

2019 HOUSE JUDICIARY COMMITTEE

HB 1118

2019 HOUSE STANDING COMMITTEE MINUTES

Judiciary Committee Prairie Room, State Capitol

HB 1118

1/23/2019

31299

31334

Subcommittee

Conference Committee

Committee Clerk: DeLores D. Shimek

Explanation or reason for introduction of bill/resolution:

Relating to the master list for jury selection.

Minutes:

1,2,3

Vice Chairman Karls: Opened the hearing on HB 1118.

Rep. K. Koppelman: Introduced the bill. When we comply jury lists. The tribal registries are not available. That is an issue because we talk about the idea of having a jury of your peers who deal with the court system regularly and Chief Justice of the Supreme Court and I discovered that it is not uncommon in areas where the native American population in our state are high; maybe have a native American on trial for something and have the representation of native American's in the jury small or non-existence. That doesn't reflect a jury of your peers so I think this bill strikes a good balance with their counsel and the best way to do this is. The concern was if we pass a law that we have to include tribal registry's we have a population on the native American reservations that has the sovereignty we could be telling a tribe aka a sovereign nation you must provide this information to us; that was the problem. The Chief Justice felt this would be a good fix. It is up to the tribes now whether they want to do it or not.

Rep. Roers Jones: If the tribe opts to provide this information; then tribal members could be called to jury duty for any type of court case. There are consequences for people who do not appear for jury duty? Would those same consequences be available for tribal members who fail to appear for jury duty?

Rep. K. Koppelman: I don't think race would be a factor in terms of how we treat any violation. We would not differentiate if someone is call and does not appear.

Rep. Roers Jones: The question is jurisdiction? If they are living totally on the reservation and being called off the reservation to participate in a trial is my question?

Rep. K. Koppelman: It is likely to be used for the 70% that we heard in the last bill that do not live on the reservation. The Devils Lake area there might be a 30% population of native Americans. The idea is inclusion. I don't know if the intent was to go onto a reservation and get someone and force them to appear on a jury outside the reservation. The tribal courts

have jurisdiction on the reservation and they may have a similar system where they include members. Often times we don't know who is and who is not a tribal member.

Rep. Paur: Aren't jury's selected from the poll books?

Rep. K. Koppelman: If you look at the statute here you can see where they get them. The bill has the list. Went over the list on the bill. This would simply include the tribal reservations.

Representative Simons: Isn't this already being done through jury selection by the attorney's?

Rep. K. Koppelman: It is who is setting in that pool of potential jurors. There is no way to include the native American population in the list now.

Rep. Magrum: Does this matter where the person is in trouble at? If they are in trouble off a sovereign land does this apply. If they area on the reservation isn't it a while different court?

Rep. K. Koppelman: Yes if they are on the reservation and the criminal activity is there that has to do with the tribal courts. This through our Supreme Court deals with the list's that are compiled off the reservations in courts throughout our state where there is still a large native American population, but they have no way knowing who those folks are so they can include them in those kinds of lists so that is the intent.

Representative Jones: You listed motor vehicle, driver's license and tax payers and they would be in that list if they are off the reservation. If we got a list and in New Town where I am from the population changes fast. How would you update that list?

Rep. K. Koppelman: In any area for any list made up of the categories that you mentioned and the more mobile a society is in a particular area the list can be outdated quickly. The clerk of court is the one who compiles this. If you voted in the last election your name is on the voters list because of that and they call you for jury duty; I think there is a system now in force. That would not have an impact on this. This is to have a representative slice of the population that is called for a particular jury on a particular trial.

Representative Simons: How does the court system know if they are native American now? Is that something they have record of? How do we do this exactly.

Rep. K. Koppelman: That is why the list would be helpful so they could know. I Rep. McWilliams told it is not uncommon in those areas where there is a relatively high percentage of the population that is Native American, if you have a Native American on trial there might be an all-white jury setting in judgement of that case. Or an under representation of Native American's based on population. This would be hard data that we could rely on.

Rep. McWilliams: Basically we take lists from all kind of things and it is from a registry data base and includes it in the master list.

Rep. K. Koppelman: This would be a master list with the tribe included if they wanted to provide it. If the tribe is concerned about its members being under represented on a jury; I would think it would be in their interest to provide this information.

Representative Jones: We are just going to be asking to add native American's to the pool and then we could get a more even representation of who they are?

Rep. Koppelman: You I believe that is right.

Representative Simons: In our area we would have more native American people than black people. Is there something where we have to address the whole area? Where do we stop?

Rep. K. Koppelman: The difference here is the whole system we have with Native American's. We have reservations, tribes and tribal registries and that does not exist for any other ethnic groups.

Vice Chairman Karls: Why do I always get picked for jury duty?

Travis Finck, Deputy Director of the Commission on Legal Counsel for Indigents: (Attachment #1) What an amazing day for indigents where we get to talk about pre-trial and the expansion and a fair cross section of your jury on the same day. When we get a jury pool we a process of selection of jurors and race is often a factor. We often find there just isn't in that jury pool. Someone cannot exclude someone once they have been called to the jury solely on the basis on race. Once they are on this list and they get randomly chosen to appear for your jury they cannot be excluded solely based upon race. The problem is getting them there and included in this list.

Dean Poll, Citizen: I am a log home contractor from West Fargo, ND: (Attachment #2 & 3) I wanted to remind you what the Governor did when he displayed the five flags outside his office of the tribal nations involved in this. Went through the handouts. (21:20-26:17) I think by him doing tis he is saying we are all in this together, this legislative process. I am in support of this bill. If this bill is passed into the law the onerous is not on the legislature it is on the tribe. The tribes cannot do this right now. If you chose to pass this bill the tool is there. The cost to do this will be to the clerk of court of each county. I would estimate that would take less than one person to do in an eight hour shift if the tribes agree to do it. I urge you to take a close look at this and recommend you pass it into law.

Representative Simons: When does sovereignty become different. You brought up birth certificates etc. which is all very awesome. They are not part of our system nor are we part of theirs. I respect that. there is going to be some irregularities?

Dean Poll: Yes. The reservation justice system is a separate process completely from what the legislature has control over in ND. This is applying to which the legislature has control over; not the sovereign part of criminal justice that is in the tribal system.

Representative Simons: If I don't show up for jury trial that is a big thing. How will this work with Native Americans? Discussed fact the Native American's do things on their own time.

Dean Poll: I draw you back to Governor Burgum is displaying the tribal flags outside his office. We need to give equal excess to everyone. We are making this an option.

Representative Jones: If it is a statewide crime; then it will include this list. Is that correct?

Dean Poll: Yes that is correct.

Opposition: None

Hearing closed.

New tape 31334

Do Pass Motion Made by Rep. McWilliams; Seconded by Rep. Vetter

Discussion:

Representative Simons: I can see some issues in this concept.

Chairman K. Koppelman: It leaves the option in the hand of the tribe.

Rep. Paur: This list would include all native American's from that tribe and if they live on the reservation they don't have to show up?

Chairman K. Koppelman: This bill would not change that.

Rep. McWilliams: The jury list goes across the entire state.

Representative Simons: Try to serve a fine on the reservation. It is a sovereign nation.

Roll Call Vote: 11 Yes 2 No 1 Absent Carrier: Rep. Jones

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 HB 1118**

House Judiciary Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar

Other Actions: Reconsider _____

Motion Made By Rep. McWilliams Seconded By Rep Vetter

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	X		Rep. Buffalo	---	
Vice Chairman Karls	X		Rep. Karla Rose Hanson	X	
Rep. Becker	X				
Rep. Terry Jones	X				
Rep. Magrum	X				
Rep. McWilliams	X				
Rep. B. Paulson	X				
Rep. Paur		X			
Rep. Roers Jones	X				
Rep. Satrom	X				
Rep. Simons		X			
Rep. Vetter	X				

Total (Yes) 11 No 2

Absent 1

Floor Assignment Rep. Jones

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1118: Judiciary Committee (Rep. K. Koppelman, Chairman) recommends DO PASS
(11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1118 was placed on the
Eleventh order on the calendar.

2019 SENATE JUDICIARY

HB 1118

2019 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Fort Lincoln Room, State Capitol

HB 1118
2/27/2019
#32898 (20:00)

- Subcommittee
 Conference Committee

Committee Clerk: Meghan Pegel

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact subsection 1 of section 27-09.1-05 of the North Dakota Century Code, relating to the master list for jury selection.

Minutes:

2 Attachments

Chair Larson begins discussion on HB 1118. Senator Osland was absent.

Kim Koppelman, District 13 Representative, testifies in favor

Representative K. Koppelman: This came to me as a suggestion from a constituent who is here today to testify. We have records we use in ND to help with jury selection such as voter lists which our courts use in order to compile lists of people for potential jury duty. The concern is that Native Americans may not be appropriately represented on our state juries. That's especially a concern if you're in some areas of our state where the Native American population is relatively high. When I enquired about this with the Indigent Defense Commission and the supreme court, I learned that this is an issue that they've looked at for some time. They realize the disparity and problem, but because tribes and reservations are sovereign nations, the state of ND has no business asking for their tribal registry. The way to fix that is in the bill- to say that the tribal registries will be included on these lists that we use to procure members to serve on juries if the tribe chooses to share that information.

Senator Bakke: Their names are not on the motor vehicle registration lists or the utility customer lists?

Representative K. Koppelman: They are, but you don't know who they are. Everyone who drives a car would be on the list, but there's no way to identify members of a tribe. We need to strive for a jury of your peers.

(4:50) Travis Finck, Deputy Director of the Commission on Legal Counsel for Indigents, testifies in favor (see attachment #1)

Senator Luick: What is the definition of "peers"?

Finck: It is simply someone that is also a resident in the county in which you are charged with a crime. We have randomly selected jury lists, and this would simply expand the number of those persons that are on this qualified juror list. A peer is simply someone else that lives in the district.

Senator Luick: We wouldn't be unintentionally overloading the peer populous?

Finck: I understand the concern, but that would not happen. If you think of bingo, all you're doing is putting more ping pong balls in the tumbler that you're pulling out of. By doing that, you're giving the opportunity for a fair cross section of your peers similarly situated to you.

Vice Chairman Dwyer: Have there been any conversations with the tribes about this? I assume they would be in favor.

Finck: There are those concerns of sovereignty and historical aspects, but since it is permissive language, they will ultimately make their own decisions.

(9:45) Dean Poll, W. Fargo Log Home Contractor, testifies in favor (see attachment #2)

Poll: The white handout is a copy of our ND statute on jury selection and how the law reads today (**pages 1-5**). The green handout is the bill that Representative Koppelman introduced with the change that's being suggested (**page 6**). The blue handout is a legal argument in support of making this change to the uniform jury selection and service act (**pages 7-8**). One of my employees was incarcerated. As part of being involved with the process of his incarceration, I noticed this disparity in the jury population. I came to find out that the ND supreme court and the legal counsel of ND for the defense of indigents was interested in making a change, so I wanted to follow through and testify today. There are a set of metrics in our state that are used to select jury participants, and we have found that Native Americans are not brought into that metric. Part of our statute requires that notifications for jury service be sent to address of residence, and a lot of Native Americans don't have an address of residence.

Chair Larson: Do you know what the penalty is if you are summoned to jury duty and don't show up?

Poll: No I don't, but whatever it is would remain intact in spite of this proposed bill. I also want to mention that the cost would be borne by the county. I would guess it would take one clerk of court perhaps one day to update any jury mastery list. The state wouldn't be on the hook for any finances in that regard.

Senator Bakke: On page 4 of the testimony it includes "penalties for failure to perform jury service", and all it says is that it was repealed. I don't know if we have anything in Century Code currently.

(16:20) Representative K. Koppelman: I didn't formally reach out to the tribes. However, if you look on the sponsorship on the bill, several of these folks either have connections with or represent areas with tribes in their districts. On a personal note, I had thought that

legislators were oftentimes excluded from jury duty because of the role we play, but that's true.

Vice Chairman Dwyer: I have a jury request during this session.

Representative K. Koppelman: I'm sure the court would make an exception for your need to be here.

Chair Larson: Does anyone know the penalty for failure to appear?

Finck: The judge could hold someone in contempt. I think in contempt you can be sentenced up to 60 days with some monetary fines; however, I have never seen this happen. I have seen a judge ridicule someone for showing up late, but not a contempt.

Chair Larson closes the hearing on HB 1118.

Senator Myrdal: Motions for a Do Pass.

Senator Luick: Seconds.

A Roll Call Vote was Taken: 5 yeas, 0 nays, 1 absent. Motion carries.

Senator Myrdal will carry the bill.

**2019 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1118**

Senate Judiciary Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Senator Myrdal Seconded By Senator Luick

Senators	Yes	No	Senators	Yes	No
Chair Larson	X		Senator Bakke	X	
Vice Chair Dwyer	X				
Senator Luick	X				
Senator Myrdal	X				
Senator Osland	AB				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Senator Myrdal

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1118: Judiciary Committee (Sen. D. Larson, Chairman) recommends DO PASS
(5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1118 was placed on the
Fourteenth order on the calendar.

2019 TESTIMONY

HB 1118

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TJF

House Bill 1118
House Judiciary
Testimony of Travis W. Finck
Deputy Director N. D. Comm. On Legal Counsel for Indigents
January 23, 2019

Chairman Koppelman, members of the House Judiciary, my name is Travis Finck, I am the Deputy Director of the Commission on Legal Counsel for Indigents, and on behalf of the commission, I rise in support of House Bill 1118.

HB 1118 expands the jury lists in the hope of creating a fairer representation of the community. Often, our attorneys have expressed concerns with the composition of juries not accurately reflecting the makeup of the community. There is nothing more sacred to American Criminal Justice system than the right of the accused to a trial by jury of their peers. This bill moves the ball in the right direction to achieve that result.

Mr. Chairman, members of the committee, for all the reasons stated herein, I respectfully request a DO PASS recommendation.

Respectfully submitted:



Travis W. Finck, Deputy Director
N.D. Commission on Legal Counsel
(701) 845-8632, tfinck@nd.gov

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pg 1

**CHAPTER 27-09.1
UNIFORM JURY SELECTION AND SERVICE ACT**

27-09.1-01. Legislative intent.

The legislative assembly of the state of North Dakota hereby declares that it is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

27-09.1-02. Discrimination prohibited.

A citizen may not be excluded from jury service in this state on account of race, color, religion, sex, national origin, physical disability, or economic status.

27-09.1-03. Definitions.

As used in this chapter, unless the context otherwise requires:

1. "Clerk" and "clerk of court" include any deputy clerk.
2. "Court" means the district court of this state, and includes, when the context requires, any judge of the court.
3. "Lists of actual voters" means the official records of persons actually voting in the most recent general election.
4. "Master list" means the list of actual voters for the county which shall be supplemented with names from other sources prescribed pursuant to this chapter (section 27-09.1-05) in order to foster the policy and protect the rights secured by this chapter (sections 27-09.1-01 and 27-09.1-02).

27-09.1-04. Jury commission.

Repealed by S.L. 1991, ch. 332, § 9.

27-09.1-05. Master list.

1. The clerk for each county shall compile and maintain a master list consisting of all lists of actual voters for the county supplemented with names from other lists of persons resident therein, such as lists of utility customers, property taxpayers, motor vehicle registrations, and driver's licenses, which the supreme court of this state from time to time designates. In compiling the master list, the clerk shall avoid duplication of names.
2. Whoever has custody, possession, or control of any of the lists making up or used in compiling the master list, including those designated under subsection 1 by the supreme court as supplementary sources of names, shall make the list available to the clerk for inspection, reproduction, and copying at all reasonable times.
3. The master list shall be open to the public for examination.

27-09.1-05.1. Selection of jurors from judicial district - Impact of natural disaster - Grounds and method for selection.

The court, upon its own motion or in response to a motion by a party, may direct that prospective jurors be selected from one or more counties in the judicial district in which the court is located if the court determines that the number of prospective jurors within the county of venue is insufficient to obtain an adequate jury pool. Following notification by the court, the clerk of court of any county in the judicial district shall submit a specified number of names, with mailing addresses, of the prospective, qualified jurors to the clerk of court of the county of venue. If a natural disaster impairs the selection of a sufficient number of prospective jurors in any county, the supreme court, by emergency order, may authorize the court in the affected county to obtain additional names and mailing addresses of prospective, qualified jurors from the clerk of court of an adjoining county or from the clerk of court of another county in the

judicial district if a sufficient number of names and addresses is not available from the adjoining county.

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27-09.1-06. Master jury wheel.

Repealed by S.L. 1991, ch. 332, § 9.

27-09.1-07. Juror qualification form.

1. From time to time and in a manner prescribed by the court, the clerk shall mail to the prospective juror a qualification form accompanied by instructions to fill out and return the form by mail to the clerk within ten days after its receipt. The juror qualification form must be approved by the state court administrator as to matters of form and must elicit the name, address of residence, and age of the prospective juror and whether the prospective juror:
 - a. Is a citizen of the United States and a resident of the county;
 - b. Is able with reasonable accommodation to communicate and understand the English language;
 - c. Has any physical or mental disability that may require reasonable accommodation to render satisfactory jury service; and
 - d. Has lost the right to vote because of imprisonment resulting from conviction of a felony (section 27-09.1-08).

The juror qualification form must contain the prospective juror's declaration that the responses are true to the best of the prospective juror's knowledge and the prospective juror's acknowledgment that a willful misrepresentation of a material fact may be punished by a fine of not more than one thousand dollars or imprisonment in the county jail for not more than thirty days, or both. Notarization of the juror qualification form is not required. If the prospective juror is unable to fill out the form, another person may do it for the prospective juror and shall indicate that fact and the reason therefor. If it appears there is an omission, ambiguity, or error in a returned form, the clerk shall again send the form with instructions to the prospective juror to make the necessary addition, clarification, or correction and to return the form to the clerk within ten days after its second receipt.

2. Any prospective juror who fails to return a completed juror qualification form as instructed shall be directed by the clerk to appear forthwith before the clerk to fill out the juror qualification form. At the time of the prospective juror's appearance for jury service, or at the time of any interview before the court or clerk, the prospective juror may be required to fill out another juror qualification form in the presence of the court or clerk, at which time the prospective juror may be questioned, but only with regard to responses to questions contained on the form and grounds for excuse or disqualification. Any information thus acquired by the court or clerk shall be noted on the juror qualification form.
3. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror is guilty of a class B misdemeanor.

27-09.1-08. Disqualification from jury service.

1. The court, upon request of the clerk of court or a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror is disqualified for jury service. The clerk shall enter this determination in the space provided on the juror qualification form and as otherwise directed by the state court administrator.
2. A prospective juror is disqualified to serve on a jury if the prospective juror:
 - a. Is not a citizen of the United States and a resident of the state and county in the jury pool;
 - b. Is not at least eighteen years old;

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- c. Is unable with reasonable accommodation to communicate and understand the English language;
- d. Is incapable, by reason of a physical or mental disability and with reasonable accommodation, of rendering satisfactory jury service, but a person claiming this disqualification may be required to submit a physician's certificate as to the disability and the certifying physician is subject to inquiry by the court at its discretion; or
- e. Has lost the right to vote because of imprisonment in the penitentiary (section 12.1-33-01) or conviction of a criminal offense which by special provision of law disqualified the prospective juror for such service.

27-09.1-09. Summoning of jury panels.

- 1. If a grand, petit, or other jury is ordered to be drawn, the clerk thereafter shall cause each person drawn for jury service to be served with a summons either personally or by first-class mail, addressed to the person at that person's usual residence, business, or post-office address, requiring the person to report for jury service at a specified time and place.
- 2. If there is an unanticipated shortage of available petit jurors, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk in a manner prescribed by the court.
- 3. A written procedure by which persons' names are drawn for jury service must be available for public review. The names of qualified jurors and the contents of jury qualification forms completed by those jurors shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

27-09.1-10. No exemptions.

No qualified prospective juror is exempt from jury service.

27-09.1-11. Excuses from jury service.

- 1. The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror should be excused from jury service. The clerk shall enter this determination in the space provided on the juror qualification form.
- 2. A person who is not disqualified for jury service may be excused from jury service by the court upon a showing of undue hardship, extreme inconvenience, or public necessity, for a period the court deems necessary, at the conclusion of which the person shall reappear for jury service in accordance with the court's direction.

27-09.1-12. Challenging compliance with selection procedures.

- 1. Within seven days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the petit jury is sworn to try the case, a party may move to stay the proceedings, and in a criminal case to quash the indictment or information, or for other appropriate relief, on the ground of a substantial failure to comply with this chapter in selecting the grand or petit jury.
- 2. Upon motion filed under subsection 1 containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with this chapter, the moving party is entitled to present in support of the motion the testimony of the clerk, any relevant records and papers not public or otherwise available used by the clerk, and any other relevant evidence. If the court determines that in selecting either a grand jury or a petit jury there has been a substantial failure to comply with this chapter, the court shall stay the proceedings pending the selection of the jury in conformity with this chapter, quash an indictment or information, or grant other appropriate relief.

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3. The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the state, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this chapter.
4. The contents of any records or papers used by the clerk in connection with the selection process and not made public under this chapter shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection 1, until after all persons selected to serve as jurors have been discharged. The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection 1.

27-09.1-13. Preservation of records.

All records and papers compiled and maintained by the clerk in connection with selection and service of jurors shall be preserved by the clerk as ordered by the state court administrator.

27-09.1-14. Mileage and compensation of jurors.

A juror must be paid mileage at the rate provided for state employees in section 54-06-09. A juror must be compensated at the rate of fifty dollars for each day of required attendance at sessions of the district court unless the juror is in attendance for four hours or less on the first day, in which case compensation for the first day is twenty-five dollars. A juror must be compensated at the rate of ten dollars for each day of required attendance at sessions of a coroner's inquest. The mileage and compensation of jurors must be paid by the state for jurors at sessions of the district court. Jurors at coroner's inquests must be paid by the county.

27-09.1-15. Length of service by jurors.

In any two-year period a person may not be required:

1. To serve or attend court for prospective service as a petit juror more than ten court days, except if necessary to complete service in a particular case;
2. To serve on more than one grand jury; or
3. To serve as both a grand and petit juror.

27-09.1-16. Penalties for failure to perform jury service.

Repealed by S.L. 1993, ch. 89, § 32.

27-09.1-17. Protection of jurors' and witnesses' employment.

1. An employer may not deprive an employee of employment, lay off, penalize, threaten, or otherwise coerce an employee with respect thereto, because the employee receives a summons or subpoena, responds thereto, serves as a juror or witness, or attends court for jury service or to give testimony pursuant to a subpoena.
2. Any employer who violates subsection 1 is guilty of a class B misdemeanor.
3. If an employer discharges an employee in violation of subsection 1, the employee within ninety days may bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable may not exceed lost wages for six weeks. If the employee prevails, the employee must be allowed a reasonable attorney's fee fixed by the court.

27-09.1-18. Court rules.

The supreme court of this state may make and amend rules, not inconsistent with this chapter, regulating the selection and service of jurors.

27-09.1-19. Savings clause.

Repealed by S.L. 1983, ch. 82, § 154.

27-09.1-20. Short title.

This chapter may be cited as the Uniform Jury Selection and Service Act.

27-09.1-21. District courts and county courts may use each other's jury panels.
Repealed by S.L. 1991, ch. 326, § 203.

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27-09.1-22. When jury panel to attend subsequent term.

A judge of the district court may, by order, require an undischarged jury panel summoned to attend a term of the court to attend any subsequent general, special, or adjourned term of the court not exceeding in all one calendar year.

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PJ1

LEGAL ARGUMENT FOR AMENDING NDCC 27-09.1 TO INCLUDE THE WORDS "TRIBAL REGISTRIES IF MADE AVAILABLE BY A FEDERALLY RECOGNIZED INDIAN TRIBE IN THIS STATE" IN THE SECTION TITLED "MASTER LIST" OR 27-09.1-05 PARAGRAPH 1:

North Dakota's Uniform Jury Selection and Service Act (NDCC 27-09.1) **systematically excludes Native Americans** from being selected to serve. This exclusion is not intentional, but rather a function of how the metrics of the jury selection system are configured, it is **systematic** in nature.

This **systematic exclusion** violates section 27-09.1-02 of the Uniform Jury Selection and Service Act which states that "A citizen may not be excluded from jury service in this state on account of race, color, religion, sex, national origin, physical disability, or economic status".

To demonstrate jury exclusion; the State of North Dakota has set a high standard. In *State v Garnder* (August 2016) the North Dakota Supreme Court built upon its findings in *State v Fredricks*, as well as the findings of the US 8th Circuit Court in *US v Robert Joseph Morin*, and determined that three important elements must hold true:

1. The jury exclusion must be impactful.
2. The jury exclusion must be exercised against a constitutionally cognizable group.
3. The jury exclusion must be unique to the specific group only.

When these three elements are applied to North Dakota's Uniform Jury Selection and Service Act (NDCC 27-09.1) the **systematic exclusion** emerges. The statute requires the clerk of court to maintain a master list of potential jurors for the county (NDCC 27-09.1-05). This list must be generated from:

1. Lists of actual voters in the most recent election
2. Lists of property tax payers
3. Lists of motor vehicle registrations
4. Lists of driver's license holders
5. Persons who have an actual physical address of residence
6. Persons who have an official birth certificate verifying 18 years of age or older

How can these simple requirements exclude **Native Americans** from the jury selection process? As revealed in another August 2016 decision dealing with voting rights, and coming from US District Court Chief Judge Daniel Hovland, called *Brakebill v Jaeger*, **Native Americans** do not fit the traditional metrics used for jury selection and service.

Since the requirements to serve as an elector/voter in North Dakota (NDCC 16.1-05-07, 16.1-07-06 and 16.1-01-04) are the same as those required to serve as a juror in the State of North Dakota (NDCC 27-09.1) the findings of *Brakebill* can be used to draw a parallel that begs for action.

Brakebill revealed that **Native Americans** in North Dakota are:

1. **Systematically excluded** from voter participation lists
2. **Systematically excluded** from lists of property tax payers (due to "reservation land", "trust land", "lease land", "homestead land" and "non-taxable land" issues)
3. **Systematically excluded** from lists of driver's license holders

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4. **Systematically excluded** from motor vehicle registrations
5. **Systematically excluded** from being listed with an actual physical address of residence
6. **Systematically excluded** from holding an officially recognized birth certificate

The reams of evidence presented in Brakebill that demonstrate the **systematic exclusion of Native Americans** come from the North Dakota Statistical Voter Survey Dr Matthew A. Barreto/Dr Gabriel R. Sanchez, the American Community Survey, multiple expert witness testimony and the Native American Rights Fund Organization of Boulder, Colorado. This evidence is so overwhelming, that US District Court Chief Judge Daniel Hovland notes 14 different times in his ruling that it is undisputable!

Secretary of State Jaeger also concedes that **systematic exclusion** exists in North Dakota by making no effort to dispute any of the studies, facts, citations, statistics, or testimony presented in Brakebill as evidence.

It is clear that **systematic exclusion of Native Americans** from the jury selection process is alive and well in North Dakota. As such it violates NDCC 27-09.1-02 which prohibits it. Adding the words "**Tribal Registries if made available by a federally recognized Indian tribe in this state**" to paragraph 1 of NDCC 27-09.1-05 "Master List" immediately removes the impact of **systematic exclusion** by unequivocally embracing all of North Dakota's registered **Native Americans** who are not represented by the standard metrics employed in the state's jury selection process.

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Engrossed House Bill 1118
Senate Judiciary Committee
Testimony of Travis W. Finck
Deputy Director N. D. Comm. On Legal Counsel for Indigents
February 27, 2019

Madam Chair, members of the Senate Judiciary, my name is Travis Finck, I am the Deputy Director of the Commission on Legal Counsel for Indigents, and on behalf of the commission, I rise in support of House Bill 1118.

HB 1118 expands the jury lists in the hope of creating a fairer representation of the community. Often, our attorneys have expressed concerns with the composition of juries not accurately reflecting the makeup of the community. There is nothing more sacred to American Criminal Justice system than the right of the accused to a trial by jury of their peers. This bill moves the ball in the right direction to achieve that result.

Madam Chair, members of the committee, for all the reasons stated herein, I respectfully request a DO PASS recommendation.

Respectfully submitted:



Travis W. Finck, Deputy Director
N.D. Commission on Legal Counsel
(701) 845-8632, tfinck@nd.gov

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**CHAPTER 27-09.1
UNIFORM JURY SELECTION AND SERVICE ACT**

27-09.1-01. Legislative intent.

The legislative assembly of the state of North Dakota hereby declares that it is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this chapter to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

27-09.1-02. Discrimination prohibited.

A citizen may not be excluded from jury service in this state on account of race, color, religion, sex, national origin, physical disability, or economic status.

27-09.1-03. Definitions.

As used in this chapter, unless the context otherwise requires:

1. "Clerk" and "clerk of court" include any deputy clerk.
2. "Court" means the district court of this state, and includes, when the context requires, any judge of the court.
3. "Lists of actual voters" means the official records of persons actually voting in the most recent general election.
4. "Master list" means the list of actual voters for the county which shall be supplemented with names from other sources prescribed pursuant to this chapter (section 27-09.1-05) in order to foster the policy and protect the rights secured by this chapter (sections 27-09.1-01 and 27-09.1-02).

27-09.1-04. Jury commission.

Repealed by S.L. 1991, ch. 332, § 9.

27-09.1-05. Master list.

1. The clerk for each county shall compile and maintain a master list consisting of all lists of actual voters for the county supplemented with names from other lists of persons resident therein, such as lists of utility customers, property taxpayers, motor vehicle registrations, and driver's licenses, which the supreme court of this state from time to time designates. In compiling the master list, the clerk shall avoid duplication of names.
2. Whoever has custody, possession, or control of any of the lists making up or used in compiling the master list, including those designated under subsection 1 by the supreme court as supplementary sources of names, shall make the list available to the clerk for inspection, reproduction, and copying at all reasonable times.
3. The master list shall be open to the public for examination.

27-09.1-05.1. Selection of jurors from judicial district - Impact of natural disaster - Grounds and method for selection.

The court, upon its own motion or in response to a motion by a party, may direct that prospective jurors be selected from one or more counties in the judicial district in which the court is located if the court determines that the number of prospective jurors within the county of venue is insufficient to obtain an adequate jury pool. Following notification by the court, the clerk of court of any county in the judicial district shall submit a specified number of names, with mailing addresses, of the prospective, qualified jurors to the clerk of court of the county of venue. If a natural disaster impairs the selection of a sufficient number of prospective jurors in any county, the supreme court, by emergency order, may authorize the court in the affected county to obtain additional names and mailing addresses of prospective, qualified jurors from the clerk of court of an adjoining county or from the clerk of court of another county in the

judicial district if a sufficient number of names and addresses is not available from the adjoining county.

27-09.1-06. Master jury wheel.

Repealed by S.L. 1991, ch. 332, § 9.

27-09.1-07. Juror qualification form.

1. From time to time and in a manner prescribed by the court, the clerk shall mail to the prospective juror a qualification form accompanied by instructions to fill out and return the form by mail to the clerk within ten days after its receipt. The juror qualification form must be approved by the state court administrator as to matters of form and must elicit the name, address of residence, and age of the prospective juror and whether the prospective juror:
 - a. Is a citizen of the United States and a resident of the county;
 - b. Is able with reasonable accommodation to communicate and understand the English language;
 - c. Has any physical or mental disability that may require reasonable accommodation to render satisfactory jury service; and
 - d. Has lost the right to vote because of imprisonment resulting from conviction of a felony (section 27-09.1-08).

The juror qualification form must contain the prospective juror's declaration that the responses are true to the best of the prospective juror's knowledge and the prospective juror's acknowledgment that a willful misrepresentation of a material fact may be punished by a fine of not more than one thousand dollars or imprisonment in the county jail for not more than thirty days, or both. Notarization of the juror qualification form is not required. If the prospective juror is unable to fill out the form, another person may do it for the prospective juror and shall indicate that fact and the reason therefor. If it appears there is an omission, ambiguity, or error in a returned form, the clerk shall again send the form with instructions to the prospective juror to make the necessary addition, clarification, or correction and to return the form to the clerk within ten days after its second receipt.

2. Any prospective juror who fails to return a completed juror qualification form as instructed shall be directed by the clerk to appear forthwith before the clerk to fill out the juror qualification form. At the time of the prospective juror's appearance for jury service, or at the time of any interview before the court or clerk, the prospective juror may be required to fill out another juror qualification form in the presence of the court or clerk, at which time the prospective juror may be questioned, but only with regard to responses to questions contained on the form and grounds for excuse or disqualification. Any information thus acquired by the court or clerk shall be noted on the juror qualification form.
3. Any person who willfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror is guilty of a class B misdemeanor.

27-09.1-08. Disqualification from jury service.

1. The court, upon request of the clerk of court or a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror is disqualified for jury service. The clerk shall enter this determination in the space provided on the juror qualification form and as otherwise directed by the state court administrator.
2. A prospective juror is disqualified to serve on a jury if the prospective juror:
 - a. Is not a citizen of the United States and a resident of the state and county in the jury pool;
 - b. Is not at least eighteen years old;

- c. Is unable with reasonable accommodation to communicate and understand the English language;
- d. Is incapable, by reason of a physical or mental disability and with reasonable accommodation, of rendering satisfactory jury service, but a person claiming this disqualification may be required to submit a physician's certificate as to the disability and the certifying physician is subject to inquiry by the court at its discretion; or
- e. Has lost the right to vote because of imprisonment in the penitentiary (section 12.1-33-01) or conviction of a criminal offense which by special provision of law disqualified the prospective juror for such service.

27-09.1-09. Summoning of jury panels.

1. If a grand, petit, or other jury is ordered to be drawn, the clerk thereafter shall cause each person drawn for jury service to be served with a summons either personally or by first-class mail, addressed to the person at that person's usual residence, business, or post-office address, requiring the person to report for jury service at a specified time and place.
2. If there is an unanticipated shortage of available petit jurors, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk in a manner prescribed by the court.
3. A written procedure by which persons' names are drawn for jury service must be available for public review. The names of qualified jurors and the contents of jury qualification forms completed by those jurors shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

27-09.1-10. No exemptions.

No qualified prospective juror is exempt from jury service.

27-09.1-11. Excuses from jury service.

1. The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror should be excused from jury service. The clerk shall enter this determination in the space provided on the juror qualification form.
2. A person who is not disqualified for jury service may be excused from jury service by the court upon a showing of undue hardship, extreme inconvenience, or public necessity, for a period the court deems necessary, at the conclusion of which the person shall reappear for jury service in accordance with the court's direction.

27-09.1-12. Challenging compliance with selection procedures.

1. Within seven days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the petit jury is sworn to try the case, a party may move to stay the proceedings, and in a criminal case to quash the indictment or information, or for other appropriate relief, on the ground of a substantial failure to comply with this chapter in selecting the grand or petit jury.
2. Upon motion filed under subsection 1 containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with this chapter, the moving party is entitled to present in support of the motion the testimony of the clerk, any relevant records and papers not public or otherwise available used by the clerk, and any other relevant evidence. If the court determines that in selecting either a grand jury or a petit jury there has been a substantial failure to comply with this chapter, the court shall stay the proceedings pending the selection of the jury in conformity with this chapter, quash an indictment or information, or grant other appropriate relief.

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3. The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the state, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this chapter.
4. The contents of any records or papers used by the clerk in connection with the selection process and not made public under this chapter shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection 1, until after all persons selected to serve as jurors have been discharged. The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection 1.

27-09.1-13. Preservation of records.

All records and papers compiled and maintained by the clerk in connection with selection and service of jurors shall be preserved by the clerk as ordered by the state court administrator.

27-09.1-14. Mileage and compensation of jurors.

A juror must be paid mileage at the rate provided for state employees in section 54-06-09. A juror must be compensated at the rate of fifty dollars for each day of required attendance at sessions of the district court unless the juror is in attendance for four hours or less on the first day, in which case compensation for the first day is twenty-five dollars. A juror must be compensated at the rate of ten dollars for each day of required attendance at sessions of a coroner's inquest. The mileage and compensation of jurors must be paid by the state for jurors at sessions of the district court. Jurors at coroner's inquests must be paid by the county.

27-09.1-15. Length of service by jurors.

In any two-year period a person may not be required:

1. To serve or attend court for prospective service as a petit juror more than ten court days, except if necessary to complete service in a particular case;
2. To serve on more than one grand jury; or
3. To serve as both a grand and petit juror.

27-09.1-16. Penalties for failure to perform jury service.

Repealed by S.L. 1993, ch. 89, § 32.

27-09.1-17. Protection of jurors' and witnesses' employment.

1. An employer may not deprive an employee of employment, lay off, penalize, threaten, or otherwise coerce an employee with respect thereto, because the employee receives a summons or subpoena, responds thereto, serves as a juror or witness, or attends court for jury service or to give testimony pursuant to a subpoena.
2. Any employer who violates subsection 1 is guilty of a class B misdemeanor.
3. If an employer discharges an employee in violation of subsection 1, the employee within ninety days may bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable may not exceed lost wages for six weeks. If the employee prevails, the employee must be allowed a reasonable attorney's fee fixed by the court.

27-09.1-18. Court rules.

The supreme court of this state may make and amend rules, not inconsistent with this chapter, regulating the selection and service of jurors.

27-09.1-19. Savings clause.

Repealed by S.L. 1983, ch. 82, § 154.

27-09.1-20. Short title.

This chapter may be cited as the Uniform Jury Selection and Service Act.

27-09.1-21. District courts and county courts may use each other's jury panels.
Repealed by S.L. 1991, ch. 326, § 203.

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27-09.1-22. When jury panel to attend subsequent term.

A judge of the district court may, by order, require an undischarged jury panel summoned to attend a term of the court to attend any subsequent general, special, or adjourned term of the court not exceeding in all one calendar year.

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Sixty-sixth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1118

Introduced by

Representatives K. Koppelman, Boe, Buffalo, Schauer

Senators J. Lee, Marcellais

- 1 A BILL for an Act to amend and reenact subsection 1 of section 27-09.1-05 of the North Dakota
2 Century Code, relating to the master list for jury selection.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. AMENDMENT.** Subsection 1 of section 27-09.1-05 of the North Dakota
5 Century Code is amended and reenacted as follows:

- 6 1. The clerk for each county shall compile and maintain a master list consisting of all lists
7 of actual voters for the county supplemented with names from other lists of persons
8 resident therein, such as lists of utility customers, property taxpayers, motor vehicle
9 registrations, tribal registries if made available by a federally recognized Indian tribe in
10 this state, and driver's licenses, which the supreme court of this state from time to time
11 designates. In compiling the master list, the clerk shall avoid duplication of names.

**LEGAL ARGUMENT FOR AMENDING NDCC 27-09.1 TO INCLUDE THE WORDS
“TRIBAL REGISTRIES IF MADE AVAILABLE BY A FEDERALLY RECOGNIZED INDIAN
TRIBE IN THIS STATE” IN THE SECTION TITLED “MASTER LIST” OR 27-09.1-05
PARAGRAPH 1:**

North Dakota’s Uniform Jury Selection and Service Act (NDCC 27-09.1) **systematically excludes Native Americans** from being selected to serve. This exclusion is not intentional, but rather a function of how the metrics of the jury selection system are configured, it is **systematic** in nature.

This **systematic exclusion** violates section 27-09.1-02 of the Uniform Jury Selection and Service Act which states that “A citizen may not be excluded from jury service in this state on account of race, color, religion, sex, national origin, physical disability, or economic status”.

To demonstrate jury exclusion; the State of North Dakota has set a high standard. In State v Garnder (August 2016) the North Dakota Supreme Court built upon its findings in State v Fredricks, as well as the findings of the US 8th Circuit Court in US v Robert Joseph Morin, and determined that three important elements must hold true:

1. The jury exclusion must be impactful.
2. The jury exclusion must be exercised against a constitutionally cognizable group.
3. The jury exclusion must be unique to the specific group only.

When these three elements are applied to North Dakota’s Uniform Jury Selection and Service Act (NDCC 27-09.1) the **systematic exclusion** emerges. The statute requires the clerk of court to maintain a master list of potential jurors for the county (NDCC 27-09.1-05). This list must be generated from:

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How can these simple requirements exclude **Native Americans** from the jury selection process? As revealed in another August 2016 decision dealing with voting rights, and coming from US District Court Chief Judge Daniel Hovland, called Brakebill v Jaeger, **Native Americans** do not fit the traditional metrics used for jury selection and service.

Since the requirements to serve as an elector/voter in North Dakota (NDCC 16.1-05-07, 16.1-07-06 and 16.1-01-04) are the same as those required to serve as a juror in the State of North Dakota (NDCC 27-09.1) the findings of Brakebill can be used to draw a parallel that begs for action.

Brakebill revealed that **Native Americans** in North Dakota are:

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4. **Systematically excluded** from motor vehicle registrations
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It is clear that **systematic exclusion of Native Americans** from the jury selection process is alive and well in North Dakota. As such it violates NDCC 27-09.1-02 which prohibits it. Adding the words "**Tribal Registries if made available by a federally recognized Indian tribe in this state**" to paragraph 1 of NDCC 27-09.1-05 "Master List" immediately removes the impact of **systematic exclusion** by unequivocally embracing all of North Dakota's registered **Native Americans** who are not represented by the standard metrics employed in the state's jury selection process.