal defendant's discovery right means that a court may not premise the
13 grant or denial of a motion to inspect upon a showing of probable success on the merits
14 of a challenge to the jury selection procedures. *U.S. v. Royal*, 100 F.3d 1019, 1025 (1st
15 Cir. 1996.).

16
17 Rule 15.1 (g), Ariz. R. Crim P. is the appropriate vehicle by which a criminal
18 defendant has to exercise the subpoena power of the Court to obtain necessary and
19 mandatory discovery. On the filing of a motion, a court may order any person (including
20 the Judicial Branch for Maricopa County) to make available to the Defendant, material
21 and information not included in Rule 15.1 if the court finds: a) the defendant has a
22 substantial need for the material or information to prepare his case, and b) the defendant
23 cannot obtain the substantial equivalent by other means without undue hardship.
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26
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1 As set forth above, Defendant has a substantial need for the requested discovery
2 to raise a fair cross section of the community constitutional challenge. The United States
3 Supreme Court has recognized this right of discovery: "[w]ithout inspection, a party
4 almost invariably would be unable to determine whether he has a potentially meritorious
5 jury challenge. *Test v. United States*, 420 U.S. at 30. ("The right to challenge the jury is
6 empty without an attendant right to discovery, because it would be virtually impossible
7 for defendants who are endeavoring to ascertain if a successful attack on the grand or
8 petit jury selection process can be advanced if the facts necessary to prove a defect in the
9 selection process are withheld." *Id.*

13 Responding to the assertion that the Judicial Branch for Maricopa County has for
14 decades, been willfully non-compliant with the mandatory requirements of Section 5-
15 203, ACJA, the Presiding Criminal Judge avowed in her Minute Entry of April 20, 2020
16 that the Jury Office "had taken steps to comply with Section 5-203, including calculating
17 disparities, and running reports several times to examine juror demographics." But a
18 review of the Deposition transcript of Ms. Nicole Garcia's reveals virtually little to no
19 support (beyond the entirely sporadic and haphazard steps described at her Deposition)
20 for the Court to have reached its conclusory opinion on such a fundamental and critical
21 responsibility of the Court. In fact, from the perspective of a Black or Hispanic
22 Defendant, Ms. Garcia's testimony is alarming, especially her belief that a 40%
23 underrepresentation of Blacks or Hispanics from the county's jury pools would only be
24 deemed to be approaching some level of concern. *Exhibit G*, pp. 40-42

1 In determining whether there is in 2021, good cause to initiate a new jury
2 challenge, (with a discovery request of no less than 6 months of jury questionnaires),
3 Defendant has a substantial need to verify that the Court is compliant with its obligations
4 as it claims to be. Only after such discovery is granted will Defendant be able to make
5 an informed decision as to whether to launch such a new jury challenge. Based on the
6 testimony of Ms. Garcia at her Deposition, Defendant is not persuaded that the Court is
7 in compliance with Section 5-203 (J) (3).
8

10 With a dramatic increase of Blacks and Hispanics flocking to Arizona from all
11 over the country in search of the American Dream, it is imperative that the Judicial
12 Branch of Arizona for Maricopa County now demonstrate its genuine commitment to
13 ending systemic racism in its jury selection system. The testimony of Ms. Garcia at her
14 Deposition that an underrepresentation of 40% would only begin to cause a concern for
15 her office, would truly concern any resident of the county, especially Blacks and
16 Hispanics. Such a "mind-set" demonstrates quite convincingly that the county's jury
17 selection system continues to suffer from systemic racism, with no end in sight.
18
19

21 The Court would deny eleven criminal defendants (represented by the same
22 privately retained and non-publicly funded attorney) the right to a hearing, and the right
23 to be heard in court (pre-Covid 19) to contend that the Court's reliance on absolute
24 disparity as the measurement of underrepresentation was wrong. The Court had entirely
25 disregarded the pertinent opinions of Dr. Weeks, with respect to the Court's incorrect
26 reliance on absolute disparity as a measurement of underrepresentation. The Court
27 would also disregard the decision of the Ninth Circuit in United States v. Hernandez-
28

1 Estrada, 749 P.3d 1154, 1164 (9th Cir. 2014), which concluded that absolute disparity
2 was not the only appropriate measurement of underrepresentation.
3

4 The action in 2007, of the Arizona Supreme Court gutting like a fish (without any
5 debate by the Arizona Judicial Council) all of the Sixth Amendment fair cross section
6 guarantee language from Section 5-203 ACJA (which language had been specifically
7 recommended and approved by its own Committee to Study Jury Practices and
8 Procedures) renders the Arizona Supreme Court an active and major historical player in
9 perpetuating systemic racism in the state. Any effort by the Arizona Supreme Court and
10 the State Bar of Arizona to honor the memory of Ruth Bader Ginsberg should begin with
11 a review of the Court's action in 2007, and by insisting on the deleted language being
12 replaced without delay.
13
14

15 A factual inference to be reasonably drawn from the Presiding Criminal Judge's
16 refusal to allow for oral argument in the *Martinez* jury challenge, and for defense
17 counsel to appear and be heard (on behalf of his eleven felony defendants), is that a
18 record would have been made showing why the Court's use of absolute disparity was
19 wrong, and why using that measurement in the year 2021 was indicative of the Court's
20 decades-old bias and systemic racism.
21
22

23 An additional factual inference to be reasonably drawn of discriminatory intent,
24 bias, and systemic racism, is shown by the Judicial Branch for Maricopa County's
25 inexplicable failure to demonstrate transparency and accountability of its supervision of
26 the jury selection system by publishing any Annual Demographic Statistical Report
27 since 2003. The evidence shows that the Judicial Branch for Maricopa County has been
28

1 unwilling since 2003, to utilize the automatic reporting features available as an "add-on"
2 to its "Agile Jury" jury management software (which is the jury management software
3 program approved by the Supreme Court). Instead, the Judicial Branch for Maricopa
4 County uses a "stand alone" software program ("Crystal Reports") that is sold by another
5 vendor and which requires county jury officials to generate demographic reports
6 manually by connecting to its own AgileJury tables through a Microsoft server which
7 increases the risk of human error. *Exhibit H*, pp. 18-24

10 In fact, in responding to a Court Order to produce jury questionnaires for a three-
11 month period in 2018, (as part of the *Martinez* jury challenge), the use of the "Crystal
12 Reports" software led county jury officials to make a significant computation error,
13 allegedly double-counting 10,000 prospective jurors. *Exhibit D*, pp.3-4. The error was
14 only discovered after Dr. Weeks had made his statistical analysis of the racial and ethnic
15 break-down of the jury pools. The significant error had forced Dr. Weeks to reduce his
16 comparative disparity finding for Hispanics from 17% to 15%.

19 It is a fair and reasonable inference to be made from the facts, that the error was
20 the result of the jury officials' own lack of experience producing such statistical
21 demographic reports, and or, by their having to make manual entries and searches in the
22 Crystal Reports program, rather than receiving automatic reports and summaries
23 prepared directly by the AgileJury software. A fair conclusion to be drawn from the use
24 of the "Crystal Reports" software instead of the readily available "Agile Jury" reporting
25 features, is that the Judicial Branch for Maricopa County has been administering an
26 intentional policy decision not to publish its demographic statistics each year to conceal
27
28

1 from public scrutiny the unfair and unreasonable underrepresentation of Blacks and
2 Hispanics from its juries.

3
4 Dr. Weeks is one of the nation's most respected population studies experts. (See,
5 *Exhibit D & E.*) He had concluded that there exists a significantly significant
6 underrepresentation of Hispanics and Blacks from the county's jury pools and the
7 disparity will become progressively more serious over time as only 10% of the county's
8 current jury eligible population 60 or older is Hispanic but 38% of the jury eligible
9 population under age 25 is Hispanic. *Id.*, pp. 15-16. Accordingly, the Judicial Branch for
10 Maricopa County which chose to disregard the opinions of Dr. Weeks has an affirmative
11 obligation to fix its jury selection system now. It can start that process by disclosing to
12 this criminal defendant documentation showing the specific steps it has taken, and the
13 reports it has prepared since January 1, 2019 (as well as the Report in 2014 of Ms. Paula
14 Paula Hannaford-Agor, and the Minutes of its Jury Advisory Committee) to correct the
15 structural deficiencies in the jury selection process which led to Dr. Weeks' finding of a
16 statistically significant underrepresentation of Blacks and Hispanics from the jury list.

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21 Conclusion

22 In the Presiding Criminal Judge's Minute Entry it was indicated that the Jury
23 Office has taken steps to comply with Section 5-203 "including calculating disparities
24 and running reports several times to examine juror demographics". But, a review of the
25 the transcript of the Deposition of Ms. Nicole Garcia, demonstrates that the Court's
26 conclusions about its own non-compliance with the law are not supported by that
27 testimony. In order to promote transparency and accountability of our public officials,
28

1 Defendant requests disclosure of those calculations, and reports (together with the other
2 requests) in order to confirm the Court's compliance with the law and efforts to fix its
3 broken jury selection system. Defendant is a criminal defendant with essentially an
4 unqualified Sixth Amendment right to insist on such disclosures being made. In the
5 event these disclosures are not made by the Court, Defendant reserves all rights to
6 initiate a new jury challenge in which (after getting the county to authorize the
7 appointment of Dr. Weeks as an expert witness) he will request the disclosure by the
8 Judicial Branch for Maricopa County to Dr. Weeks of a six- month sampling of jury
9 questionnaires from January 1, 2019 to June 30, 2019. If any such motion is filed, it is
10 entirely probable that more than twenty-two (22) major felony defendants (all privately
11 represented by defense counsel) with cases pending before the Court, will initially be
12 seeking to join that jury challenge. Separately, all of those defendants will now be filing
13 this motion with their respective divisions as soon as possible.

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17
18 DATED: April 5, 2021

19
20 Respectfully submitted,

21 /s/ _____
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