

2021

The Continuing and Unlawful Exclusion of Qualified Ex-Offenders from Jury Service in Ohio

Jordan Berman

Follow this and additional works at: <https://ideaexchange.uakron.edu/akronlawreview>



Part of the [Criminal Law Commons](#)

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Recommended Citation

Berman, Jordan (2021) "The Continuing and Unlawful Exclusion of Qualified Ex-Offenders from Jury Service in Ohio," *Akron Law Review*. Vol. 54 : Iss. 2 , Article 2.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol54/iss2/2>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.

**THE CONTINUING AND UNLAWFUL EXCLUSION OF
QUALIFIED EX-OFFENDERS FROM JURY SERVICE IN
OHIO**

Jordan Berman *

I.	Introduction	238
II.	Current law in Ohio regarding juror eligibility.....	239
III.	How Courts Are Implementing The Law.....	243
	A. Cuyahoga County’s jury selection process.....	244
	B. Hamilton County’s jury selection process.....	248
	C. Franklin County’s jury selection process.....	250
IV.	Constitutional implications of the improper exclusion of jury-eligible persons with a felony conviction	251
	A. Fair Cross Section under the Sixth and Fourteenth Amendments.....	252
	1. People who have been convicted of felonies and African-American men are distinct groups in the community.....	254
	2. Whether the number of those with felony convictions and African-American men on the juries was fair and reasonable in relation to their number in the community.....	257
	3. Whether the exclusion of those with felony convictions and underrepresentation of African- American men was systematic.....	259
	B. Fourteenth Amendment Equal Protection.....	260
V.	Strategies to improve juror underrepresentation.....	262
	A. Courts and court officers.....	262
	B. Persons with felony convictions.....	264
	C. Attorney education on jury eligibility.....	265
VI.	Conclusion.....	266

* Assistant Federal Public Defender, Capital Habeas Unit, Federal Public Defender of the Southern District of Ohio. Thank you to Lisa Lagos, Assistant Federal Public Defender, for her editorial assistance and her work on this subject.

I. INTRODUCTION

Whether an Ohioan with a felony conviction can be considered for jury service may well depend on where he or she lives in the state or the judge presiding at trial, rather than the dictates of Ohio law. By statute, Ohio permits those with felony convictions to serve on juries upon the completion of any parole or community control sanctions that may have been imposed.¹ This article is not concerned with this settled law but rather the dramatic unevenness of its implementation, as Ohio courts of common pleas, and even individual judges, vary widely in whether they abide by or even recognize this statutory directive. For example, the Cuyahoga County Court of Common Pleas systematically excluded any individual with a felony conviction from jury service for over 20 years, ending only in 2020.² The Hamilton County Court of Common Pleas seems to accurately promote the state law in its Local Rules, but it is unclear the extent to which individual judges or attorneys understand that directive.³ The Franklin County Court of Common Pleas, by contrast, currently provides either vague or clear misstatements of the law in its website and Local Rules.⁴

Part II of this article clarifies the current state of the law in Ohio regarding juror eligibility for those with felony convictions. Part III examines juror selection in the courts of common pleas in Ohio's three largest counties, mentioned above—Cuyahoga (Cleveland), Hamilton (Cincinnati), and Franklin (Columbus)—and their disparate approaches to this issue. Part IV discusses the legal implications of excluding jurors with felony convictions, not only as a violation of Ohio law, but also as a violation of the Sixth Amendment right to a jury from a fair cross section of the community and the Fourteenth Amendment rights to due process and equal protection. Part V offers practical solutions that courts, the Adult Parole Authority, and others can implement to address these

1. OHIO REV. CODE ANN. § 2967.16(C)(1) (West 2020) (“Except as provided in division (C)(2) of this section, the following prisoners or person shall be restored to the rights and privileges forfeited by a conviction: (a) A prisoner who has served the entire prison term that comprises or is part of the prisoner’s sentence and has not been placed under any post-release control sanctions; (b) A prisoner who has been granted a final release or termination of post-release control by the adult parole authority pursuant to division (A) or (B) of this section; (c) A person who has completed the period of a community control sanction or combination of community control sanctions, as defined in section 2929.01 of the Revised Code, that was imposed by the sentencing court.”).

2. See discussion *infra* Part III.A.

3. See discussion *infra* Part III.B.

4. See discussion *infra* Part III.C.

concerns. These solutions would preserve the rights of eligible Ohioans to serve on a jury along with defendants' rights to be tried by a jury of their peers.

II. CURRENT LAW IN OHIO REGARDING JUROR ELIGIBILITY.

Article V, § 4 of the Ohio Constitution grants the Ohio General Assembly the “power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.”⁵ Pursuant to this authority, the General Assembly enacted Ohio Rev. Code § 2961.01, which provides that a person convicted of a felony under the laws of Ohio “is incompetent to be an elector or juror or to hold an office of honor, trust, or profit” unless the person’s conviction is reversed or annulled, or the person is granted a full pardon.⁶

Ohio Rev. Code § 2967.16(C)(1) then restores civil rights—including the right to serve on a jury—to those convicted of a felony once the person has completed probation or community control sanctions that may have been imposed.⁷ Specifically, the law restores “the rights and privileges forfeited by a conviction” to a prisoner who has completed his or her prison term “and has not been placed under any post-release control sanctions,” who “has been granted a final release or termination of post-release control by the adult parole authority,” or “who has completed the period of a community control sanction or combination of community control sanctions . . . that was imposed by the sentencing court.”⁸ The law was first enacted in 1994, but at that time did not contain language

5. OHIO CONST. art. V, § 4; *see also* OHIO CONST. art. I, § 2 (“no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly”).

6. OHIO REV. CODE ANN. § 2961.01(A)(1) (West 2020); *see also* OHIO REV. CODE ANN. § 2313.17(B)(1) (West 2020) (a good cause to challenge a person called as a juror is that “the person has been convicted of a crime that by law renders the person disqualified to serve on a jury”); § 2945.25(I) (a juror in a criminal case may be challenged on the ground that “he has been convicted of a crime that by law disqualifies him from serving on a jury”); OHIO R. CRIM. P. 24(C)(1) (a juror in a criminal case may be challenged on the ground that “the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury”).

7. *See* State v. Dawson, 2015-Ohio-488, ¶¶ 21–23 (Ohio Ct. App. 2015). A “community control sanction” is defined as “a sanction that is not a prison term and that is described in section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code or a sanction that is not a jail term and that is described in section 2929.26, 2929.27, or 2929.28 of the Revised Code. ‘Community control sanction’ includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004”; OHIO REV. CODE ANN. § 2929.01(E) (West 2020); *see also id.* § 2961.01(C)(1); *id.* § 2967.01(P).

8. OHIO REV. CODE § 2967.16(C)(1) (West 2020).

restoring juror eligibility to those with felony convictions.⁹ In 1996, the law was updated to reflect the restoration of benefits, including to those who committed a felony prior to the 1996 amendment.¹⁰

As described by an Ohio appellate court, §§ 2961.01 and 2967.16 should be read “together so as to give effect to both” as follows:

R.C. 2961.01, first enacted in 1953, provided one manner in which a convicted felon may have the right to serve as a juror restored. That manner was to obtain a pardon. The legislature later drafted R.C. 2967.16, providing additional ways in which convicted felons may have various rights and privileges restored, including the right to serve as a juror. Read together, R. C. 2961.01 and 2967.16 provide that a convicted felon may have the right to serve as a juror restored by obtaining a pardon or by the terms outlined in R.C. 2967.16(C)(1).¹¹

Under § 2967.16(C)(1), a person who has been convicted of a felony is eligible for jury service upon the completion of any parole or community control sanctions that may have been imposed.¹² The General Assembly also included language referring to the restoration of such rights and privileges when one has satisfied those statutory conditions in Ohio Rev. Code § 2953.33(A)—regarding a person who has had his or her record of conviction sealed—and § 2967.17(B)—regarding termination of jurisdiction over a particular sentence or prison term by the Adult Parole Authority for administrative reasons.¹³ The Ohio Attorney General has noted that “[t]he use of such language in these statutes demonstrates that

9. Ohio Att’y Gen., Op. No. 2006-031, at 2-295 n.6, <https://www.ohioattorneygeneral.gov/getattachment/9e4a7fcf37ab40b492a34fea50986991/2006-031.aspx> [https://perma.cc/ZWZ8-3XL8] [hereinafter Ohio AG Opinion].

10. *Id.* The law was updated most recently on October 29, 2018, in Am. Sub. S.B. 66 § 1 at 31–33.

11. *Dawson*, 2015-Ohio-488, ¶ 22.

12. See Ohio AG Opinion, *supra* note 12, at 2-291 (“R.C. 2967.16(C)(3) restores the privilege of serving as a juror on a petit jury to a person who was convicted of a felony under the laws of Ohio prior to, or on or after July 1, 1996, and who has completed his probation or a period of one or more community control sanctions.”); see generally Ohio Trial Court Jury Use and Management Standards adopted by the Supreme Court of Ohio on August 16, 1993, Standard 4 (“[a]ll persons should be eligible for jury service except those who . . . [h]ave been convicted of a felony and have not had their civil rights restored”).

13. OHIO REV. CODE ANN. § 2953.33(A) (West 2020) (“An order issued under section 2953.37 of the Revised Code to expunge the record of a person’s conviction or, except as provided in division (G) of section 2953.32 of the Revised Code, an order issued under that section to seal the record of a person’s conviction restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control.”); *id.* § 2967.17(B)(2) (“Any person granted an administrative release under this section may subsequently apply for a commutation of sentence for the purpose of regaining the rights and privileges forfeited by conviction,” subject to certain exceptions).

the General Assembly intended to restore a felon's rights and privileges when the felon satisfies any of the conditions set forth in R.C. 2967.16(C)."¹⁴

While "collateral sanctions" such as disqualification from jury service are less visible than incarceration, "their consequences to felons may be equally profound" for reintegration.¹⁵ For instance, allowing those with felony convictions to take part in the judicial process legitimizes the law and likely facilitates law-abiding conduct.¹⁶ Those convicted of felonies who served on a jury often find the experience validating and transformative, a "recognition of their reformation."¹⁷ Jury exclusion, on the other hand, "impedes the ability of felons to transition back into society as they are denied a stake in what happens in their communities."¹⁸

In addition, the absence of "those with direct experience of the criminal justice system" is a detriment to juries, since the workings of the system "are often not intuitive."¹⁹ For example, those with felony convictions may better understand common factors of wrongful conviction, such as why someone would falsely confess to a crime he or she did not commit.²⁰

14. Ohio AG Opinion, *supra* note 12, at 2-298.

15. Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, ANNALS, AAPSS 281, 296, 303-04 (May 2006), *citing* Jeremy Travis, *Invisible punishment: An instrument of social exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, ed. Marc Mauer and Meda Chesney-Lind, 15, (2002); James M. Binnall, *Sixteen Million Angry Men: Reviving A Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 VA. J. SOC. POL'Y & L. 1, 22 (2009). *See also* Uggen et al., *supra* note 17, at 303-04.

16. *See, e.g.*, James M. Binnall, *Felon-Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 ME. L. REV. 71, 88-96 (2018) (detailing a study finding that Maine's lack of felon exclusion helped "build a former offender's self-concept, provide pro-social roles, and promote civic immersion tend to promote criminal desistance"); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 661 (2007); *see also* KENNETH L. KARST, *BELONGING TO AMERICA—EQUAL CITIZENSHIP AND THE CONSTITUTION* 4 (1989) ("The most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves.").

17. James M. Binnall, *Summoning Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4, 15 (2018).

18. Amanda L. Kutz, *A Jury of One's Peers: Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community*, 46 WM. & MARY L. REV. 2109, 2135 (2005).

19. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 606 (2013).

20. *Id.* at 609. In Ohio, low-level felonies include nonviolent offenses such as forgery, theft, receiving stolen property, or failure to pay child support. *See generally* *Looking Forward: A Comprehensive Plan for Criminal Justice Reform in Ohio*, ACLU OF OHIO & OHIO JUST. & POL'Y CTR. (Mar. 2016).

Felon exclusion from jury service creates even more “glaring racial disparities” than felon disenfranchisement, including “[r]educing the representation of black men on juries by thirty percent[.]”²¹ This exclusion prevents communities of color from participating in jury service because “the rate of black and Hispanic incarceration for felonies [is] several times higher than the same rate among white defendants.”²² Such exclusion “belies the democratic legitimacy of juries as adjudicative bodies representing the totality” of the community.²³ The exclusion of those with criminal records risks “exacerbating racial disparity within the jury system,” thus undermining “the perceived impartiality of the justice system and, at the most fundamental level, the rule of law.”²⁴

In enacting Ohio Rev. Code § 2967.16(C)(1), the Ohio General Assembly decided that it was more important to have a representative jury than it was to keep all those with felony convictions from jury service.²⁵ This law sets Ohio apart from certain other states who opted to keep those with felony convictions permanently ineligible, even at the expense of a more representative jury.²⁶ This legislation follows the pattern of the Ohio

21. Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U.L. REV. 65, 113–14 (2003); see also Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement*, SENT’G PROJECT, 3 (2016) (“One in 13 African Americans of voting age is disenfranchised, a rate more than four times greater than that of non-African Americans.”), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> [https://perma.cc/94JR-TXLT].

22. Juan R. Sánchez, *A Plan of Our Own: The Eastern District of Pennsylvania’s Initiative to Increase Jury Diversity*, 91 TEMP. L. REV. ONLINE 1, 12–13 (2019) (discussing national statistics); Sharon Scott, *Justice in the Jury: The Benefits of Allowing Felons to Serve on Juries in Criminal Proceedings*, 57 WASH. U. J.L. & POL’Y 225, 236–37 (2018) (“[M]any modern day laws limit or forbid the inclusion of former felons on juries, eliminating a large number of blacks that have the potential to serve.”).

23. Ashley Alexander, *Banned from the Jury Box: Examining the Justifications and Repercussions of Felon Jury Exclusion in the District of Columbia*, 57 AM. CRIM. L. REV. 11, 17 (2020) (discussing the disproportionate racial impact of felony-juror exclusion in D.C.).

24. Roberts, *supra* note 19, at 605, quoting Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 158 (2005) (mentioning “disqualification of felons” as one of the mechanisms that bars “disproportionate numbers of Latina/os from serving on juries”).

25. See Ohio AG Opinion, *supra* note 12.

26. In some circumstances, a state may pass a law that excludes all those with felony convictions from juries, even if that law has a disparate impact. However, rational basis is not sufficient to overcome a fair cross section violation. See *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (a violation of the fair cross section requirement of the Sixth Amendment “cannot be overcome on merely rational grounds.”). To overcome a fair cross section violation, the state must present “weightier reasons” that justify the impact on the composition of the jury. *Id.*

General Assembly's other efforts to restore rights and privileges in recent years to those with prior convictions.²⁷

The numbers of those affected are significant: more than 20,000 inmates are released from custody in Ohio every year.²⁸ In total, only about 31,000 of those released throughout those years are still on some form of post-release control.²⁹ As of 2018, “[a]n estimated 994,000 Ohioans are living with a felony conviction—approximately one in eleven adults in the state”³⁰

III. HOW COURTS ARE IMPLEMENTING THE LAW.

This article's concern is not with the law itself but with the dramatic unevenness of its implementation, to the extent that courts in the most populous counties in the state have been, to varying degrees, defying the law for years.

A jury commission or trial judge in a particular county cannot ignore state law and, on his or her own accord, prohibit those with felony convictions whose rights have been restored from serving on juries. By so doing, such a prohibition causes a racial and sex-based disparity that primarily impacts African-American men in the affected counties.³¹ It also creates a disparity between those with felony convictions whose rights have been restored and who live in counties with different juror eligibility practices. There is no compelling, or even rational, governmental reason for treating jury eligibility for those with felony

27. See, e.g., Fatima Hussein, *Kasich Signs “Ban the Box” into Law*, CINCINNATI ENQUIRER, May 15, 2015 (“Ohio Gov. John Kasich on Tuesday signed into law a bill that will bar public employers from including on job applications questions concerning an applicant’s criminal background.”); Joseph R. “Randy” Klammell, *Ohio SB 66 Expands Expungement Eligibility—But It Truly Does Much More*, OHIO ST. B. ASS’N, Dec. 28, 2018 (“In summary, expungement is now available to persons with nonviolent, nonsexual misdemeanors and/or felony offenses of the fourth and fifth degree. SB 66 allows for expungement review for a person with up to five felonies of the fourth or fifth degree.”).

28. OHIO DEP’T REHAB. & CORR., *2020 Annual Report*, at 19, <https://drc.ohio.gov/Portals/0/ODRC%20FY2020%20Annual%20Report%202%202%281%29.pdf> [<https://perma.cc/HA2M-S72U>].

29. *Id.* at 41.

30. Michael Shields & Pamela Thurston, *Wasted Assets: The Cost of Excluding Ohioans with a Record from Work*, POL’Y MATTERS OHIO AND OHIO JUST. & POL’Y CTR. (Dec. 18, 2018).

31. Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1795, 1805; Kalt, *supra* note 21, at 113–14 (“Reducing the representation of black men on juries by thirty percent without dissent is difficult to imagine, but felon exclusion does just that.”).

convictions differently from county to county, even if a jury commission is acting entirely in good faith and simply misunderstands the law.³²

According to their Local Rules, at least some county courts in Ohio appear to follow the state law that permits those with felony convictions to serve on juries once they have completed their sentence and community control.³³ Numerous disparities remain, however. As discussed below, the three most populous counties in Ohio, for example, have either inconsistently applied the law, or consistently flouted the law, by disqualifying from jury service anyone who has been convicted of a felony, regardless of how long ago the conviction took place or whether that individual has completed community control sanctions.³⁴

A. *Cuyahoga County's jury selection process.*

For at least the prior 22 years, the practice of the Cuyahoga County Common Pleas Court Jury Commission administrators had been to remove all potential jurors with felony convictions.³⁵ Starting around the beginning of 2020, Cuyahoga County updated its summons form and website to inform jurors of the correct state law: “You are disqualified

32. *See Garcia-Dorantes v. Warren*, 801 F.3d 584, 604 (6th Cir. 2015) (“[B]ecause the glitch was inadvertent, no state interest was advanced by the computer error and subsequent underrepresentation of minorities in the jury venire.”).

33. *See, e.g., Lucas County L.R. 7.02(B)* (2019) (listing as ineligible those who “are convicted felons whose rights have not been restored”); *Scioto County L.R. XVI(C)(1)(e)* (2004) (listing as ineligible those who “[h]ave been convicted of a felony and have not had their civil rights restored”); *Summit County L.R. 24.04(A)(5)* (“Pursuant to R.C. 2961.01, any person convicted of a felony under the laws of this state or any other state or the United States, unless the conviction is reversed or annulled, is incompetent to serve as a juror, excepting those persons who have been convicted under Ohio law and incarcerated under Ohio law and have had the restoration of their rights restored pursuant to R.C. 2967.16. Pursuant to such section, those persons who have been granted a final release by the Ohio Parole Authority, as otherwise provided in R.C. 2967.16, are competent to serve as jurors in Ohio. This section is applicable only to those persons convicted under Ohio law and incarcerated in Ohio institutions and are otherwise restored to their rights pursuant to R.C. 2967.16.”).

34. *See discussion infra* Part III. Even federal courts in Ohio have been confused on this issue. While some courts have properly referenced the rights of those convicted of a felony as discussed in Ohio Revised Code §§ 2961.01 and 2967.16, *see Lumpkin v. United States*, No. 1:15 CR 317, 2018 WL 467515, at *2 (N.D. Ohio Jan. 18, 2018) (“when Devine was released from prison in June of 2006, her civil rights to vote, hold public office, and serve on a jury were automatically restored”), others have improperly cited § 2961.01 without considering how § 2967.16 restores certain rights. *See Jones v. Bradshaw*, 489 F. Supp. 2d 786, 810 (N.D. Ohio 2007) (“Under Ohio law, a juror who has been convicted of a felony cannot serve as a juror absent a full pardon.”); *see also Hanna v. Ishee*, No. C-1:03-CV-801, 2009 WL 485487, at *15 (S.D. Ohio Feb. 26, 2009) (citing *Jones*, 489, F. Supp. 2d at 810).

35. *The Jury Room, On The Record: The Podcast of the Cuyahoga County Common Pleas Court*, at 4:53 (Apr. 1, 2018), <https://www.buzzsprout.com/99872> [<https://perma.cc/7MCJ-MM8Z>] (“If you’re a felon, you’re excused.”).

from service if you have been convicted of a felony **and** are currently on probation or are serving a community control sanction.”³⁶ The Cuyahoga Court of Common Pleas Local Rules still do not reference how a felony conviction affects juror eligibility.³⁷

At a pretrial hearing in the Cuyahoga County Court of Common Pleas, in *State v. Sowell*, Cuyahoga C.P. No. 2011-1921 (June 1, 2011), three court officials testified about the system that they used to select potential jurors: Gregory M. Popovich, the Court Administrator for the Cuyahoga County Court of Common Pleas; Colleen Kelly, an employee for the Jury Commission; and Paul Ley, the Assistant Director of Information Services for the Cuyahoga County Court of Common Pleas.

Mr. Popovich stated that the County selects potential jurors from a single source—the voter registration list.³⁸ He explained that through a series of “several random draws” performed by software designed by a court employee, the list of potential jurors for a given week is generated.³⁹ That list is generated every Tuesday.⁴⁰

The Jury Commission then mails a jury summons to each potential juror.⁴¹ The summons asks for personal and demographic information including “name, birth date, age, address, city, zip, telephone number, home, cell, work, occupation, employer, married, single, divorced, separated, widowed, spouse’s occupation, spouse’s employer, can you read, speak and understand English.”⁴² In another section of the summons, it asks whether the individual has served on a jury within the last two years, and “if there’s a felony conviction and if you’re over the age of 75 and you’re choosing not to serve.”⁴³

Colleen Kelly, an employee for the Jury Commission, testified next.⁴⁴ Her job duties included “answering the phones, calls from people that do get summonses”⁴⁵ Ms. Kelly noted that if potential jurors are older than 75, they were not required to serve and are automatically

36. CUYAHOGA CTY. CT. COM. PL., *Jury Duty* (emphasis original), <http://cp.cuyahogacounty.us/internet/Jury%20Duty.aspx#3> [<https://perma.cc/WDH4-QUN8>] (click “Who is exempt or disqualified from jury duty?” under FAQs).

37. Cuyahoga County C.P. L.R. 35.0.

38. Transcript of Trial at 1111–12, *State v. Sowell*, No. 2011-1921 (Cuyahoga Com. Pl., June 1, 2011); *see also id.* at 1111 (“We just summon people that are registered voters.”).

39. *Id.*

40. *Id.* at 1113.

41. *Id.* at 1116–17.

42. *Id.* at 1117.

43. *Id.*

44. *Id.* at 1121.

45. *Id.*

granted a health waiver without the need for a doctor's note.⁴⁶ She entered an "H" in the system for these individuals.⁴⁷

She went on to explain the following:

[A]fter Tuesday's draw, I run a list of what we call felons, and then I check them against the Sheriff's Department database, and then I mark them and put an "F" in there for felon.

And then a lot of them call in and say, "Hey, I have a felony," so they're automatically taken out.⁴⁸

Ms. Kelly described other types of circumstances that allow or require a potential juror to be excused or receive a postponement of service.⁴⁹ She testified that her office handles these excuses and postponements without judicial involvement.⁵⁰

Paul Ley, the Assistant Director of Information Services for the Cuyahoga County Court of Common Pleas, designed the jury selection software in or about 1998.⁵¹ He described the process by which the court selected potential jurors. Each year, the Jury Commission receives the entire list of registered voters from the Board of Elections.⁵² From that list, the Jury Commission

[G]rab[s] what we think we need for a full year So say we get 50,000 jurors. That's going to do our needs for a whole year. We get that file and randomly draw those 50,000 jurors.

And then from there, every Tuesday we draw what we think we need for that next week for jurors. Typically, you know, we try to get 200 jurors in. So we do another random draw based on that 50,000 jurors.

From there, the jurors check in, do respond and actually show. They are placed on panels after that. The judges call down for panels, randomly drawn panels.⁵³

Mr. Ley explained that all the excuses are funneled through the judge and the court, except for the ones that are permitted by statute.⁵⁴ People over age 75, with previous juror service within two years, and "a felony"

46. *See id.* at 1121–22.

47. *Id.*

48. *Id.* at 1122.

49. *Id.* at 1122–25.

50. *Id.* at 1125.

51. *Id.* at 1129.

52. *Id.* at 1132.

53. *Id.* at 1131.

54. *Id.* at 1135.

were excused without any judicial intervention.⁵⁵ Mr. Ley went on to explain how the court verifies these excuses.⁵⁶ Felony convictions are confirmed with the Sheriff's database described by Ms. Kelly, and the court also has its own database, the CJIS application, which allows them to check for convictions on the court's docket.⁵⁷ According to Mr. Ley, a felony conviction at any point in one's life automatically renders a person ineligible for jury service.⁵⁸ Potential grand jury members, as well as municipal court venires,⁵⁹ were also selected in the same manner.⁶⁰

At the conclusion of the hearing, the trial court concluded that "it's been clear from the testimony here that the draw of the jurors from the community for this particular case has been no different than any other case. As a matter of fact, the same procedures were used as for the policy for general juries in this jurisdiction."⁶¹

Accordingly, until the changes in early 2020, there was no representation of those with felony convictions in Cuyahoga County venires, even though Cuyahoga County's felon population may be even higher than overall state estimates, given it had "the highest share of returning prisoners in the state," with just over one-fifth (22%) of all people released from prison in Ohio in 2001 being released to Cuyahoga County.⁶²

For at least the last 20 years, by design, there was no chance a person with a felony conviction would appear in an eligible jury pool in

55. *Id.* ("Q. So it's the practice to excuse those three without any judicial intervention? A. Correct.")

56. *Id.* at 1136.

57. *Id.*

58. *Id.* at 1136–37 ("Q. And is it your practice that if a person has a felony conviction any time in their life, then they will not be eligible for jury duty? A. I believe that's how the statute reads, yes. Q. That's your interpretation? A. Yes.")

59. CLEVELAND MUNICIPAL COURT, *Jury Services*, <https://clevelandmunicipalcourt.org/judicial-services/administrative-services/jury-services> [https://perma.cc/2SUK-TPGG] ("In 2013, the Cleveland Municipal Court and the Cuyahoga County Common Pleas Court united their resources and created a new system in which we share jury services. Cleveland Municipal Court jurors are drawn from a pool of registered voters in Cleveland and the Village of Bratenahl supplied by the Cuyahoga County Board of Elections.")

60. *I-Team Exclusive: Inside the Grand Jury*, FOX 8, (Jul. 23, 2015, 6:26 PM), <https://fox8.com/news/i-team-exclusive-inside-the-grand-jury/> [https://perma.cc/5D47-U3LU] ("Grand Jury members "are drawn from the same pool of people chosen to serve on juries in court cases.")

61. Transcript of Trial at 1142, *State v. Sowell*, No. 2011-1921 (Cuyahoga Com. Pl., June 1, 2011).

62. NANCY G. LA VIGNE, GILLIAN L. THOMSON, CHRISTY VISHER, VERA KACHNOWSKI & JEREMY TRAVIS, *A PORTRAIT OF PRISONER REENTRY IN OHIO* 60–80 (2003).

Cuyahoga County.⁶³ The exclusion of people with felony convictions was so systemic in Cuyahoga County that the Jury Commission established three separate processes to identify, verify, and then exclude people with felony convictions. First, the Jury Commission identified people with felonies using the Sheriff's database as described by Ms. Kelly, and second, by using the court's own database, the CJIS application, which allows the Jury Commission to check for convictions on the court's docket.⁶⁴ Lastly, people with felony convictions were also removed if they called in to alert the officials of their prior conviction.⁶⁵

Because of the systemic exclusion of people with felony convictions in Cuyahoga County juries over the last two decades—as well as the high percentage of African-American men in that excluded population—venires in the Cuyahoga County Court of Common Pleas using this jury selection process reflected a significant underrepresentation of African-American men. Further, such a disparity has been observed in these jury pools over a significant period of time.⁶⁶

It remains to be seen how the 2020 changes will affect the representation of those with felony convictions or African-American men in Cuyahoga County jury pools, and to what extent individual judges and attorneys are aware of this change.

B. Hamilton County's jury selection process.

The Hamilton County Courts provide the correct statement of the law on their website, explaining, “Jurors who have prior felony convictions are eligible to serve on jury duty provided that they are no longer

63. Transcript of Trial at 1129, *State v. Sowell*, No. 2011-1921 (Cuyahoga Com. Pl., June 1, 2011).

64. *Id.* at 1136.

65. *Id.* at 1127. In a rare case when a prospective juror with a felony conviction slipped into the jury pool, the trial court still removed her after learning of her felony conviction, in contravention of Ohio Rev. Code § 2967.16. *State v. Lee*, 2017-Ohio-1449, ¶ 22 (Ohio Ct. App. 2017). The Court of Appeals found no prejudice since any argument that the prospective juror “would have voted to acquit is speculative”—a seemingly impossible standard for any defendant to overcome. *Id.* ¶ 27 (citing *State v. Harrison*, 2015-Ohio-1419, ¶ 27, 31 N.E.3d 220, 233 (Ohio Ct. App. 2015) (internal quotation omitted)). As described in section IV, below, the constitutional implications of juror exclusion are clearer on a systemic level than in an individual instance.

66. Transcript of Trial at 819–20, *State v. Madison*, No. 579539 (Cuyahoga Com. Pl. Apr. 28, 2014) (trial attorney noting that out of 300–400 jury trials in Cuyahoga Court of Common Pleas over several decades, “I can probably think of maybe two or three . . . jury venires that I have had that actually reached that level [of proportionate representation of African-Americans on jury venires]. I have had a number of . . . jury venires in which there have been no minorities of any kind.”).

incarcerated or on their period of probation/community control.”⁶⁷ The Hamilton County Local Rules also state, less specifically, that persons are ineligible for jury service if they “[h]ave been convicted of a felony and have not had their civil rights restored.”⁶⁸

The Court’s juror information website permits a potential juror with a prior felony conviction to “opt out” of jury service. As the Court’s website explains, “[i]f you wish to be excused based on a past felony conviction the Jury Commission Office will consider your request.”⁶⁹ No additional information could be found on the website about what the guidelines are for allowing a person with a felony conviction to “opt out” of jury service. Allowing a subset of otherwise qualified jurors to “opt out” could be constitutionally problematic, especially when “a flavor, a distinct quality is lost” by the absence of the excluded group.⁷⁰

In addition, there are pressing questions as to whether courts or attorneys understand the appropriate standard for jury service. In a death penalty case before Judge Steven Martin in the Hamilton County Court of Common Pleas, for example, the trial court repeatedly removed prospective jurors for cause for having prior felony convictions, excusing a total of five potential jurors.⁷¹ This included four jurors before voir dire, including one with a conviction from 17 years earlier.⁷² The Court listed all four of these jurors in its two entries “Excusing Jurors for Cause.” In addition, during voir dire, the trial court removed a prospective juror for cause, even after he made clear that his conviction was a decade old and that he was not on post-release control.⁷³

For each dismissal in that case, defense counsel not only failed to object or request to question the jurors, but repeatedly agreed that the prospective jurors should be removed for cause for having prior felony convictions. On March 22, 2010, for example, defense counsel agreed to

67. HAMILTON CTY. CTS., *Juror Excuses*, <https://hamiltoncountycourts.org/index.php/juror-excuses/> [<https://perma.cc/R8YX-66DZ>] (further noting that any wish to be excused based on a past felony conviction will be considered by the Jury Commission Office).

68. L.R. 8(IV)(A) of the Court of Common Pleas of Hamilton County, General Division.

69. HAMILTON CTY. CTS., *supra* note 70.

70. *Taylor*, 419 U.S. at 532; *see Duren v. Missouri*, 439 U.S. 357, 369 (1979).

71. Transcript of Proceedings on Motions, at 250–51, *State v. Pickens*, No. B-0905088 (Hamilton Com. Pl., Mar. 22, 2010); Transcript of Proceedings on Pretrial Motions at 400, *State v. Pickens*, No. B-0905088 (Hamilton Com. Pl., Mar. 31, 2010). The author is lead counsel on the pending habeas corpus petition challenging this conviction in federal court. *Pickens v. Shoop*, No. 1:19-cv-558, 2020 WL 3128536 (S.D. Ohio June 12, 2020).

72. Transcript of Proceedings on Pretrial Motions at 400, *State v. Pickens*, No. B-0905088 (Hamilton Com. Pl., Mar. 31, 2010).

73. Transcript of Trial at 652–53, *State v. Pickens*, No. B-0905088 (Hamilton Com. Pl., Apr. 12, 2010) (Court: “What we’re going to do is excuse you from service because of your felony.”).

the removal of two prospective jurors with felony convictions before voir dire, stating that “they would be excused anyway so we would agree they should be excused.”⁷⁴

In another case, the Court of Appeals in Hamilton County has recognized that “a convicted felon may have the right to serve as a juror restored by obtaining a pardon or by the terms outlined in R.C. 2967.16(C)(1),” and that the Hamilton County Court of Common Pleas “erred in excluding the two potential jurors in this case solely because their convictions had not been pardoned, expunged, or reversed on appeal.”⁷⁵ Nonetheless, the Court of Appeals found that the trial court did not abuse its discretion in excusing the jurors for cause “because the record fails to demonstrate that either juror had the right to serve as a juror restored pursuant to the terms of R.C. 2967.16(C)(1)[.]”⁷⁶

The Court of Appeals’ disinclination to look into the matter further does not inspire confidence in the court’s decision, particularly since potential jurors may have lacked any opportunity to discuss on the record their restoration of rights.⁷⁷ Accordingly, this is a concerning gap in the protection of the rights of those with felony convictions from court to court within the county.

C. *Franklin County’s jury selection process.*

On its website, the Franklin County Court of Common Pleas lists the incorrect standard for disqualification. According to the site, if you “have been convicted of a felony that has not been expunged,” then “that, by law, make[s] you ineligible for jury service in Franklin County.”⁷⁸ As noted above, pursuant to Ohio Rev. Code § 2967.16(C)(1), there is no requirement that a felony be expunged before one can serve on a jury. Accordingly, the Franklin County Court of Common Pleas is

74. Transcript of Proceedings on Motions, at 250–51, *State v. Pickens*, No. B-0905088 (Hamilton Com. Pl., Mar. 22, 2010).

75. *Dawson*, 2015-Ohio-488, ¶ 23.

76. *Id.* (citing *State v. Stone*, 2014-Ohio-4444, ¶ 36 (Ohio Ct. App. 2014) (holding that “we cannot say that the trial court abused its discretion in dismissing Prospective Juror No. 3 for cause” where “nothing in the record indicated that his rights had been restored” after a prior conviction)).

77. *See, e.g.*, *State v. Madrigal*, 87 Ohio St. 3d 378, 393, 721 N.E.2d 52, 67 (Ohio 2000) (“The better practice in this case would have been to question the juror, on the record, to determine the status of his previous conviction.”). In that case, however, the court determined that the juror would have been excused anyway, since the same prosecutor and police officer from the case had been involved in his prior conviction. *Id.*

78. FRANKLIN CTY. CT. COM. PL., *Requests For Disqualification*, <https://www.fcourts.org/248/Requests-for-Disqualification> [https://perma.cc/V6MG-PVDC].

misinforming potential jurors about the standards for disqualification from jury service under state law.

The Local Rules preclude individuals from jury eligibility who “[h]ave been convicted of a felony and have not had their civil rights restored.”⁷⁹ According to the Rules, Ohio Rev. Code § 2961.01 “[p]recludes convicted felons from serving as jurors.”⁸⁰ While the first formulation is technically correct, the second formulation clearly is not. Rather, Ohio Rev. Code § 2967.16(C)(1) restores the privilege of serving as a juror on a petit jury to a person who was convicted of a felony who has completed his probation or a period of one or more community control sanctions. Even in the first formulation, the Local Rules include no definition of “restored” or any reference to Ohio Rev. Code § 2967.16(C)(1). The only reference to “restore[d]” rights in Ohio Rev. Code § 2961.01, the statute cited in the Local Rule, is when someone receives a full pardon.⁸¹ There is nothing in the Local Rules informing judges, attorneys, or potential jurors that those with felony convictions may have their right to juror eligibility restored outside of the pardon process.

Accordingly, the Local Rules, combined with the information available on the court’s website, serve to erroneously inform the public that persons with a felony conviction are precluded from jury service unless the conviction is expunged or pardoned.

IV. CONSTITUTIONAL IMPLICATIONS OF THE IMPROPER EXCLUSION OF JURY-ELIGIBLE PERSONS WITH A FELONY CONVICTION

Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic

79. Loc.R. 27.07 of the Court of Common Pleas of Franklin County, General Division (citing OHIO REV. CODE ANN. § 2961.01 (West 2020)).

80. *Id.* The Montgomery Court of Common Pleas lists as ineligible those who “[h]ave been convicted of a felony, have not completed their jail time, probation, or community sanction, and have not had their civil rights restored.” Loc.R. 1.23(D)(3) of the Court of Common Pleas of Montgomery County. While this is a less problematic framing than the Franklin County Local Rules, it is still potentially confusing. As § 2967.16 automatically restores ones’ rights at the end of community control or parole, it is not clear why the rule lists “have not had their civil right restored” as a separate requirement. See OHIO REV. CODE ANN. § 2967.16 (West 2020). The Montgomery County Court of Common Pleas website appears to provide no clarifying discussion of the matter. See MONTGOMERY CTY. CT. COM. PL., *Jury FAQ*, <https://montcourt.oh.gov/jurors/#jury-faq> [<https://perma.cc/X3JC-D47C>].

81. OHIO REV. CODE ANN. § 2967.16(C)(1) (West 2020).

responsibility.⁸²

Even apart from violating state law, the underrepresentation of a cognizable group in a petit jury venire can constitute a denial of the Due Process Clause of the Fourteenth Amendment,⁸³ the Fair Cross Section requirement of the Sixth Amendment,⁸⁴ and the Equal Protection Clause of the Fourteenth Amendment.⁸⁵ The principles establishing a Sixth Amendment fair cross section claim are the same for showing lack of a fair cross section in violation of the Fourteenth Amendment's Due Process Clause.⁸⁶ Accordingly, constitutional challenges relating to underrepresentation in a jury venire generally arise as either (1) a fair cross section claim under the Sixth and Fourteenth Amendments or (2) an equal protection claim under the Fourteenth Amendment.

A. *Fair Cross Section under the Sixth and Fourteenth Amendments*

The presence of a fair cross section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfillment of both the Fourteenth Amendment's guarantee of due process and the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions.⁸⁷ This Sixth Amendment guarantee—made binding on the States through the Fourteenth Amendment—ensures not that the particular jury hearing the case reflect a fair cross section of the community, but rather that “the jury wheels, pools of names, panels or venires from which juries are drawn [do] not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”⁸⁸ Similarly, a state cannot “subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States.”⁸⁹ Accordingly, “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

82. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

83. *Peters v. Kiff*, 407 U.S. 493, 501–03 (1972).

84. *Taylor*, 419 U.S. at 531.

85. *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).

86. *Peters*, 407 U.S. at 495–96; *see Duren v. Missouri*, 439 U.S. 357, 358–359 (1979); *Taylor*, 419 U.S. at 528; *see also Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (making applicable to the states the Sixth Amendment right to a petit jury through the Due Process Clause of the Fourteenth Amendment).

87. *Taylor*, 419 U.S. at 526, 530; *Peters*, 407 U.S. at 501–03.

88. *Taylor*, 419 U.S. at 526, 538 (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)).

89. *Peters*, 407 U.S. at 502–03.

thereby denies him due process of law.”⁹⁰ In other words, under both the Sixth and Fourteenth Amendments, a fair cross section claim is concerned with whether steps in the jury selection process that precede the selection of petit jurors fail to include representative numbers of groups in the community.

A fair cross section claim is generally not waived by failure to raise it at trial. Counsel are not expected to be on notice of systematic jury composition issues from the composition of a single jury, particularly when there is an underrepresentation of a relatively small group.⁹¹ Each jury pool will vary even without systematic exclusion, and thus “[a] gaze into the jury gallery tells you nothing and, in fact, can be misleading.”⁹² Further, to “suggest that an effective defense attorney must investigate the jury assembly process in every case conditioned upon his client’s loss of the right is unnecessary and wasteful.”⁹³ In *Garcia-Dorantes*, for example, the U.S. Court of Appeals for the Sixth Circuit affirmed a grant of habeas corpus where the attorney learned about the facts underlying the claim after trial.⁹⁴ Specifically, the attorney read in a news article about a computer glitch that had caused racial disparities in the jury venire.⁹⁵ In that case, the Sixth Circuit found that the facts underlying the claim were not “reasonably available” to counsel at the time of the trial.⁹⁶

Under *Duren*, a criminal defendant alleging a fair cross section violation under the Sixth and Fourteenth Amendments must satisfy a three-prong prima facie test by showing the following:

- (1) [T]he group alleged to be excluded [from the jury system] 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

90. *Id.* at 504–05 (evaluating a claim that African-Americans were systematically excluded from jury service, and citing 18 U.S.C. § 243 (prohibiting exclusion of jurors “on account of race or color”).

91. *See* *Ambrose v. Booker*, 684 F.3d 638, 645–47 (6th Cir. 2012).

92. *Id.* at 646 (quoting *Ambrose v. Booker*, No. 06-13361-BC, 2011 WL 1806426, at *2 (E.D. Mich.)).

93. *Id.*

94. *Garcia-Dorantes*, 801 F.3d at 598 n.9 (6th Cir. 2015).

95. *Id.* at 590.

96. *Id.* at 598 n.9 (“Because the factual basis for *Garcia-Dorantes*’ claim—the computer glitch—was not reasonably available to counsel, and *Garcia-Dorantes* could not have known that minorities were underrepresented in the jury pool by looking at the venire panel, *Garcia-Dorantes* has shown cause.”); *see also* *Ege v. Yukins*, 485 F.3d 364, 372 (6th Cir. 2007) (holding that where defense counsel did not get actual notice of a letter until four years after it was written, the court would consider the date defense counsel learned of the letter as the first date they were actually aware of it); *Ambrose*, 684 F.3d at 645.

this underrepresentation is due to systematic exclusion of the group in the jury-selection process.⁹⁷

If a defendant establishes these three prongs, he has established a prima facie violation of the fair cross section requirement.⁹⁸ The burden shifts then to the government to show “attainment of a fair cross section to be incompatible with a significant state interest.”⁹⁹ This standard was unanimously reaffirmed by the Supreme Court in the 2010 case of *Berghuis v. Smith*.¹⁰⁰ Unlike an equal protection violation, a fair cross section violation does not require any showing of intent or improper motive.¹⁰¹ The U.S. Court of Appeals for the Second Circuit explained “[w]hile the equal protection clause of the Fourteenth Amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination, ‘[t]he sixth amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of . . . motive.’”¹⁰² Thus, even accidental errors can establish a fair cross section violation.

1. People who have been convicted of felonies and African-American men are distinct groups in the community.

The first prong of a fair cross section violation is that the excluded jurors are of a distinct group.¹⁰³ For the purposes of this article, two distinct groups excluded from the juries are: (1) those with felony convictions who were eligible to serve because their civil rights had been restored and, more broadly, (2) African-American men. Several circuits have adopted a three-prong test for determining whether a group is distinctive:

- (1) [T]hat the group is defined and limited by some factor (i.e., that the group has a definite composition such as race or sex); (2) that a common thread or basic similarity in attitude, ideas, or experience runs through

97. *Duren*, 439 U.S. at 364.

98. *Id.*

99. *Id.* at 367–68.

100. *Berghuis v. Smith*, 559 U.S. 314 (2010).

101. *See United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989).

102. *Id.* (alterations in original) (internal citation omitted); *see also* Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It With Equal Protection*, 64 HASTINGS L.J. 141, 141 (2012) (“Under the Sixth Amendment . . . a defendant can establish a prima facie violation by showing that the underrepresentation of a distinctive group in the jury pool is inherent in the selection process, whether by accident or design. The equal protection clause, in contrast, demands evidence of discriminatory intent.”).

103. *See Duren*, 439 U.S. at 364.

the group; and (3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.¹⁰⁴

Both sex and race are well-established, distinct groups.¹⁰⁵ Thus, African-American men are clearly a distinct group for this analysis.¹⁰⁶ In addition, African-Americans as a group have a long history of underrepresentation on juries. A study of Lucas County, Ohio, for example, found that “blacks and Hispanics are underrepresented in a statistically significant degree beginning with the source list” of potential jurors.¹⁰⁷ After the source list, “the various jury lists revealed big increases in black and Hispanic underrepresentativeness.”¹⁰⁸ The effects of felony exclusion only exacerbate this historic underrepresentation.¹⁰⁹ As a result of “the disproportionately high rate of felony convictions among African Americans and the policies that disenfranchise those with convictions, Black people continue to be regularly underrepresented in jury pools.”¹¹⁰

This disparity has a profound effect on the justice system where studies have shown that “the greater the percentage of Whites on a jury, the more likely it was to convict a Black defendant” regardless of the type of crime or the strength of the prosecution's case.¹¹¹ There is a large racial disparity in support for the death penalty, for example, with whites being

104. Ford v. Seabold, 841 F.2d 677, 681–82 (6th Cir. 1988) (citing Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985) (en banc); Willis v. Zant, 720 F.2d 1212 (11th Cir. 1983), cert. denied, 467 U.S. 1256 (1984)).

105. See, e.g., Whitus v. Georgia, 385 U.S. 545, 549–51 (1967); Taylor, 419 U.S. at 532.

106. See also Kutz, *supra* note 18, at 2110–11 (“Virginia’s restoration of rights process, although neutral on its face, disparately impacts the African American community and may deprive an accused African American of his right to be tried by a jury of his peers in a criminal trial.”).

107. Ronald Randall, James A. Wood & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71, 81 (2008).

108. *Id.* at 82.

109. See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 602–05 (2013) (“The exclusion of those with criminal records brings the risk of exacerbating racial disparity within the jury system.”).

110. Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. (forthcoming 2020) (manuscript at 20), <https://ssrn.com/abstract=3636336>, [<https://perma.cc/LF2H-A4W5>] (citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 97–114 (2012); EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 14–16 (2010), <https://eji.org/wpcontent/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/2N7T-3AEF>]).

111. Samuel R. Sommers & Satia A. Marotta, *Racial Disparities in Legal Outcomes: On Policing, Charging Decisions, and Criminal Trial Proceedings*, 1 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCI. 103, 106–09 (2014) (collecting studies).

significantly more likely to support the death penalty than blacks.¹¹² Accordingly, “the systematic exclusion of one race and its unique set of experiences from the jury process raises serious concerns.”¹¹³ Even outside of the effect on verdicts themselves, there is a significant impact of jury demographics on the perceived legitimacy of the judicial system.¹¹⁴

People who have a felony conviction constitute a distinct group under this definition as well.¹¹⁵ Being convicted of a felony defines and limits the group of people under consideration. In other words, there is a clear line of demarcation between those who are “felons” and those who are not. The experiences of those with felony convictions are unlike those of other potential jurors. They have firsthand experience with the criminal justice system and understand the implications and collateral consequences of convicting someone. Other segments of society lack this extremely relevant viewpoint, and when people who have been convicted of a felony are categorically excluded as a class, their perspective is completely lost from the jury.

112. See Joseph Carroll, *Who Supports the Death Penalty?*, GALLUP (Nov. 16, 2004), <https://news.gallup.com/poll/14050/who-supports-death-penalty.aspx> [<https://perma.cc/485P-9BAE>] (“The data show that 71% of whites support the death penalty, compared with only 44% of blacks.”); Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 286 (2001) (“Nearly two-thirds of white jurors vote for death on the first vote, compared to about one third of black jurors.”); William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 192–93 (2001) (There is a clear “white male dominance” effect in capital sentencing in cases with black defendants and white victims. “The presence of five or more white males on the jury dramatically increased the likelihood of a death sentence The presence of black male jurors in [the same cases], by contrast, substantially reduced the likelihood of a death sentence.”).

113. Edward S. Adams & Christian J. Lane, *Constructing a Jury that is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 710 (1998). The authors found difficulty measuring how demographics affect verdict outcomes, but concluded, “Since persons of different races often process the same information in different ways, often to different conclusions, the exclusion of any race or other group results in a sort of unconstitutional partiality.” *Id.* (citing Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 443 (1992) (“The systematic exclusion of a particular point of view from the jury box through the exclusion of minority jurors implicates the very reality that jurors are called upon to certify.”)).

114. Adams, *supra* note 112, at 710 (“What becomes apparent in evaluating juries is the impact of jury demographics on the public’s acceptance of verdicts and the public’s perception of justice.”).

115. See Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y.C. L. REV. 313, 348 (2010) (“The *Duren* concept of a cognizable or distinct group encompasses those with conviction histories At least one federal circuit court has already conceded that individuals’ contact with the criminal justice system is sufficient to make them a distinctive group for cross-section purposes.”) (citing *United States v. Greene*, 995 F.2d 793, 797 (8th Cir. 1993)).

“People with felony records are set apart not only by the stigma and collateral consequences that come with a criminal conviction but also by the extreme concentration by sex, race, and socioeconomic status.”¹¹⁶ “[I]ncarceration has become a routine life event for low-skilled black men—more common than serving in the military or earning a college degree.”¹¹⁷

Thus, both categories of potential jurors—African-American men and people with felony convictions—are distinct groups under the first prong of *Duren*.

2. Whether the number of those with felony convictions and African-American men on the juries was fair and reasonable in relation to their number in the community.

The second prong of a fair cross-section violation is that the distinct group is unfairly or unreasonably underrepresented.¹¹⁸ Those with felony convictions make up at least 5 to 9.9% of the population in Ohio, and counties with population centers likely have a higher percentage of those with felony convictions than the state overall.¹¹⁹ Accordingly, when those with felony convictions are systematically removed, such exclusion from a jury is unfair and unreasonable underrepresentation.¹²⁰

The prison and community control populations are overwhelmingly male and disproportionately African-American.¹²¹ People with felony convictions account for an estimated 8% of all adults in the United States, but constitute 33% of the African-American adult male population.¹²² By 2010, between 15% and 19.9% of black adults in Ohio had a felony record.¹²³

Even when African-American men are not completely excluded from a jury venire, they can be underrepresented as a result of excluding those with felony convictions. There are a variety of ways to analyze the relative representation of a group, most frequently through measuring absolute and comparative disparity.¹²⁴ Absolute disparity “measures the difference between the percentage of a group in the general population and its

116. Shannon *et al.*, *supra* note 31, at 1797. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

117. Shannon *et al.*, *supra* note 31, at 1797 (internal citations and emphasis omitted).

118. See *Duren*, 439 U.S. at 364.

119. Shannon *et al.*, *supra* note 31, at 1810.

120. See *Taylor*, 419 U.S. at 532.

121. Shannon, *supra* note 31, at 1797.

122. *Id.*

123. *Id.* at 1810.

124. See *Garcia-Dorantes*, 801 F.3d at 600–04.

percentage in the qualified wheel.”¹²⁵ To find the absolute disparity, subtract the percentage in the venire from the percentage in the general population. As an example, “if Asians constitute 10% of the general population and 5% of the qualified wheel, the absolute disparity is 5%.”¹²⁶ In contrast, the comparative disparity “measures the decreased likelihood that members of an underrepresented group will be called for jury service.” To find the comparative disparity, divide the absolute disparity by the percentage in the population. So, in the above example the comparative disparity is 50%. Although courts look at both absolute and comparative disparities, the U.S. Court of Appeals for the Sixth Circuit has made clear that the comparative test is more accurate for evaluating disparities in smaller populations.¹²⁷

Analyzing absolute and comparative disparities for representations in jury venires will reveal whether a particular venire was “not fair and reasonable in relation to the number of [African-American men] in the community.”¹²⁸ The U.S. Court of Appeals for the Sixth Circuit has found that an absolute disparity of 3.45% and comparative disparity of 42% for African-Americans, and a 1.66% absolute disparity and 27.64% comparative disparity for Hispanics, was sufficient to establish this prong.¹²⁹ The Sixth Circuit has also found that a 1.28% absolute disparity and 34% comparative disparity was sufficient.¹³⁰

In Hamilton County, for example, a statistician recently affirmed that in the 16 capital trials and grand juries summoned between 1987 and 2016, African-Americans were underrepresented with an absolute disparity of 7.96% and a comparative disparity of 33.86% using the U.S. Census Bureau’s 2006–2010 American Community Survey.¹³¹ In other words, “a third of the African Americans expected to be summoned are missing.”¹³²

125. *Id.* at 600–01; *see also* Ramseur v. Beyer, 983 F.2d 1215, 1231 (3d Cir. 1992) (“Absolute disparity in the jury selection context is defined as the difference between the percentage of a certain population group eligible for jury duty and the percentage of that group who actually appear in the venire.”).

126. *Garcia-Dorantes*, 801 F.3d at 601.

127. *See id.*; *see also* United States v. Hernandez-Estrada, 749 F.3d 1154, 1160–64 (9th Cir. 2014) (explaining in detail the problems with exclusively relying on the absolute disparity).

128. *Duren*, 439 U.S. at 364.

129. *See Garcia-Dorantes*, 801 F.3d at 603.

130. *See* Smith v. Berghuis, 543 F.3d 326, 338 (6th Cir. 2008), *rev’d on other grounds*, 559 U.S. 314 (2010); *see also Garcia-Dorantes*, 801 F.3d at 602 n.12 (explaining why the holding on prong two in *Smith v. Berghuis* remains binding precedent despite the Supreme Court reversal); *Ambrose*, 684 F.3d at 643 (finding a 3.45% absolute disparity and 42% comparative disparity sufficient).

131. Declaration of Jeffrey O’Neal Martin at ¶ 22, 28, *Pickens v. Shoop*, No. 1:19-cv-558 (S.D. Ohio June 11, 2020).

132. *Id.* at ¶ 28.

In the 24 capital trials seated between 1985 and 2016 in Hamilton County, African-Americans were underrepresented with an absolute disparity of 10.88% and a comparative disparity of 46.28% using the U.S. Census Bureau's 2006-2010 American Community Survey.¹³³ In other words, "almost half of the African-Americans expected to be serving on capital trials are missing."¹³⁴

Where those with felony convictions are completely excluded from the jury venire, and African-American men were unfairly and unreasonably underrepresented in the jury venire, the second prong of *Duren* is satisfied.

3. Whether the exclusion of those with felony convictions and underrepresentation of African-American men was systematic.

The final question for determining whether there is a prima facie case of a Sixth Amendment violation is whether the underrepresentation was systematic.¹³⁵ "Systematic" means that the exclusion or underrepresentation was "due to the *system* by which juries were selected."¹³⁶

In Cuyahoga County, for example, court personnel testified that it was their regular practice to exclude everyone with a felony conviction, and that procedures were in place to ensure individuals with a felony conviction at any time in their lives were not included on eligible jury lists for at least the last 22 years.¹³⁷ The exclusion of those with felony convictions was so systematic in Cuyahoga County that there were three separate processes to identify, verify, and then exclude individuals with a felony conviction at any time in their lives.¹³⁸ First, the Jury Commission identified people with felonies using the Sheriff's database, second, using the Court's own CJIS database, and third, relying on those that called in and alerted the officials to their felon status.¹³⁹ Despite a 2006 Attorney General advisory opinion confirming that many of those with felony convictions should not be excluded from Ohio juries, the Cuyahoga County courts apparently continued to do so until early 2020.¹⁴⁰

133. *Id.* at ¶ 23, 29.

134. *Id.* at ¶ 29.

135. *See Duren*, 439 U.S. at 366.

136. *Id.* at 367.

137. Transcript of Trial at 1102–38, *State v. Sowell*, No. 2011-1921 (Cuyahoga Com. Pl., June 1, 2011).

138. *Id.*

139. *Id.*

140. Ohio AG Opinion, *supra* note 12. *See discussion supra* Part III.A.

Similarly, Franklin County continues to this day to misinform potential jurors that if they “have been convicted of a felony that has not been expunged,” they are “by law. . . ineligible for jury service in Franklin County.”¹⁴¹ In addition, as outlined above, the Hamilton County Court of Common Pleas has repeatedly failed to uphold the rights of those with felony convictions to serve on juries.¹⁴² Using a standard deviation analysis, a statistician recently found that the underrepresentation of African-American jurors summoned or serving on capital trials in Hamilton County is “statistically significant” and “not the result of random factors, chance, or luck, but is the result of a systematic process that underrepresents African Americans” over the course of decades.¹⁴³ As a result, the number of “actual capital trials without African American trial jurors analyzed exceeded the expected number of trials without African American trial jurors by 4 to 8 times.”¹⁴⁴ Because African-American men are disproportionately convicted of felonies,¹⁴⁵ a systematic exclusion of those with felony convictions is at least one cause of the underrepresentation of African-American men in jury pools. A systematic exclusion of those with felony convictions causes systemic underrepresentation of African-American men, which would satisfy a prima facie case of a violation of the fair cross section requirement of the Sixth Amendment.

B. Fourteenth Amendment Equal Protection.

The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.¹⁴⁶

To establish a violation of the Equal Protection Clause of the Fourteenth Amendment, a defendant must prove that: (1) the group alleged to have been wrongly excluded is a distinct group in the community; (2) the degree of underrepresentation is disproportionate to the number of the group in the community; and (3) the selection procedure

141. FRANKLIN CTY. CT. COM. PL., *Requests for Disqualification*, <https://www.fccourts.org/248/Requests-for-Disqualification> [https://perma.cc/EW9M-VXXU].

142. See discussion *supra* Part III.B.

143. Declaration of Jeffrey O’Neal Martin at ¶ 34, *Pickens v. Shoop*, No. 1:19-cv-558 (S.D. Ohio June 11, 2020).

144. Petition for Writ of Habeas Corpus at 178, *Pickens v. Shoop*, No. 1:19-cv-558 (S.D. Ohio June 11, 2020).

145. Shannon, *supra* note 31, at 1810.

146. *Strauder v. W. Va.*, 100 U.S. 303, 308 (1879).

is subject to abuse.¹⁴⁷ Therefore, unlike a due process challenge, a defendant may establish a prima facie case without explicitly proving that the discrimination was caused by systematic exclusion.¹⁴⁸

For an equal protection claim, the only consideration in addition to those in the previous section is whether a defendant can establish a prima facie case of intentional discrimination in the selection process.¹⁴⁹ Such a claim is satisfied if county officials were aware of the issue and neglected to take action to remedy the discriminatory felon exclusion practice. In 2006, the Ohio Attorney General was asked by a county prosecutor's office to provide an advisory opinion on the issue of felon juror eligibility.¹⁵⁰ In the July 24, 2006, opinion, the Ohio Attorney General clearly explained that a person convicted of a felony may serve as a juror after completing probation or community control sanctions.¹⁵¹ As a result of this opinion, as well as judicial opinions discussing the relevant law,¹⁵² court officials should have actual and constructive knowledge of what Ohio law requires. Indeed, it is the job of a court to know and apply the correct law from the time it becomes effective. Alternatively, discriminatory intent exists where the substantial underrepresentation has persisted over a significant period of time, such as the more than 20 years of exclusion in Cuyahoga County.¹⁵³

As noted above, there is no compelling, or even rational, governmental reason for treating jury eligibility for those with felony convictions differently from county to county, in violation of state law.¹⁵⁴ Pointing out the constitutional implications of improper jury exclusion should not be necessary to remedy the situation, given that the Ohio General Assembly already bestowed jury eligibility to those with felony convictions who completed any parole or community control sanctions that may have been imposed. However, constitutional violations may be necessary for a federal action or habeas relief, for example, should the state courts fail to offer relief for their own violations.¹⁵⁵

147. *Castaneda*, 430 U.S. at 494; see *Rose v. Mitchell*, 443 U.S. 545, 565 (1979).

148. See *Duren*, 439 U.S. at 370–371 (Rehnquist, J., dissenting).

149. See *Gelb*, 881 F.2d at 1161.

150. Ohio AG Opinion, *supra* note 12.

151. *Id.*

152. See, e.g., *Dawson*, 2015-Ohio-488, ¶¶ 21–23.

153. *Castaneda*, 430 U.S. at 495.

154. See *Garcia-Dorantes*, 801 F.3d at 604 (6th Cir. 2015) (“[B]ecause the glitch was inadvertent, no state interest was advanced by the computer error and subsequent underrepresentation of minorities in the jury venire.”).

155. A federal court may entertain a habeas corpus petition filed by a person in state custody “only on the ground that he is custody in violation of the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 2254(a).

V. STRATEGIES TO IMPROVE JUROR UNDERREPRESENTATION.

A. *Courts and court officers.*

If court personnel, judges, and jury commissioners are confused by the current state of the law, then there is little chance they will correctly inform the public or implement the law at trial.¹⁵⁶ The Supreme Court of Ohio Judicial College “[p]rovide[s] a comprehensive program of continuing education for the judges, acting judges, magistrates, and court personnel of the state¹⁵⁷ As part of this education for both judicial officers and court personnel, the Judicial College should make clear in its curriculum that a person who has been convicted of a felony is eligible for jury service upon the completion of any parole or community control sanctions that may have been imposed. The Chief Justice of the Supreme Court of Ohio could also create a task force to study the issues across all counties and help bring local courts into compliance with state law on jury selection.¹⁵⁸

In addition, a division of the Supreme Court of Ohio—such as the Office of Court Services—could send a letter or hold a roundtable to make clear to trial and appellate courts the standards for juror eligibility.¹⁵⁹ In turn, the local courts should update their websites and other sources of information—including the summons language—to accurately reflect the law and include an overview of juror eligibility as part of the training or education of their own judicial officers and relevant court staff.

156. Under Ohio Revised Code Chapter 2313, jury commissioners are tasked with, among other responsibilities, compiling the jury source list annually, conducting a drawing of jurors, and—along with the courts of common pleas—deciding whether a juror may be excused from service. OHIO REV. CODE ANN. §§ 2313.06, 09, 13–14. Commissioners may also “examine under oath any juror called for trial as to that person’s qualifications to serve as a juror[.]” *id.* § 2313.01(B), including whether “the person has been convicted of a crime that by law renders the person disqualified to serve on a jury,” *id.* § 2313.17(B)(1).

157. Ohio Gov. Jud. R. V(1)(B)(2).

158. See *Advisory Committees and Task Forces*, OHIO SUP. CT., <https://www.supremecourt.ohio.gov/Boards/committees/> [https://perma.cc/9DKD-2SXX] (“Advisory committees provide advice and assistance to the Court and Court staff on topics of general public interest or emerging issues significant to the law, the legal profession, and the judicial process. Task forces are formed to review specific issues or topics involving the law, courts, the legal profession, or the administration of justice. . . . Advisory committees and task forces are created by the Chief Justice with notice to the Court and operate at the discretion of the Chief Justice. Members of advisory committees and task forces are appointed by or with approval of the Chief Justice. [T]hey are comprised of judges, attorneys, clerks of court, other court personnel, and private citizens from throughout Ohio.”).

159. *Office of Court Services*, OHIO SUP. CT., <http://www.sconet.state.oh.us/JCS/courtSvc/default.asp> [https://perma.cc/VBF8-4XGZ].

Since those with felony convictions who appear on jury source lists are often those who have completed incarceration and re-registered to vote, courts should start from the presumption that those with felony convictions who are summoned are eligible to serve.¹⁶⁰ Thus, courts should assume eligibility unless the person responds that they are still on parole or under community control sanction—as provided for in the new summons language on the Cuyahoga County Court of Common Pleas website—or upon questioning at voir dire.

If such channels are incapable of resolving the confusion, formal legal action may be required, particularly in light of the constitutional concerns outlined above. While attorneys can seek redress for defendants where a court improperly excluded eligible jurors,¹⁶¹ systemic change may be better accomplished outside of the confines of a particular trial. Another possibility is a civil action to ensure that the courts take steps to provide correct information to those with felony convictions and enforce the proper standards for juror eligibility. A 2004 lawsuit, for example, sought to enjoin local boards of elections

from advising ex-offenders that they are ineligible to vote while on probation, parole, or post release control, and requiring Defendant Secretary of State to issue notice to all felon ex-offenders in the state who have been released from prison during the past five years, advising them that they are eligible to vote if not incarcerated.¹⁶²

The suit settled when the boards of elections agreed “to take steps to ensure that correct information is provided to felons about their right to vote.”¹⁶³ Similar action may be required to protect the right to serve on a jury for those eligible under state law.

160. OHIO REV. CODE ANN. § 2313.06 (West 2020) (“Annual compilation of jury source list”) (directing compilations of lists from the board of elections from each county as well as the registrar of motor vehicles).

161. *See, e.g.*, Petition for Writ of Habeas Corpus at 114, *Pickens v. Shoop*, No. 1:19-cv-558 (S.D. Ohio June 11, 2020) (“The trial court deprived Pickens of his rights to an impartial jury, a fair trial, due process, equal protection, and the right to be free of excessive punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the constitution when it removed prospective jurors with felony convictions.”).

162. Class Action Complaint, *C.U.R.E. Ohio v. Kenneth Blackwell*, No. 1:04CV543, 2004 WL 3708731, at *2 (Aug. 17, 2004, S.D. Ohio).

163. *The Disenfranchisement of the Re-Enfranchised: Four Years Later*, OHIO JUST. & POL’Y CTR., at 3 (Sept. 2008). The report also cited a separate suit against the Summit County Board of Elections. The Board had sent those with felony convictions letters informing them of the revocation of their right to vote, but not that it was reinstated upon release from incarceration. The District Court for the Northern District of Ohio required the Board “to send correction letters to over 1,900 people who had been potentially misled by the earlier letter.” *Id.*; *see* Temporary Restraining Order, *Racial Fairness Project v. Summit Cty. Bd. Elections*, No. 5:04-CV-1948 (N.D. Ohio Sept. 28, 2004). If

B. Persons with felony convictions.

The Ohio Department of Rehabilitation and Correction (ODRC) requires that each institutional library and Adult Parole Authority (APA) Regional Office contains “mandatory information for offender access” on subjects such as voting rights and “[o]ther verified ‘service’ information pertaining to reentry preparation.”¹⁶⁴ In contrast, there is no requirement in the ODRC rules to provide information to released prisoners on their right to serve on a jury at the conclusion of any imposed parole or community control sanctions.

The ODRC should provide every released prisoner, either at the time the prisoner is released from incarceration or at the time he or she is released from any imposed parole or community control sanctions, with written notice that his or her right to serve on a jury is restored. It would be appropriate to convey this information at the same time as any information about restoration of voting rights or how to register to vote, since jury source lists are compiled from electors in the county.¹⁶⁵ The institutions could also place signs throughout prison facilities advising prisoners, in everyday language, that their jury eligibility is restored at the conclusion of any parole or community control sanctions. Since the ODRC and APA are already providing the aforementioned information pertaining to reentry preparation, there should be low implementation costs to including information related to jury eligibility as well.

Similarly, APA officers could be required, as part of a final supervision meeting, to verbally inform ex-offenders at the close of their community supervision that they are now eligible for jury service and the importance of that civic responsibility. There is little rationale not to do so, as the implementation costs here should be similarly low if they exist at all. In addition, the Correctional Institution Inspection Committee (CIIC)—a bipartisan legislative committee tasked to “evaluate and assist the development of programs to improve the condition or operation of

potentially misleading mailings have similarly dissuaded eligible jurors from responding affirmatively to a summons, similar remedial action may be required.

164. *Reentry Resource Center*, OHIO DEP’T. REHAB. & CORR., No. 78-REL-05 (Dec. 1, 2012).

165. OHIO REV. CODE ANN. § 2313.06 (West 2020). While ODRC provides information about voter registration, neither it nor the APA appear to provide voter registration forms as part of release. As ODRC provides forms for obtaining a social security card, birth certificate, and driver’s license, it could provide the voter registration form as well, since—unlike for juror eligibility—there is no requirement that an ex-offender finish parole or community control sanctions before his or her right to vote is restored. *See Inmate Transitional Release Planning*, OHIO DEP’T. OF REHAB. & CORR., No. 78-REL-01 (Feb. 25, 2019); *see also The Disenfranchisement of the Re-Enfranchised*, PRISON REFORM ADVOCACY CTR. (Aug. 2004); *The Disenfranchisement of the Re-Enfranchised: Four Years Later*, *supra* note 168.

correctional institutions”¹⁶⁶—could ensure implementation of the ODRC recommendations mentioned above, including written notice to released offenders that they are eligible to serve on a jury upon the completion of any imposed parole or community control sanctions.¹⁶⁷

C. Attorney education on jury eligibility.

Active attorneys in the State of Ohio must complete 24 hours of accredited continuing legal education (CLE) activities every two years.¹⁶⁸ In addition, attorneys newly admitted to practice in Ohio are required to complete a minimum of 12 credit hours of New Lawyers Training instruction.¹⁶⁹ CLE requirements include at least 2.5 credit hours of instruction on professional conduct topics such as “[a]ccess to justice and fairness in the courts and how these issues impact public trust and confidence in the judicial system and the perception of justice in Ohio,” including “[a]ssuring fairness in matters of race, ethnicity, foreign origin, religion, gender, sexual orientation, disability, socio-economic status, or other relevant topics.”¹⁷⁰

As attorneys serve as active participants in any voir dire where a court is considering juror eligibility for those with felony convictions, it is imperative that they are properly trained to know and keep the court informed of the proper law in Ohio. Unfortunately attorneys have not consistently lived up to this role—for instance, in the Hamilton County case referenced above where both defense and prosecution counsel repeatedly agreed that the prospective jurors should be removed for cause for having prior felony convictions.¹⁷¹

Accordingly, it is imperative that Ohio CLE trainings focused on trial practice, particularly on voir dire, accurately address juror qualifications for those with felony convictions so that attorneys can correct any misunderstanding at trial and properly select a more representative jury. In addition, the topic of juror eligibility for those with felony convictions would also be appropriate for professional conduct trainings on topics

166. OHIO REV. CODE ANN. § 103.73(A)(2) (West 2020).

167. See *id.* §§ 103.71–74; *The Role of the CIIC*, CORR. INST. INSPECTION COMM., <http://www.ciic.state.oh.us/charge/index.html> [<https://perma.cc/JAQ5-J72J>].

168. GOV. BAR R. X § 3(A); see also *Continuing Legal Education*, OHIO SUP. CT., <http://supremecourt.ohio.gov/AttySvcs/CLE/default.asp> [<https://perma.cc/YFL2-QDCG>].

169. GOV. BAR R. X § 1(A).

170. *Id.* § 3(B)(4)(d).

171. See Transcript of Proceedings on Motions, at 250–51, *State v. Pickens*, No. B-0905088 (Hamilton Com. Pl., Mar. 22, 2010) (defense counsel agreed to the removal of prospective jurors with felony convictions before voir dire, stating that “they would be excused anyway so we would agree they should be excused.”).

such as “public trust and confidence in the judicial system and the perception of justice in Ohio” and “[a]ssuring fairness in matters of race,”¹⁷² given the disproportionate impact of felon exclusion laws on African-American men, as noted above.

VI. CONCLUSION

Jury service is an integral part of American citizenship and American criminal justice, both for those convicted of felonies who wish to serve, as well as for those defendants seeking to preserve their rights to due process, equal protection, and to be tried before a fair cross section of their community, as required by the U.S. Constitution. As the Ohio General Assembly has granted the right to serve on a jury to those convicted of a felony upon the completion of any imposed parole or community control sanctions, it is incumbent upon the courts and other legal institutions to educate ex-offenders, attorneys, judges, court personnel, and other relevant parties about these rights and responsibilities.

As noted above, there are viable solutions available to address these concerns, including trainings, updated institutional rules, and potentially formal legal action. Such actions are necessary to fortify the public trust and confidence in the judicial system and the perception of justice in Ohio. In order for the Ohio justice system to retain perceived legitimacy regarding juror selection, it must at minimum ensure that existing laws on juror eligibility are properly understood and enforced—a requirement it has so far failed to meet with any consistency.

172. GOV. BAR R. X § 3(B)(4)(d).