Fair Cross Section

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Yesterday, the United States Supreme Court decided *Berghuis v. Smith*, a case in which the defendant claimed that the pool from which his jury was selected was not a fair cross section of the community. In my experience, it is not uncommon for a defendant, particularly a minority defendant, to look at the jury pool and say something like "I thought I was supposed to have a jury of my peers!" Since the issue comes up reasonably often, it's worth taking a look at the basic doctrine, which is as follows:

1. The Sixth Amendment guarantees the right to trial by jury.

2. "[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522 (1975).

3. If a defendant can show that a "distinctive" group is significantly underrepresented in a jury pool as a result of "systematic exclusion," he has made a prima facie case that his fair cross section rights have been violated. *Duren v. Missouri*, 439 U.S. 357 (1979).

4. Such a defendant is entitled to relief -- the exact nature of which may depend on the stage of the case -- unless the state can show that the discrepancy is the result of eligibility requirements or exemptions from service that "manifestly and primarily advance[]" a "a significant state interest." *Id.*

Remember, all of this has to do with the jury pool, not with the selection of the jurors from the pool. Claims of discrimination in that process are addressed under the framework established in *Batson v. Kentucky*, 476 U.S. 79 (1986).

Let's look at how this doctrine applied in *Smith.* The defendant was an African-American man charged with murder. Between 60 and 100 prospective jurors appeared for jury selection. "[A]t most, three venire members were African-American." The defendant objected to the venire, but his objection was overruled. The defendant was convicted, and appealed. The state intermediate appellate court ordered the trial court to conduct an evidentiary hearing on the fair cross section issue.

At the hearing, the evidence showed that prospective jurors were assigned to local misdemeanor courts first, and only once those courts' needs were met were any remaining prospective jurors assigned to the county-wide felony court in which the defendant was tried. Shortly after the defendant's trial, this system was changed because court officials believed that the local misdemeanor courts "swallowed up" most of the minority jurors, leaving few for the county-wide felony court.

The statistical evidence showed that blacks were 7.28% of the local jury-eligible population, and 6% of the jury pool at the county-wide felony court over the six months leading up to Smith's trial. The "absolute disparity" was therefore 1.28%, while in relative terms, blacks were 18% underrepresented. (7.28% - 6% = 1.28%, and 1.28/7.28 = 18%.) This 18% underrepresentation shrank to 15% after the system for assigning prospective jurors was changed.

The trial court, the state intermediate appellate court, and the state supreme court disagreed over how the disparity should be measured (in absolute terms, relative terms, or otherwise); whether it was significant; and whether it was the result of systematic exclusion. The state supreme court ruled in the state's favor, and Smith sought federal habeas review. The federal district court denied relief, but the Sixth Circuit reversed finding sufficient evidence of systematic exclusion. The Supreme Court reversed again. (As an aside, this is the third time this Term that the Court has reversed a Sixth Circuit decision granting habeas relief. Two more cases are pending, as noted here. I haven't seen a statistical analysis, but I suspect that the Sixth Circuit is the second-most-reversed federal court of appeals.)

The Court declined to adopt a single test for disparity, describing each of the several statistical techniques used by the parties as "imperfect." Nor did it establish a clear threshold for when a disparity is significant enough to raise fair cross section concerns. Instead, it found that the Sixth Circuit erred, under the deferential standard of review mandated by the Antiterrorism and Effective Death Penalty Act, in finding that any underrepresentation was the result of systematic exclusion. It found that Smith's best explanation for how blacks were systematically excluded from his jury pool -- through the system of assigning prospective jurors to local misdemeanor courts first -- was unpersuasive in light of the nominal change in the underrepresentation of blacks when the system was abandoned. Smith also argued that systematic exclusion resulted from practices such as "excusing people who merely alleged hardship or simply failed to show up for jury service, . . . rel[ying] on mail notices, . . . fail[ing] to follow up on nonresponses, . . . us[ing] . . . residential addresses at least 15 months old, and . . . refus[ing] . . . to enforce court orders for the appearance of prospective jurors," but the Court rejected this as unsupported speculation.

Justice Thomas concurred, suggesting that there is no fair cross section requirement in the Sixth Amendment, which was adopted at a time when many states forbade women, those who did not own property, and other groups, from serving on juries. (Maryland apparently didn't permit atheists to serve.)

The Supreme Court has long emphasized that the fair cross section requirement must be applied in a flexible way that accommodates local practices. In the wake of *Smith*, federal courts will probably be even more reluctant to find fair cross section violations. Except in extreme cases, state courts may be no more receptive to such claims. Certainly, fair cross section claims don't appear to have had a great history of success in the North Carolina courts. *See*, *e.g.*, *State v. Williams*, 355 N.C. 501 (2002) (12% disparity insufficient to establish significant underrepresentation, and discussing cases in which even greater disparities were not enough; also noting lack of evidence of systematic exclusion). So when a defendant says "that's not a jury of my peers," the constitutional answer, in most cases, is "yes, it is."