

January 1987

Reforming West Virginia's Jury Selection Process: West Virginia Jury Selection and Service Legislation of 1986

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Recommended Citation

Keith A. George, *Reforming West Virginia's Jury Selection Process: West Virginia Jury Selection and Service Legislation of 1986*, 89 W. Va. L. Rev. (1987).

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REFORMING WEST VIRGINIA'S JURY SELECTION PROCESS: WEST VIRGINIA JURY SELECTION AND SERVICE LEGISLATION OF 1986

I. INTRODUCTION

Given the perceived and real abuses of the "key-man" system for selecting juries,¹ there developed a national move in the late 1960s and early 1970s to abolish this system and use a random system. In 1968, Congress enacted the Federal Jury Selection and Service Act establishing a random method for selecting juries.² In 1970 the National Conference of Commissioners on Uniform State Laws proposed a uniform jury selection act which established a random system for jury selection.³ The American Bar Association approved the act in 1972.⁴ Several states abolished systems similar to West Virginia's key-man system in favor of a random system with objective qualification criteria, including North Carolina,⁵ Idaho,⁶ Colorado,⁷ Maine,⁸ North Dakota,⁹ Hawaii,¹⁰ Indiana,¹¹ Mississippi,¹² Delaware,¹³ Minnesota,¹⁴ and Michigan.¹⁵ West Virginia joined the trend enacting a new jury selection and service act in 1986.¹⁶

II. THE OLD JURY SELECTION SYSTEM

Much of Chapter 52 of the West Virginia Code, the source of West Virginia's recently abolished key-man system of jury selection, was first enacted by Virginia prior to West Virginia's civil war secession.¹⁷ The power to determine who became jurors was centralized in the jury commissioners. The circuit court of each county

¹ See Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349 (1969); DiSalvo, *The Key-Man System for Composing Jury Lists in West Virginia--The Story of Abuse, The Case for Reform*, 87 W. VA. L. REV. 219 (1985); McKusick & Boxer, *Uniform Jury Selection Act*, 8 HARV. J. LEGIS. 280 (1970).

² Federal Jury Selection and Service Act, 28 U.S.C. §§ 1861-1869 (1982).

³ Uniform Jury Selection and Service Act, 13 U.L.A. 509-11 (1980 & Supp. 1986).

⁴ *Id.*

⁵ N.C. GEN. STAT. §§ 9-11 to -26 (1981 & Supp. 1985).

⁶ IDAHO CODE §§ 2-201 to -221 (1979 & Supp. 1986).

⁷ COLO. REV. STAT. §§ 13-71-101 to -122 (1973 & Supp. 1985).

⁸ ME. REV. STAT. ANN. tit. 14, §§ 1201-A to 1354 (1964 & Supp. 1985).

⁹ N.D. CENT. CODE §§ 27-09.1-01 to -22 (1971).

¹⁰ HAWAII REV. STAT. §§ 612-1 to -60 (1973).

¹¹ IND. CODE ANN. §§ 33-4-5.5-1 to -22 (West 1974).

¹² MISS. CODE ANN. §§ 13-5-2 to -97 (1974).

¹³ DEL. CODE ANN. tit. 10, §§ 4501 to 4541 (1976).

¹⁴ MINN. STAT. ANN. §§ 593.31 to .50 (West 1977).

¹⁵ MICH. STAT. ANN. §§ 27A.1303(1) to .1342 (Callaghan 1986).

¹⁶ W. VA. CODE §§ 52-1-1 to -3-1 (Supp. 1986).

¹⁷ W. VA. CODE §§ 52-1-1 to -3-1 (1981) amended by 1986 W. Va. Acts ch. 94.

appointed two jury commissioners.¹⁸ Although the commissioners were to be “well known members” of the opposing principal political parties,¹⁹ they were to pick jurors without regard to party affiliation.²⁰ The commissioners were to be “citizens of good standing” and “residents in the county.”²¹ Commissioners were to serve for a four year term without succession except in Class V, VI, and VII counties where they could serve two consecutive terms.²² The commissioners could be removed by the circuit court for “official misconduct, incompetency, habitual drunkenness, neglect of duty or gross immorality.”²³

Once in office, the commissioners were to make a master list of from 200 to 1,000 names of people who would be potential petit jurors.²⁴ Since the statute was silent as to the source of the names, the commissioners had complete discretion. They could use tax rolls, welfare rolls, phone books, city directories, club rosters, newspaper articles, lists of recent high school graduates, and drivers license lists, or could merely include personal friends, acquaintances, and relatives. The statute provided some limitations on who could be included on the list, disqualifying “[i]diots, lunatics, paupers, vagabonds, habitual drunkards, and persons convicted of infamous crimes.”²⁵ The potential jurors must not have served on a jury within the last two years or have requested that their names be included on the list.²⁶ The commissioners had to believe that their potential jurors were “well qualified to serve as jurors,” “of sound judgement,” “good moral character,” and “free from legal exception.”²⁷ Traditionally, each commissioner prepared half the list independently of the other and used whatever method he or she desired.²⁸

After the master list was prepared, it was kept by the clerk of the circuit court.²⁹ However, the commissioners’ discretion did not end at this point. At any time, the commissioners and the court had access to the list to strike a name of a person who had been “convicted of any scandalous offense or been guilty of any gross immorality, and substitute another in his place.”³⁰ The names were written on slips of paper, ballots, and kept in a box.³¹ Later, before a trial, the

¹⁸ *Id.* at § 52-1-3.

¹⁹ *Id.*

²⁰ *Id.* at §§ 52-1-3 to -4.

²¹ *Id.* at § 52-1-3.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at § 52-1-4.

²⁵ *Id.* at § 52-1-2.

²⁶ *Id.* at § 52-1-4.

²⁷ *Id.* - The statute required the commissioners to make serious judgement about individual citizens often with little or no information.

²⁸ DiSalvo, *supra* note 1, at 223.

²⁹ W. VA. CODE § 52-1-5 (1981).

³⁰ *Id.*

³¹ *Id.* at § 52-1-6.

commissioners would draw names of potential jurors from the box.³² The statute required a drawing of at least thirty names, but any number greater than that number could be drawn.³³ Even at this stage the commissioners could decide not to use the juror for the particular case.³⁴ If in the commissioner's opinion the person drawn was unable to attend because of sickness, absence from home, or any other cause then the juror's ballot was destroyed and another drawn.³⁵ Later, after the jurors were summoned, a smaller number was chosen randomly from the thirty selected by the commissioners.³⁶

The method of choosing jurors for grand juries was essentially the same with a few minor exceptions. The commissioners could have a much smaller master list of from 100 to 200 names.³⁷ The commissioners were also to make sure each magisterial district was represented on the master list in proportion to its population.³⁸ The potential jurors had to be "free of felony convictions, and convictions of scandalous offenses," "citizens of the county," "not officeholders," and residents of the state for at least one year.³⁹

The essential problem with West Virginia's key-man system of selecting juries was that it left a great amount of discretion, with very little statutory direction, in the hands of the jury commissioners.⁴⁰ The commissioners had virtually unlimited discretion at several stages in the process, the first and most critical being development of the master list. Because the commissioners were allowed to use any source to create the list, the lists potentially did not represent a fair cross section of the community.⁴¹

Another area of the commissioners' discretion was their ability and duty at any time to strike a name from the master list and replace it with another name if the person was guilty of a gross immorality or convicted of a scandalous offense.⁴² This provision extended the commissioner's discretion as to the names on the master list to the duration of his term. Any time a commissioner made new discoveries about a citizen's moral character, the commissioner could remove the name and replace it with a new name.

³² *Id.* at § 52-1-10.

³³ *Id.* at § 52-1-8.

³⁴ *Id.* at § 52-1-12.

³⁵ *Id.*

³⁶ W. VA. TRIAL CT. R. XII.

³⁷ W. VA. CODE § 52-2-2 (1981).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ The key-man system of jury selection has been widely criticized. The most prominent recent critic of West Virginia's key-man system was Professor Charles DiSalvo. *See*, DiSalvo, *supra* note 1.

⁴¹ *Id.* at 244-48.

⁴² W. VA. CODE § 52-1-5 (1981).

The final area of discretion was the commissioners' ability when drawing for a pool of juror's names for a particular trial to destroy the ballots drawn and draw another name.⁴³ As previously stated, the commissioner was to destroy ballots of those who in his opinion were unable to attend the trial and be a good juror because they were sick, away from home or any other cause.⁴⁴ This essentially allowed the commissioners to veto particular jurors for particular trials. The system left almost total discretion with the commissioners with virtually no meaningful guidance from the statute, and no mechanism in place to act as a check on the commissioners. The statute created a system ripe for abuse and misuse. Members of certain identifiable groups (relating to economic, social, racial, gender, age groups) were most certainly going to be intentionally or unwittingly excluded or underrepresented.

The available quantitative analysis of the West Virginia key-man system supports the conclusion that the system resulted in the selection of juries that were not a fair cross section of the community. Although based on judges' and attorneys' perceptions, one study found an underrepresentation of the young, the poor, blacks, Spanish-Americans, and the elderly on West Virginia's juries.⁴⁵ Another study found that "no county's jury pool in our survey was found to be representative of the county population."⁴⁶ The study discovered underrepresentation of the age groups eighteen to thirty-eight, and fifty to sixty-four, and underrepresentation of those with less than a high school education and those who made at or below the state's mean income.⁴⁷ A third study found a statistically significant underrepresentation of women on West Virginia's jury lists.⁴⁸

Like most archaic and unfair laws, citizens challenged the old jury selection statute in the courts. The earliest significant challenge to West Virginia's key-man system's constitutionality came about in *State v. Johnson*.⁴⁹ In *Johnson*, the appellant challenged the statute on two basic grounds. First, the defendant claimed that the statutory qualification that excluded idiots, lunatics, paupers, habitual drunkards, and those convicted of infamous crimes was unreasonable and vague, and therefore unconstitutional.⁵⁰ The second ground was that the commissioners could not constitutionally choose jurors because in their opinion the jurors were

⁴³ *Id.* at § 52-1-12.

⁴⁴ *Id.*

⁴⁵ An Assessment of the Jury Selection Process in West Virginia 12. (League of Women Voters of West Virginia, Inc. (1984)).

⁴⁶ M. Arbogast, D. Bumgardner, & S. Knox, Prospective Jurors in West Virginia: A Comparison 57 (Dec. 1984) (unpublished research available at the Department of Public Administration at West Virginia University).

⁴⁷ *Id.*

⁴⁸ DiSalvo, *supra* note 1, at 250.

⁴⁹ *State v. Johnson*, 157 W. Va. 341, 201 S.E.2d 309 (1973).

⁵⁰ *Id.* at 346, 201 S.E.2d at 313.

of "sound judgement, good moral character, and free from legal exception."⁵¹

In answering the first contention, the court reasoned that to insure the fairness of the trial and protection of due process rights, the courts must have a good reputation and atmosphere,⁵² and therefore must be able to reject jurors who by their "mere presence produce distraction or cause disruption."⁵³ Idiots, lunatics, habitual drunkards, and persons convicted of infamous crimes were held to fall into this category.⁵⁴ The court insisted that the legislature's definition of "vagabonds and paupers" included persons that are "habitually and inextricably destitute by their own purposeful neglect of responsibilities."⁵⁵ The court criticized the statute as "inartfully drawn and now archaic,"⁵⁶ but nevertheless, using the narrow definition of paupers and vagabonds, upheld the constitutionality of the statute.⁵⁷ The defendant failed to present evidence that the commissioners used a less restrictive definition.⁵⁸ Addressing the defendant's second contention, the court ruled that giving vast discretion to the commissioners was not unreasonable,⁵⁹ and that since there was no proof that the system discriminated against a recognizable class⁶⁰ the law was constitutional as written.⁶¹ Five years later the court summarily reaffirmed *Johnson*.⁶²

A similar challenge arose in the case of *State ex rel. Whitman v. Fox*.⁶³ The appellant challenged the validity of his indictment because the grand jury was not a fair cross section of the community.⁶⁴ The appellant also challenged the statute's constitutionality as applied by the commissioners (who used land books and voting rolls to establish the master list).⁶⁵ Noting that almost all lists used tend to produce some sort of bias, the court used an equal protection analysis and adopted the *Castaneda* rule.⁶⁶ This rule requires that the appellant prove a "substantial under-representation of his race or the identifiable group to which he belongs."⁶⁷ The appellant must prove: (1) the existence of a recognizable, distinct class that was singled out for different treatment under the law as written

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 348, 201 S.E.2d at 314.

⁵⁸ *Id.* at 347, 201 S.E.2d at 313.

⁵⁹ *Id.* at 347-48, 201 S.E.2d at 313.

⁶⁰ *Id.*

⁶¹ *Id.* at 348, 201 S.E.2d at 314.

⁶² See *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978).

⁶³ *State ex rel. Whitman v. Fox*, 160 W. Va. 633, 236 S.E.2d 565 (1977).

⁶⁴ *Id.* at 647, 236 S.E.2d at 574.

⁶⁵ *Id.* at 647-48, 236 S.E.2d at 574.

⁶⁶ The rule was adopted from *Castaneda v. Partida*, 430 U.S. 482 (1977).

⁶⁷ *Whitman*, 160 W. Va. at 649, 236 S.E.2d at 574 (quoting *Castaneda*, 430 U.S. at 478).

or applied, (2) that underrepresentation has occurred over a long period of time, and (3) that the procedure is susceptible to abuse or is not facially neutral in selection.⁶⁸ The court held that the appellant failed to meet all of the standards of the test,⁶⁹ but did not clearly decide if nonvoting nonlandowners constituted an identifiable group. The court also rejected the additional contention that the act violated the Magna Carta.⁷⁰

In *State v. Williams*,⁷¹ the court found that the appellant failed to present any evidence to support his contention that using voting registration lists to select jurors excluded blacks or the poor. The court upheld the use by the commissioners of voter registration lists noting that both voting and jury duty are privileges "evidencing one's desire responsibly to participate in a democratic society."⁷² The court, nevertheless, refused to limit commissioners' discretion by making the use of the list mandatory.⁷³

The last significant court challenge of the statute also failed. In *State v. Hobbs*,⁷⁴ the Court rejected the appellant's claim that the statute violated the sixth amendment and the equal protection clause of the fourteenth amendment. Noting the shift of the United States Supreme Court from an equal protection analysis to sixth amendment analysis in *Taylor v. Louisiana*,⁷⁵ the court adopted the new test for the constitutionality of the jury selection procedure. The appellant must show: (1) that the group alleged to be excluded is a distinctive group in the community, (2) that representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community, and (3) that underrepresentation is due to systematic exclusion of the group from the selection process.⁷⁶ The appellant's challenge failed the first step that non-personal property taxpayers constituted a "cognizable" or "distinctive" group.⁷⁷ Since non-personal property taxpayers had no factors which defined or limited the group, no cohesion, and no interest which could not be protected adequately by the rest of the population, the court found the group was not "cognizable".⁷⁸ The court discussed groups held by other courts to be cognizable: Blacks, Mexican-Americans, American Indians, those over sixty-five, and young adults.⁷⁹ The court also discussed decisions where groups were found not to be

⁶⁸ *Id.*, 236 S.E.2d at 574-75.

⁶⁹ *Id.* at 649-50, 236 S.E.2d at 575.

⁷⁰ *Id.* at 650, 236 S.E.2d at 575.

⁷¹ *State v. Williams*, 162 W. Va. 348, 357, 249 S.E.2d 752, 757 (1978).

⁷² *Id.*

⁷³ *Id.*, 249 S.E.2d at 758.

⁷⁴ *State v. Hobbs*, 168 W. Va. 13, 282 S.E.2d 258 (1981).

⁷⁵ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁷⁶ The test is taken from *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

⁷⁷ *Hobbs*, 168 W. Va. at 26, 282 S.E.2d at 267.

⁷⁸ *Id.* at 27, 282 S.E.2d at 267.

⁷⁹ *Id.* at 28 n.3, 282 S.E.2d at 267 n.3.

cognizable, including persons without drivers licenses, persons with less than twelve years education, and opponents of the death penalty.⁸⁰

Although the court consistently refused to overturn the statute's validity, it did so primarily on the lack of proof that the defendants put forward. The major problem in the court challenges appeared to be a lack of gathering and presenting statistical proof.

III. A NEW SYSTEM IS CREATED

The alleged inequities of the old system were recently addressed by the legislature. West Virginia's new jury selection statute radically alters the way juries are selected in West Virginia.⁸¹ The thrust of the law eliminates the key-man system and introduces a random method of selecting juries. The new law also updates several other provisions in Chapter 52 of the West Virginia Code.

The new law establishes a three person jury commission for each county, made up of two jury commissioners, appointed by the circuit court in much the same fashion as the old statute, and the clerk of the circuit court.⁸² The new jury commission will have virtually no discretion, a significant change from the vast discretion given to the old commissioners. Unlike the old law which allowed the commissioners to decide who would be put on the master list, the new statute precisely mandates what constitutes the master list. However, the new law gives an important choice to the circuit court or chief judge, allowing them to decide if the county will use a jury wheel or a jury box.⁸³ The decision impacts heavily on the county's jury selection process.

When the circuit court chooses to use a jury wheel (any electronic system in which names or identifying numbers can be placed and removed at random), the statute requires that the master list contain all voter registration lists and all drivers' license lists for the county.⁸⁴ The commission is to avoid duplication of names on the master list.⁸⁵ The law also gives the West Virginia Supreme Court of Appeals the authority to designate additional lists to be included on the master list in order to insure that it represents a fair cross-section of the county.⁸⁶

If the circuit court chooses to use a jury box (any physical, nonelectronic device in which names or identifying numbers can be placed and drawn at random),

⁸⁰ *Id.*, 282 S.E.2d at 268 (footnote 3 continued).

⁸¹ The new jury selection act appears to be a partial adoption of a proposed act put forth by Professor Charles DiSalvo in his article. DiSalvo modeled the proposal after the *Uniform Jury Selection and Service Act* and the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1869 (1982). See DiSalvo, *supra* note 1.

⁸² W. VA. CODE § 52-1-4 (Supp. 1986).

⁸³ *Id.* at §§ 52-1-5(a) to -3.

⁸⁴ *Id.* at § 52-1-5(b)(1).

⁸⁵ *Id.* at § 52-1-5(b).

⁸⁶ *Id.*

the master list is limited to all the voter registration lists.⁸⁷ Critics have suggested that such a single source list fails to represent a fair cross-section of the community, underrepresenting certain identifiable groups.⁸⁸ It is conceivable that in some counties, where the commissioners under the old system conscientiously used multiple lists and under the new system where the judge chooses the jury box/single list system, that the new statute will create a master list that is less representative of the county's population. This result directly contradicts the legislature's declaration of policy.⁸⁹ The statute also fails to give the West Virginia Supreme Court of Appeals the authority to designate additional lists to the jury box counties in order to insure their master lists represent a fair cross-section of their communities.⁹⁰ Given the simpler and less expensive nature of the jury box/single list method, many counties will likely choose the jury box over the less criticized jury wheel/multiple list method.⁹¹ Under either system, compiling the master list will not involve discretion on the part of the jury commission.

After the master list is properly compiled, it is to be open to the public for examination.⁹² The commission is to use a specific random method to acquire a set number of potential jurors from the master list to use in the jury wheel or box.⁹³ The statute requires a minimum number of potential jurors to use in the jury wheel or box for counties within four population ranges.⁹⁴ Counties with a population of less than 15,000 people must have at least 200 potential jurors in their jury wheel or box.⁹⁵ Counties with a population greater than 15,000 but less than 50,000 must have at least 400.⁹⁶ Counties with population greater than 50,000 but less than 90,000 must have at least 800.⁹⁷ Counties with a population over 90,000 must have at least 1,600 potential jurors.⁹⁸ The jury commission or circuit court can increase the number used.⁹⁹ The jury wheel or box is to be emptied and refilled in October of every even-numbered year.¹⁰⁰

To obtain the required number of potential jurors for the the jury wheel or box from the master list, the statute dictates a particular random method.¹⁰¹ The

⁸⁷ *Id.* at § 52-1-5(b)(2).

⁸⁸ See DiSalvo, *supra* note 1, at 256-61 for a discussion of such criticism.

⁸⁹ W. VA. CODE § 52-1-1 (Supp. 1986).

⁹⁰ *Id.* at § 52-1-5(b)(2).

⁹¹ One reason the single list method may be perceived as less expensive is that it eliminates the need to cross-check the lists to avoid duplication of names.

⁹² W. VA. CODE § 52-1-5(d) (Supp. 1986).

⁹³ *Id.* at § 52-1-6.

⁹⁴ *Id.* at § 52-1-6(b).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at § 52-1-6(c).

number on the master list is to be divided by the number needed for the jury wheel or box.¹⁰² The next greater whole number will be the "key number" (never less than two).¹⁰³ A "starting number" will be chosen by a random method from numbers from one to the key number.¹⁰⁴ The required names shall then be selected by taking names starting with the name that corresponds to the starting number and then successively at intervals equal to the key number.¹⁰⁵ If need be, the commission can start again at the beginning of the list and continue selecting the names at intervals equal to the key number.¹⁰⁶ Prior to selecting the names, the commission will strike from the master list all people who have served on petit juries in the preceding two years.¹⁰⁷ The new statute no longer allows commissioners to strike names of those people who they determine to be guilty of gross immorality, or that have been convicted of any scandalous offense.¹⁰⁸

After the jury wheel or box is filled, the jury commission shall publicly draw at random from the wheel or box the number of jurors required.¹⁰⁹ The statute no longer allows the commissioners the discretion to remove names and then destroy them if they believe the juror to be sick, away from home, or unable to act as a juror for other reasons.¹¹⁰ The circuit court is to establish the rules relating to this public random drawing.¹¹¹

After the names are drawn, the selected jurors receive a juror qualification form which elicits the name, address, sex, race, and age of the prospective juror and asks a series of questions dealing with their qualifications to serve as jurors.¹¹² Such a provision will help preserve data needed to determine whether the new system is producing juries who represent a fair cross-section of the community.

The circuit court, rather than the commission, determines when a juror is disqualified. The statute sets forth a list of factors for disqualification: (1) if the juror is not a citizen of the United States, at least eighteen, and a resident of the county; (2) if the juror cannot read, speak, and understand English; (3) if the juror is incapable because of a substantial physical or mental disability to serve; (4) if the juror has served on a jury within the past two years; (5) if the juror has lost the right to vote because of a criminal conviction; or (6) if the

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The statute provides an illustrative example of the whole process.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at § 52-1-6(d).

¹⁰⁸ *Id.* at § 52-1-5 (1981).

¹⁰⁹ *Id.* at § 52-1-7(a) (Supp. 1986).

¹¹⁰ *Id.* at § 52-1-12.

¹¹¹ *Id.*

¹¹² *Id.* at § 52-1-7(a). This requirement is different from the old system which was not uniform and rarely kept such data. See DiSalvo, *supra* note 1, at 255.

juror has been convicted of perjury, false swearing, or another infamous offense.¹¹³ The disqualification criteria is much improved from the previous "idiots, lunatics, paupers, vagabonds, habitual drunkards, and persons convicted of infamous crimes" criteria.¹¹⁴

The new law provides that a party may challenge a jury selected by a method that substantially fails to comply with the act.¹¹⁵ Within seven days after the party discovered or by exercise of reasonable diligence should have discovered the failure to comply, the party may move to stay the proceedings, and in a criminal case can move to quash the indictment.¹¹⁶ The party is entitled to see all records, public and private, used by the commissioners or clerk to select the jury.¹¹⁷ The new statute requires that all records and papers used be kept for at least four years to facilitate challenges.¹¹⁸ It also requires the jury commission of each county to make an annual report to the West Virginia Supreme Court of Appeals on methods used and the age, race, and gender of each person for which a juror qualification form is received.¹¹⁹ The annual report enables the court to readily determine if the system is selecting juries which represent a fair cross-section of the community.

The new statute applies all the provisions for the selection of petit juries to magistrate juries.¹²⁰ Under the old system, the West Virginia Supreme Court of Appeals set forth rules for the selection of magistrate juries.¹²¹ Given the limited jurisdiction and purpose of the magistrate courts, the new provisions may create a greater burden on the magistrate court system than is warranted by the advantages of the new selection process.

Article 2 of the new statute applies the same procedures as used by Article 1 to grand juries, with an important exception.¹²² This exception involves situations where there is an unanticipated shortage of jurors. When there is a shortage of petit jurors, the court may require the additional jurors to be selected at random from the jury wheel or jury box.¹²³ However, where there is a shortage of grand jurors, the court may allow the selection of up to two additional jurors by a nonrandom method.¹²⁴

¹¹³ W. VA. CODE § 52-1-8(a) (Supp. 1986).

¹¹⁴ *Id.* at § 52-1-2 (1981).

¹¹⁵ *Id.* at § 52-1-15(a) (Supp. 1986).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at § 52-1-15(b).

¹¹⁸ *Id.* at § 52-1-16.

¹¹⁹ *Id.*

¹²⁰ *Id.* at § 52-1-26.

¹²¹ *Id.* at § 50-5-8 (Supp. 1986).

¹²² *Id.* at §§ 52-2-1 to -13.

¹²³ *Id.* at § 52-1-9(b).

¹²⁴ *Id.* at § 52-2-4.

Several minor changes made by the new statute should be pointed out. The mileage paid jurors is now set at the same rate as paid to state employees, and the maximum allowable daily compensation rate for jurors has been increased to a range of \$15.00 to \$40.00 a day.¹²⁵ Jury costs assessed against a losing defendant or civil litigant increased to a maximum of \$180.00.¹²⁶ The statute added a prison sentence of one to five years, or both imprisonment and a maximum fine of \$5000.00 as a penalty for fraud in selecting a jury.¹²⁷ There also is an increase in the maximum fine for failure to perform jury service ranging from \$50.00 to \$1000.00.¹²⁸

The new statute cleaned up archaic, confusing, and sloppy language in several sections but left the sections essentially the same. These include old West Virginia Code section 52-1-18, regarding juror competency when a municipality, county, or district is a party; section 52-1-20, regarding how to summon jurors from other counties; section 52-1-22, regarding when a juror is not entitled to compensation; section 52-1-23, regarding the administration of the payment of jurors; section 52-1-24, regarding the payment of compensation; and section 52-3-1, regarding the right of action for discrimination against employees because of jury duty. The new statute did not affect section 52-2-1 and sections 52-2-5 through 52-2-12, which relate to grand juries.¹²⁹

IV. CONCLUSION

West Virginia's archaic key-man system for jury selection, by giving virtually unlimited and unchecked discretion to the jury commissioners, created a serious danger of abuse. Although various judicial challenges to the key-man system failed, the Legislature finally took action by enacting the new jury selection and service legislation.

The new act is a step towards a more just judicial system. The new system is intended to insure that all of our state's citizens are fairly represented on juries and that litigants and defendants can stand trial before juries that are a fair cross-section of the community. Even if there is a failure within the new system, there will now be checks and mechanisms designed to correct the failure. The West Virginia Supreme Court of Appeals will have the data needed to monitor the process, and the authority to require the jury commissions of counties using a jury wheel to use additional lists to remedy any future underrepresentation. Un-

¹²⁵ Section 52-1-17 was section 52-1-21 under the old code.

¹²⁶ W. VA. CODE § 52-1-17 (Supp. 1986).

¹²⁷ *Id.* at § 52-1-22 (amending W. VA. CODE § 52-1-25 (1981)).

¹²⁸ *Id.* at § 52-1-24 (amending W. VA. CODE § 52-1-16 (1981)).

¹²⁹ Old section 52-1-18 is now section 52-1-13; old section 52-1-20 is now section 52-1-14; old section 52-1-22 is now section 52-1-18; old section 52-1-23 is now section 52-1-19; old section 52-1-24 is now section 52-1-20.

fortunately, counties using the jury box will not have the same protection. Nevertheless, juries in West Virginia will become more democratic.

Keith George