

STATE OF MICHIGAN

IN THE SUPREME COURT

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Appeal from the Court of Appeals,  
Kathleen Jansen, P.J., and Stephen L. Borrello and Cynthia D. Stephens, J.J.  
Reversing the Circuit Court for the County of Kent, Dennis C. Kolenda, J.  
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PEOPLE OF THE STATE  
OF MICHIGAN,

Plaintiff-Appellant,

vs

RAMON LEE BRYANT,

Defendant-Appellee.

\_\_\_\_\_ /

Supreme Court  
No. 141741

Court of Appeals  
No. 280073

Kent County Circuit  
Court No. 01-08625-FC

**PLAINTIFF-APPELLANT'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

William A. Forsyth (P 23770)  
Kent County Prosecuting Attorney

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**STATEMENT OF APPELLATE JURISDICTION**

This matter is before the Court pursuant to this Court’s order of May 18, 2011, granting Plaintiff-Appellant’s Application for Leave to Appeal.

**STATEMENT OF QUESTION PRESENTED**

WAS A MARGINAL SHORTFALL OF AFRICAN-AMERICAN JURORS, A PORTION OF WHICH MAY HAVE ARISEN FROM A COMPUTER ERROR THAT WAS CORRECTED WHEN DISCOVERED, ONE THAT DID NOT LEAD TO A SYSTEMATIC EXCLUSION OF AFRICAN-AMERICAN'S FROM THE VENIRE; AND WHERE THE STATISTICAL EVIDENCE SHOWS THAT THE PURPORTED NUMBER OF AFRICAN-AMERICAN JURORS IN THE DEFENDANT'S VENIRE COULD HAVE BEEN THE RESULT OF RANDOM CHANCE, DID THE COURT OF APPEALS ERR IN FINDING THAT THE DEFENDANT SHOWED THAT HE WAS DEPRIVED OF A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY?

The Trial Court answered Yes.

The Court of Appeals answered No.

Defendant-Appellee answered No.

Plaintiff-Appellant answers Yes.

## STATEMENT OF FACTS

The defendant was convicted by a jury of criminal sexual conduct first degree, MCL 750.520b(1)(e), armed robbery, MCL 750.229, and possession of marijuana, MCL 333.7403(2)(d). The issue on appeal is whether the jury was selected from a constitutionally acceptable cross-section of the community.

The essential facts of the case were summarized by the Court of Appeals in its first opinion on this matter (34a):

The victim in this case testified that on August 5, 2000, she went to a "bad area of town" to buy crack cocaine. When she arrived, approximately ten people rushed towards her car vying for her business. Defendant jumped into her car, saying that she did not want to deal with the others, and ordered her to drive up the road. The victim drove to where defendant indicated, stopped, and told defendant that she wanted to buy \$90 of crack. Defendant told the victim to drive up a few more blocks and park, which she did. Defendant then left her car stating he would be back in a few minutes. On defendant's return, he put a gun to the victim's head and demanded her \$90. After searching for and finding the money, defendant ordered the victim to perform oral sex on him. The victim testified that she pleaded with defendant, but he took her car keys and stated, "You ain't going anywhere until you do." Defendant testified that the victim performed the sexual act in exchange for drugs, and that the money found on him at the time of his arrest was a birthday present from his mother.

Prior to trial, defense counsel challenged the jury array, saying that he saw only a single African-American juror in the venire. A hearing was held prior to trial. Gail VanTimmeran, the Kent County jury clerk, testified that jurors were selected in a random process, from a list obtained from the secretary of state, using drivers' licenses and state identification cards (13a-14a). The race of the person selected for jury duty was not specified (14a). For the week of the defendant's trial, 183 jurors were called. 32 had failed to respond to jury questionnaires. Of the 151 who responded, 132 appeared (14a-15a). The 45 members of the defendant's venire were

chosen from this group at random (15a). She could not determine the number of minority jurors from that venire. When asked about the number of minorities of those who appeared for jury duty, she said, “Visually speaking, your Honor, without being able to legally tell by statute, I believe there was one” (16a), whom she believed was African-American (19a). “We had only one minority that came in. It doesn’t mean that there were more – there weren’t more minorities that were summoned. However, we have no idea if they were or not because there’s no distinction of race in the jury system” (22a).

The trial court<sup>1</sup> said (26a):

Mr. Woods [defense counsel], for the record, as I sit here and look at panels that come in, I think I would have to conclude from my experience that I see more minority representation today than I did and can remember some panels in my courtroom for major trials with as many as half a dozen minorities. But we’re just beginning this new process<sup>2</sup> commencing as of the first of this year, which it is hoped will increase minority participation.

When the hearing continued, defense counsel’s objection was that the process of selecting jurors did not “ensure that the jury reflects a cross-section of the society here in the community” (28a). Defense counsel claimed that there were only 2 African-Americans of 169 in the January 7, and one or two for other weeks (29a). The prosecutor responded that this only reflected jurors who had responded to a voluntary questionnaire that asked about race (30a).

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<sup>1</sup> Hon. H. David Soet presided over the trial. By the time this matter was remanded to the Kent County Circuit Court, Judge Soet had retired, and Hon. Dennis C. Kolenda was reassigned the case.

<sup>2</sup> The “new process” was picking jurors for a single week and excusing them after one trial, as opposed to the prior process of picking jurors for five weeks where a person might serve on two or more juries.

The trial court denied the motion. The trial court noted that the county did not always get questionnaires returned from heavily minority areas, and that the hope was that the new system of one-week jury duty would make jury duty less burdensome (32a).

The defendant appealed of right. In the first opinion, the Court of Appeals said that a “visual survey” showed a single African-American juror out of 45 selected for the venire, and concluded that this reflected 2.2% of the jury pool. Using a figure of 7.28% as the jury eligible population of African Americans in Kent County (36a), the Court of Appeals remanded for a hearing to determine whether the shortfall of African-American jurors was the result of systematic exclusion.

At the hearing on remand, Terry Holtrop, the Kent County case management supervisor, testified that jurors were selected from a list of 350,000 names (44a). Starting in April 2001, it was “brought to my attention that there was an underrepresentation” of minority jurors (45a). Mr. Holtrop said that they can, and sometimes do, run LEIN checks on potential jurors who have not returned summons and questionnaires, to see if they have a correct address (45a), but that it was his understanding that police agencies would not enforce bench warrants for those who failed to appear for jury duty (47a). Jury questionnaires have a name and address, but no other identifying information such as height, weight, eye color, hair color, or race (48a). Gail VanTimmeran also testified that she had the names of the 45 people who were in the venire for the defendant’s trial (49a), but no identifying information on race, since that information was not contained in the Secretary of State’s list (51a). She said her conclusion that there was a single African-American juror in the venire was based on visual observation, and she would have no additional knowledge of or about how many minorities were actually in the venire (52a).

Wayne Bentley was the Chair of the Kent County Jury Board in 2001 (54a). Using the Freedom of Information Act, he discovered that “76% of the county, virtually 300,000 people, were not represented in the jury pools” (54a). Because of an error in the computer programming, only 118,000 people were listed as potential jurors from the Secretary of State report, instead of the 453,000 that should have been listed. The issue started in April 2001 and prevailed for 16 months (55a). The result was that jurors from lower numbered zip codes were not sent jury questionnaires in proportion to their numbers in the population. For example, his research showed 39 questionnaires sent to zip code 49507, which has the largest minority population of any zip code in Kent County, and 235 questionnaires sent to zip code 49341, which contains about 3/5 of the population of zip code 49507 and a low minority population (55a).<sup>3</sup> Changes were made after his discovery, and he believed the African-American community was now completely represented in jury venires (55a).

Mr. Bentley said that jurors had still been selected from zip code 49507 and other lower zip code numbers (57a). His figures showed that 7.7% of jury questionnaires should have come from zip code 49507, but that only 2.13% actually did (57a).

Mr. Bentley also testified that issues with representation of minorities on juries predated the change in the jury selection procedure in 2001. He estimated that in 1999 and 2000 African-American jurors were underrepresented by half to two-thirds (58a). This was before the computer error that led to the under selection of jurors from certain zip codes that started in April 2001, so the computer “glitch” did not affect the 1999 and 2000 results (58a). He agreed that

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<sup>3</sup> Mr. Bentley first said that zip code 49507 was 89% African-American, but when shown census figures, said he was not sure where he got this 89% figure, and that it “could be as low as 67%” (56a).

there was nothing on the Secretary of State list of potential jurors that showed the race of the jurors (58a).

When asked if this computer “glitch” was the result of a deliberate policy, Mr. Bentley said

Under no circumstances have I ever said or pointed out that it was done intentionally. I have only said that it was systematic, and the computer, by the very nature of it is systematic. As a matter of fact, contrary wise, I never felt that it was ever intended (59a).

Mr. Bentley said he could not say if the underrepresentation of jurors from zip code 49507 was more or less in any particular census tract within that zip code (60a).

The defense called Dr. Chidi Chidi as an expert witness. Dr. Chidi has a PhD in mechanical engineering and applied mathematics and teaches classes in statistics (64a), though he does not have a degree in statistics (65a). Dr. Chidi said his study of Kent County jurors in 2002 showed that there were 11,056 prospective jurors, and only 246 black jurors (66a). The figure of 11,056 was the number of jurors summoned for jury duty in 2002. The figure of 246 came from a voluntary survey that jurors were asked to fill out, which included race. 7,341 people responded to the survey (67a). Dr. Chidi insisted that the correct denominator was the number of jurors called for jury duty, not the number who filled out the voluntary survey (68a-69a).

Terry Holtrop, recalled as a witness, said the jury community representation survey was given to jurors who actually showed up for jury duty. While these jurors were urged to fill out the survey, it was voluntary. The survey asked, among other things, that the jurors identify themselves by race (78a-79a). He said the total number of jurors who appeared for jury duty in 2002 was actually 8,197. Approximately 7,341 responded to the jury community representation

survey (79a). This was not a precise number, because it was possible that some people filled out a survey twice. The survey was supposed to be anonymous, but some people put their name on the survey so they threw out those results (79a).

The summons and jury questionnaire were done in a one-step process (80a). 17,578 people were summoned for jury duty in Kent County in 2002. Of these, 1,154 were excused, 2,699 were disqualified, 3,143 were deferred, and 984 questionnaires were returned as undeliverable. 1,924, or 11% of those summoned, did not appear (80a-81a). Because there was insufficient information to put into LEIN, no bench warrant would be issued for those who did not show up or ignored the summons and questionnaire (82a-83a).

The trial court, dissatisfied with Dr. Chidi's testimony (86a-87a), procured its own expert, Dr. Paul Stephenson, Chair of the Department of Statistics at Grand Valley State University (87a). Dr. Stephenson used a binomial statistical test, which started with the assumption that the process of selecting jurors in a venire was unbiased, and examined whether there was sufficient evidence to conclude that the venire selection was biased (88a). In the long run he expected the proportion of African-American jurors to be 8.25%, which figure he took from census data in 2000 showing the African-American population of people in Kent County between the ages of 18 and 65 to be 8.25% (88a). The odds of having no more than one African-American juror out of 45 was 10.477%, which statistically was insufficient to conclude there was bias in the defendant's venire (88a).

Looking at the January through March 2002 data, Dr. Stephenson studied the number of potential jurors summoned by zip code. He used the Chi-Square Goodness-of-Fit test to compute

his results (89a).<sup>4</sup> He discovered that the jury selection process was not representative across all zip codes; some zip codes were over-represented and some were under-represented (89a-90a). He calculated the expected number of African-American jurors by multiplying the percentage of African-American jurors in each zip code by the number of jurors from those zip codes who were summoned (90a). He concluded that 4.17% of the jurors summoned for those three months were African-American (90a). “Now, quite frankly, I don’t know for sure. That’s just a guess. That’s a guess based on if jurors were selected at random from within zip codes” (90a).

Dr. Stephenson said that in the long run African-Americans would be underrepresented in venires generally, though he could not say that there was such underrepresentation in the defendant’s venire (91a). Even if African-American jurors were present in exact proportion to the numbers in the census, 14 of 140 jury trials would have resulted in either zero or one African-American in the venire (91a). Had he found zero African-Americans in the venire, he would have considered this to be statistically suspicious (91a). The highest probability from random selection is that a venire of 45 people would have three African-American jurors (91a).

Dr. Stephenson said that given the voluntary nature of the jury community representation survey, and the lack of controls on that survey, he considered the ethnicity information from that survey to be unreliable (92a).

Dr. Chidi, recalled as a witness, said that he disagreed with Dr. Stephenson’s report, and said that there should never have been fewer than 4 African-American jurors in a venire of 45 (96a-97a).

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<sup>4</sup> For a quick explanation of the Chi-Square Goodness-of-Fit test, see: <http://www.stat.yale.edu/Courses/1997-98/101/chigf.htm>

The trial court denied the defendant's motion for a new trial. The trial court found that 293 jurors were summoned for jury duty for the week of January 28, 2002, the time that encompassed the defendant's trial. 183 jurors were randomly summoned for January 28 itself. 132 jurors answered summonses. 45 jurors were randomly placed in the venire for this case (107a).

The trial court further found that the computer program used to select jurors from the Secretary of State database contained an incorrect setting, which randomly selected jurors disproportionately from zip codes where there were relatively few African-American jurors. The Kent County population of African-Americans among those residents old enough to be jurors was 8.25% (108a).

The trial court said that the Kent County Circuit Court had undertaken "a widespread public education campaign to encourage participation by African-Americans" for jury duty, and that each of the judges in the Kent County Circuit Court "had occasion to note" what Judge Soet had said on this case, that there were jury venires with three or four black jurors and sometimes as many as five or six (109a).

Kent County began in August 2001 to conduct a survey of prospective jurors who responded to their summonses, asking them to identify their gender and race. The initial response was low, but by 2004 the response rate was consistently in the 96-98% range. From that time, African-Americans had appeared every day in percentages ranging from an occasional 2-3%, a fairly frequent 7-10%, and occasionally 11-12% (109a).

Professor Stephenson had estimated the racial make up of each zip code in Kent County, the number of African-Americans to whom questionnaires would have been sent but for the programming error, and the number of African-Americans in each zip code to whom

questionnaires had been sent. The trial court found that Professor Stephenson's estimate was that, given the zip code programming error, there would have been 163 questionnaires sent to African-Americans in the first three months of 2002. Had 8.25% of the individuals to whom questionnaires were sent for those weeks been African-American, a total of 322 African-Americans would have received questionnaires. If the number of African-Americans estimated by Professor Stephenson to have been sent questionnaires for those three months had shown up and been assigned to equal-sized weekly pools there should have been 13 African-Americans in each week's pool; exact proportional weekly pools would have included 25 African-Americans (111a-112a).

The trial court further found that Professor Stephenson found there was an underrepresentation of African-Americans during those three months, but also had concluded that there was insufficient evidence to conclude that African-Americans were underrepresented in the venire from which the defendant's jury was selected. Because of the small number of jury eligible African-Americans in Kent County, 10.447% of venires randomly selected by unbiased processes would have none or only one African-American member, and a 10% likelihood is common enough to be statistically insignificant (113a).

The trial court found that Professor Stephenson was credible and persuasive, and that Professor Chidi showed a lack of understanding of basic statistics (113a).

Based upon the evidentiary hearing and the court's factual findings, the trial court found that the defendant had not proven actual underrepresentation in the group to whom the flawed computer program had sent questionnaires (116a-117a). The trial court also noted that the "computer glitch" was accidental, lasted for 15 months before it was discovered, and immediately corrected (125a). The trial court also found that there was no actual proof that

African-Americans were underrepresented in the venire from which the defendant's jury was selected (126a). The trial court also noted that a total of 51 prospective jurors failed to appear for jury selection at the time of the defendant's trial, and that a disproportionate number of jurors who fail to appear or fail to answer jury questionnaires come from high minority areas (129a). Some of the 51 non-shows were likely African-American, and had they appeared the composition of the venire would have been different (129a).

The trial court noted that statistical estimates, while valuable, were of necessity only estimates (123a), and that "the number of African-Americans in defendant's venire may have been greater than the one seen 'visually' by the trial judge and trial counsel," referring to two recent cases where the trial court had juries with individuals who were not known to be African-American until they mentioned it after trial (1281-29a).

The defendant then re-appealed. The Court of Appeals, in a published opinion, *People v Bryant*, 289 Mich App 260; 796 NW2d 135 (2010) (132a-133a) held that the comparative disparity test was the most appropriate test to measure underrepresentation in this case, and concluded that the comparative underrepresentation of minority jurors was 73.1% (135a). The Court of Appeals found that the underrepresentation was the result of the system by which jurors were selected in Kent County, and since it was inherent in the jury-selection process, it was irrelevant that the underrepresentation did not appear to be the result of intentional discrimination (137a).

## SUMMARY OF ARGUMENT

The Sixth Amendment of the United States Constitution guarantees a defendant the right to a jury selection system that does not systematically exclude members of an identifiable group from jury service. The United States Supreme Court cases addressing this issue have involved gross discrepancies in the numbers of a particular group called for jury duty. The United States Supreme Court has never specified the proper test for measuring discrepancy, or what constitutes a “gross discrepancy.”

The absolute disparity test – measuring the difference between the percentage of the population of a distinctive group eligible for jury duty and the percentage of that group that actually appears in jury venires – is the most appropriate test for measuring whether a gross discrepancy has occurred. Any other test tends to overstate the magnitude of the problem. The absolute disparity test is used by most Federal Courts, and should be the normative test used by this Court.

When measuring whether there was a discrepancy between the number of a particular group called for jury service and the percentage of that group in the population, it is necessary to look at venires over a period of time, not just the defendant’s individual venire. The individual venire is nonetheless relevant, since if an individual defendant cannot show that a systematic exclusion operated on his particular venire, the defendant cannot say that his right to a jury drawn from a fair cross-section of the community was violated.

Statistical estimates are of assistance in determining whether there was a systematic shortfall of an identifiable group, but they are of necessity only estimates, and cannot be considered without reference to non-system factors that may lead to such a shortfall. To the extent that statistical estimates are used, the statistical conclusions from those estimated must

also be used, and those conclusions show insufficient information to conclude that the defendant's venire could not have resulted from random chance.

The instant case does not involve an Equal Protection Challenge. But the Equal Protection Clause is still relevant. If there were any deliberate action undertaken with the intent to depress the number of African-American jurors, the result would be an Equal Protection violation. If there were a gross discrepancy between the number of expected African American jurors and the number who appeared – for example, if the African-American population of jury eligible jurors were 11%, and there were no African-American jurors or only 1% of venires were African-American – an inference of an Equal Protection issue would be strong. This addresses the concern that a large absolute disparity would constitutionally justify the complete exclusion of a distinctive group from the venire.

## ARGUMENT

A MARGINAL SHORTFALL OF AFRICAN-AMERICAN JURORS, A PORTION OF WHICH MAY HAVE ARISEN FROM A COMPUTER ERROR THAT WAS CORRECTED WHEN DISCOVERED, DID NOT LEAD TO A SYSTEMATIC EXCLUSION OF AFRICAN-AMERICAN'S FROM THE VENIRE. WHERE THE STATISTICAL EVIDENCE SHOWS THAT THE PURPORTED NUMBER OF AFRICAN-AMERICAN JURORS IN THE DEFENDANT'S VENIRE COULD HAVE BEEN THE RESULT OF RANDOM CHANCE, THE COURT OF APPEALS ERRED IN FINDING THAT THE DEFENDANT SHOWED THAT HE WAS DEPRIVED OF A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Standard of Review. The Court of Appeals stated (133a) that questions regarding the alleged systematic exclusion of minorities from jury venires are reviewed de novo. That is not entirely accurate. Ultimate conclusions of law are of course reviewed de novo. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). But whether the defendant has been denied his right to a jury selected from a fair cross-section of the community presents a mixed question of law and fact. *United States v Allen*, 160 F3d 1096, 1101 (CA 6, 1998); *United States v Grisham*, 63 F3d 1074 (CA 11, 1995). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *People v Thenghkam*, 240 Mich App 29; 610 NW2d 571 (2000).

### Historical Background

A criminal defendant has a right under the Sixth Amendment of the United States Constitution to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." This provision does not specifically provide that a defendant has a right to a jury of any particular ethnic makeup. The United State Supreme Court, however, has held that the Sixth Amendment includes the right to a jury that does not systematically exclude members of an

identifiable group from jury service. The lead case for this proposition is *Taylor v Louisiana*, 419 US 522; 95 S Ct 692; 42 L Ed 2d 690 (1975). In *Taylor*, the jury system was one which completely excluded all women from jury service, unless they filed a declaration of their willingness to serve on a petit jury. The net result, not surprisingly, was that the jury venires were overwhelmingly male. Of 1800 jurors summoned over a one year period, only 12 were women, and of the 175 chosen for the time of Taylor's trial, none were women. *Id.*, 419 US at 524.

The *Taylor* Court spoke in terms of the Sixth Amendment right to a fair trial, including the right to have a jury drawn from a fair cross section of the community, but also spoke to the Fourteenth Amendment Equal Protection Clause. The Court observed that "restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Id.*, 419 US at 530. The exclusion there, of course, was almost total, and a consequence of a deliberate action by the State of Louisiana. The *Taylor* Court identified three specific purposes underlying a fair cross-section requirement: (1) "to guard against the exercise of arbitrary power" by relying on the "commonsense judgment of the community," (2) to instill "public confidence in the fairness of the criminal justice system," and (3) "sharing in the administration of justice [as a] phase of civic responsibility." *Id.*

*Taylor* specifically rejected the argument that a defendant's particular jury must mirror the composition of the community:

It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to

a jury of any particular composition, *Fay v New York*, 332 US 261, 284; 67 S Ct 1613, 1625; 91 L Ed 2d 2043 (1947); *Apodaca v Oregon*, [406 US 404, 413; 92 S Ct 1628; 32 L Ed 2d 184 (1972)] (plurality opinion); but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. [419 US at 538]

In *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979), the Supreme Court held that to establish a prima facie violation of the fair cross-section requirement of the Sixth Amendment, a criminal defendant must show (1) that the group alleged to be excluded 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 this underrepresentation is due to the systematic exclusion of the group in the jury selection process. *Duren* again involved exclusion of women from juries. While not as blatant as the Louisiana system, the Missouri system did lead to a large shortfall of women. In *Duren*, women who did not want to serve on juries simply had to indicate on a jury questionnaire that they did not want to serve, in which case they would be automatically excluded. Those women who did not so indicate were given a second chance to self deselect when a jury summons was sent out. The net result is that although 54% of the adults in the county in which this system was used were women, only 26.7% of the prospective jurors summoned were women, and only 14.5% of the prospective jurors assigned to jury venires were women. While not as overwhelming a shortfall as in *Taylor v Louisiana*, this still presented a stunningly “gross discrepancy between the percentage of women in jury venires and the percentage of women in the community” This gross discrepancy “requires the conclusion that women were not fairly represented in the source from which petit juries were drawn” in that case. *Id.*, 439 US at 366.

*Taylor* and *Duren* established that a program that actively excludes a large number of a distinctive group from jury venires is constitutionally impermissible. But those cases involved gross discrepancies that led to wholesale exclusion of women from jury venires. Neither case addressed just how much of a disparity is constitutionally permissible, nor how a court should go about determining whether a specific group is underrepresented in jury venires, and the amount by which the group is underrepresented.

#### The Test For Determining Underrepresentation

The concern of *Duren*, then, was to the underrepresentation of large groups of a community from jury service. *Duren* did not create any specific formula to use in addressing whether a constitutional violation occurred in the composition of the jury venire.

The first part of the *Duren* test is whether the group in question constitutes a distinctive group in the community. No one has ever challenged that African-Americans constitute a distinctive group in the community.<sup>5</sup> The second, however, is more difficult: what test is used to determine whether the representation of the group in venires is not “fair and reasonable in relation to the numbers of such persons in the community”?

In *People v Smith*, 463 Mich 199, 217-220; 615 NW2d 1 (2000) (concurring opinion of Cavanagh, J), this Court summarized the three tests that are generally used to measure whether representation of a distinctive group is fair and reasonable. The first is the absolute disparity test. This test measures the difference between the percentage of the population of a distinctive group

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<sup>5</sup> We should, however, be a little cautious in how far this concept is taken. It would be foolish to deny that race is an important concept in American history, and that discrimination based on race is a longstanding historical, political, and moral issue. It would also be foolish to ignore changing racial attitudes, and that race is a sociological, not a biological, category. For purposes of the issue in the case at bar, though, every case that has discussed the issue accepts that African-Americans are a distinctive group under the *Duren* test.

eligible for jury duty and the percentage of the group that actually appears in jury venires. To calculate absolute disparity, a court subtracts the percentage of the distinctive group in the jury pool from the percentage present in the population. For example, if the jury eligible population of a county were 10% African-American, and the number of African-Americans in the venire were 5%, the absolute disparity would be  $10\% - 5\% = 5\%$ . Absolute disparities of 10% or less have rarely been held sufficient to show a shortfall of jurors in a particular case. In contrast, the comparative disparity test measures the diminished likelihood that members of a distinct group would be called to jury service. It is calculated by dividing the absolute disparity by the population of the distinct group as a whole. So in the example above, if 10% of the jury were expected to be African-American, and only 5% were, the absolute disparity would be  $5\% / 10\% = 50\%$ .

The third method of calculating whether representation is fair and reasonable is the standard deviation test, measuring the probability that a given disparity is the product of random chance. Few if any courts have used the standard deviation test, and when they have, it has usually been in Fourteenth Amendment challenges, not Sixth Amendment fair cross section challenges. *Id.*, 463 Mich at 221.

As this Court noted in *Smith*, all the tests can be criticized. The absolute disparity test could result in a complete elimination of a distinctive group from jury arrays<sup>6</sup>; for example, if 10% of the jurors were expected to be African-American and none were, the absolute disparity of 10% would be constitutionally insignificant, which on its face makes little sense. On the other

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<sup>6</sup> Such a result would, however, inevitably cause an inquiry into why there was a complete lack of a group in jury venires, and the failure to investigate the cause of such a result would give rise to a powerful equal protection argument, to be discussed in detail *post*.

hand, using the comparative disparity test would lead to an absurd result: a relatively small absolute disparity could be translated in a comparative disparity that sounds terrible but has little practical effect. For example, if a distinct group were 5% of the jury eligible population, but only 3% of those on venires, the subsequent comparative disparity of 40% would cause a false conclusion that a large number of that group were excluded from jury venires, when the actual effect would be only an occasional shortfall of one juror from that group in an occasional venire.

This Court in *Smith* held that no specific test should be controlling, and that courts should consider the results of all the tests in determining whether the representation in a particular case was fair and reasonable. *Id.*, 463 Mich at 204, 221-222.

This Court's decision in *Smith* was reversed on habeas corpus review by the Sixth Circuit Federal Court of Appeals in *Smith v Berghuis*, 543 F3d 326 (CA 6, 2008). But that reversal was itself reversed by the United States Supreme Court in *Berghuis v Smith*, \_\_\_ US \_\_\_; 130 S Ct 1382; 176 L Ed 2d 249 (2010). The primary issue before the United States Supreme Court was whether this Court's decision was contrary to or an unreasonable application of United States Supreme Court precedent. The Court noted that "neither *Duren* nor any other decision of this Court specified the method or tests courts must use to measure the representation of distinctive groups in jury pools," 130 S Ct at 1393, and declined to address whether the absolute disparity test should be the appropriate measure for a fair cross section claim. 130 S Ct at 1394, fn 4.

Federal courts have most often used the absolute disparity test, and have rejected claims of a constitutional disparity in cases where there was a small absolute disparity but a large comparative disparity. See e.g. *United States v Royal*, 174 F3d 1, 10-11 (CA 1, 1999) (jury pool of 1.89% of African-Americans, out of an expected 4.86%, an absolute disparity of 2.97%, and a comparative disparity of 61%); *United States v Weaver*, 267 F3d 231, 241, 243 (CA 3, 2001)

(jury pool of 5% African Americans out of a community of 7.08%, absolute disparity of 2.07%, comparative disparity of 29%, and 2.1% of Latinos from a community of 4.24%, absolute 2.14%, comparative disparity of 50%); *United States v Sanchez-Lopez*, 879 F2d 541, 547-549 (CA 9, 1989) (jury pool of 2.79% Latinos, from a community of 5.59%, absolute disparity of 2.8%, comparative disparity of 50%); *United States v Orange*, 447 F 3d 792, 798-799 (CA 10, 2006) (jury pool of 4.78% of African-Americans, from a community of 7.4%, absolute disparity 2.62%, comparative disparity 35.4%, and similar numbers for smaller groups of Native Americans, Asian Americans, and Latino Americans). In *United States v Clifford*, 640 F2d 150 (CA 8, 1981), the issue was a shortfall of Native Americans, who constituted 15.6% of the population in the district where the case was prosecuted, and were only 8.4% of the prospective jurors; the Court found this insufficient to create a constitutional violation of the fair cross section requirement.

This Court in *People v Smith*, noting the apparent weaknesses of both the absolute disparity test and the comparative disparity test, chose to adopt neither test, but to proceed on a case by case basis. As noted, under an absolute disparity test, absolute disparities between 2% and 11.2% are considered statistically insignificant and do not constitute substantial underrepresentation. *People v Hubbard (after remand)*, 217 Mich App 459, 475; 552 NW2d 493 (1996), citing *United States v Ashley*, 54 F 3d 311, 314 (CA 7, 1995). That could result in the situation where all jurors of a particular identifiable group were excluded, but the absolute disparity would nonetheless be considered insignificant. For example, if every black juror in a county with a black population of under 11.2% were excluded from jury service, there would, under the absolute disparity test, still be no showing of underrepresentation. On the other hand, any other test would reach absurd results when the percentage of the group on question was small

or the figures on which the parties were relying are inaccurate. The tendency in such a case would be to exaggerate the effect of any deviation. *Thomas v Borg*, 159 F 3d 1147, 1150 (CA 9, 1998).

The People submit that the concerns over the use of the absolute disparity test are overblown, and that the absolute disparity test should be the normative test.

After the jury had been selected but before it was sworn, defense counsel objected to the racial composition of the venire. There were 45 persons in the venire. Only one appeared to be African-American. By random chance, this single individual was not drawn from the venire. There was no evidence that any members of the venire were asked to self-identify themselves according to race or other ethnicity, so the figure of one African-American was a conclusion from visual observation only. No other evidence besides defense counsel's statement addressed the race of the jurors. We do not know, for example, if there was another juror in the venire who would have identified himself or herself as African-American, but did not appear to be so from casual observation, which would of course make a substantial difference in the minority representation on the venire. As Judge Kolenda noted in his findings of fact after remand, this is not just idle speculation; it is something that can, and has, happened.

The trial court found from the testimony of Professor Stephenson that the zip-code bias created by the programming error would have resulted in an estimated 163 jury questionnaires being sent to African-Americans. Assuming that Professor Stephenson's statistical estimate is accurate and accepting the 8.25% figure as the African-American population of Kent County eligible for jury service, a total of 322 such persons would have received questionnaires had those questionnaires gone to precisely the racial composition of the county eligible for jury

service. Calculating these percentages, the comparative disparity would have been 49.4% ( $322/163 - 1 = 49.4\%$ ), and the absolute disparity 4.05% ( $8.25\% - c. 4.3\% = 4.2\%$ ).

The Court of Appeals found that there was a comparative disparity of 73.1% in “the venire for defendant’s trial” (135a). But of course that is not the correct figure to use. The operative figure is not the absolute and comparative disparity for one venire; it is rather the absolute and comparative disparity for the venires chosen over a longer section of time.<sup>7</sup> Both *Taylor v Louisiana* and *Duren v Missouri* discussed a shortfall of women jurors over a long period of time, not merely in the defendant’s venire. This Court in *People v Smith, supra*, also used the figures from an extensive period of time, not simply the single venire of the defendant. In *United States v Allen, supra*, the Sixth Circuit rejected the argument that only the defendant’s venire could be considered. A defendant challenging the composition of a jury “must show more than that their particular panel was under representative.” 160 F3d at 1103. A court must look at the overall period of time during which venires were chosen, and compare jury pools to relevant population percentages over that time. *Id.*, citing *Ford v Seabold*, 841 F2d 677, 683-684, n 4 (CA 6, 1988). The proper comparative disparity is not 73.1%, as the Court of Appeals found; it is 49.4%. The best estimate, then, even accepting the statistical estimates, is that the number of African-Americans to whom jury questionnaires were sent was about half of what would be expected.

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<sup>7</sup> That was one of the many errors made by the Sixth Circuit in *Smith v Berghuis, supra*. The Sixth Circuit used a 34% comparative disparity figure – for the month from which that defendant’s venire was chosen. The proper figure, as this Court found in its opinion in *Smith*, was 18%, from the several month period of time in which venires were selected.

This is not to say that the individual venire from which a defendant's jury is chosen is irrelevant. If a defendant's venire contained, even by happenstance, a proportional number of a particular group, the defendant would have no basis to complain. That was precisely the situation in *Parks v Warren*, \_\_\_ F Supp 2d \_\_\_ (ED Mich, February 29, 2011). The Eastern District rejected a fair cross section challenge in another case from Kent County, tried during the same time frame as the case at bar, where 4 of the 45 jurors in the defendant's venire were African-Americans. The Court found that the defendant could not raise a fair cross section complaint if his own venire was, in fact, fairly represented. But the opposite does not follow: if venires are generally fairly representative, a defendant cannot complain because his own venire, by happenstance, contains fewer of a particular group than he or she would like. To hold otherwise would be to hold precisely that which *Taylor* rejected: that a defendant somehow has a right to a particular petit jury that precisely mirrors the population of the community in which the trial occurs.

The answer to the question, then, of whether courts must examine the composition of the defendant's particular jury venire, or whether courts must examine the composition of broader pools or arrays of prospective jurors is: courts must view both. Only a view of a large number of jury pools over a significant length of time can show whether there is an underrepresentation of jury pools generally; but only a view of a defendant's individual jury venire can show whether such a general underrepresentation resulted in a constitutional violation in the defendant's own case.

Analyzing the effect of the shortfall of African-American jurors in this case, even looking at the evidence in the light more favorable to the defendant and according to the defendant every

conceivable assumption, a consideration of the actual effect of such a shortfall illustrates why the absolute disparity test is the best one to use.

Assume 100 juries are chosen by random selection. With 12 in each jury, that would be a total of 1200 jurors. Using the 8.25% figure as the percentage of eligible jurors who would be African Americans, one would expect 99 African-Americans jurors ( $1200 \times .0825 = 99$ ). The result would be that there would be some juries with one African-American juror, some with 2 African-American jurors, some with 3, and some by random chance with zero.

If for that same 100 juries we use a base figure of 4.3%, the result would be 52 African-American-jurors ( $1200 \times .043\% = 51.6$ , rounded to 52). This would result in a shortfall of 47 African-American jurors, which means that an average of a little less than one out of 2 juries would end up with one fewer African-American jurors.

This stands in stark contrast to *Duren v Missouri*. There, 54% of the jury eligible population were women, but only 14.5% of the jury venires were women. 1200 jurors should have resulted in 648 women ( $1200 \times .54 = 648$ ). But the actual results would have been only 174 women ( $1200 \times .145 = 174$ ). That was a shortfall of 474 women jurors over 100 juries, or nearly five per jury.

The point is not that discrepancies lower than those found in *Duren* should be blithely accepted. They should not. And they were not. The zip code anomaly in this case was corrected when discovered. The point remains, however, that the potential net effect of this computer error was far less significant than the Court of Appeals believed. This was hardly the sort of “gross discrepancy” that the United States Supreme Court had in mind in *Taylor* and *Duren*. Using the comparative disparity test results in the reversal of a conviction where the defendant’s venire

could have occurred by random chance without the computer glitch, based on a supposition that the problem was drastically more significant than it actually was.

#### Use of Statistical Estimates

Among the questions this Court asked the parties to address was whether a defendant's claim of underrepresentation of a distinctive group "must always be supported by hard evidence, or whether statistical estimates are permissible and, if so, under what circumstances."

Jurors are not identified by race. The information received from the Secretary of State contains no racial classification. The lack of any particular group in venires is a matter of supposition, observation, and anecdotal evidence, all of which are unreliable as accurate measurements.

Statistical evidence has been used and accepted in the past. *Duren* and *Taylor* both relied on statistical conclusions. But in those cases, the statistical evidence confirmed a "gross discrepancy" in the number of women in the venire as opposed to the expected number.

Statistical evidence is an estimate. And it cannot account for other factors that might lead to a shortfall of African-American jurors noted by this Court in *People v Smith, supra*, such as distrust of the system of justice, general poverty, higher rate of felony convictions, more transient population, all of which affect the African-American community to a higher degree than the general population and have nothing to do with the system of selecting jurors, but could subtly and cumulatively contribute to a shortage of African-American jurors.

There was nothing in the jury selection system in this case that would lead to an automatic conclusion that there was any systematic problem in the jury selection system. There was to be sure a perceived problem in the number of African-American jurors in Kent County venires. But Wayne Bentley, the Chair of the Kent County Jury Board who discovered the

computer issue, estimated the underrepresentation of African-American jurors for the years 1999 and 2000 as half to 2/3 – at a time period totally unaffected by the computer issue involved in the case at bar (58a). Jurors were still chosen from zip code 49507, as well as from other areas of the City of Grand Rapids.<sup>8</sup> A shortfall of jurors can certainly occur without a computer programming error.<sup>9</sup> The statistical evidence in this case led to an inference of a shortfall of African-American jurors, but what it did not do, and could not do, was precisely measure how much, if any, of that shortfall was due to the computer issue discovered by Mr. Bentley.

Statistical evidence is helpful, but it can lead to a false conclusion: that a jury selection system resulted in a halving of potential jurors from a distinct group, when in fact there may be many other factors at work depressing the number of potential jurors from the group. The statistics cannot alone establish a bias in the jury selection system.<sup>10</sup>

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<sup>8</sup> Contrast *United States v Osario*, 801 F Supp 966 (D Conn, 1992), where a computer error led to a complete exclusion of potential jurors from cities with large African-American populations. Had there never been jurors from the City of Grand Rapids on Kent County venires, the conclusion that there was a fair cross section violation would be powerful; but where there was only a shortage of such jurors, and where the lack of African-American jurors was apparently no greater than it had been before the computer “glitch,” the suggestion that the “glitch” caused a constitutional deprivation of the fair cross section rule is weak.

<sup>9</sup>For example, a study in Wayne County over a two year period from 2004 to 2005 showed that Wayne County jury venires were 25.7% African-American, while 39.6% of the adult population eligible for duty was African-American. See:  
<http://house.michigan.gov/SessionDocs/2011-2012/Testimony/Committee14-5-5-2011-1.pdf>

<sup>10</sup> We have to be cautious to distinguish the meaning of “bias” in a statistical sense from our ordinary use of the word. “Bias” generally is used to convey a prejudice. Statistically, though, it only means a variation from the null hypothesis, the odds that a result would occur from random chance, and could be caused by any number of factors that have nothing to do with “bias” as the word is generically used. See:  
[http://en.wikipedia.org/wiki/Bias\\_\(statistics\)](http://en.wikipedia.org/wiki/Bias_(statistics))

Finally, we would note one overwhelming problem with reliance on statistical estimates. We cannot rely on the use the statistical estimates, and then avoid the statistical conclusions. Dr. Stephenson concluded that the odds of having no more than one African-American juror in the defendant's venire would be, even without any statistical bias, 10.477%, which was statistically insignificant (88a). In other words, if 8.25% of potential jurors were African-American, and venires were chosen at random from that group of potential jurors, one out of 10 venires chosen from that group would have no more than one African-American juror. Even if we assume that the number of African-Americans were reduced by a systematic issue, we cannot conclude that the defendant himself was deprived of his right to a jury drawn from a fair cross section of the community when his venire could have occurred precisely the way it did by reasonable random chance.

#### Fair Cross Section v Equal Protection

A great deal of the problem analyzing this issue is the blurring of the fair cross section rule of the Sixth Amendment with the Equal Protection Clause rule of the Fourteenth Amendment.<sup>11</sup> The former does not require a specific intent to discriminate; the latter does. But cases such as *Taylor* and *Duren*, which involved a rather obvious and intentional discrimination against women, were viewed as fair cross section cases.

As we noted in our application for leave to appeal, the Court of Appeals cited *Duren v Missouri*, *supra*, 439 US 357, 368, n 26, for support of the proposition that the intent behind the

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<sup>11</sup> A strong argument can be made that *Taylor* and *Duren* erred in grounding their decision on the Sixth Amendment rather than the Equal Protection Clause of the Fourteenth Amendment. See *Berghuis v Smith*, *supra*, 130 S Ct at 1396 (concurring opinion of Thomas, J.). But that is a question for the United States Supreme Court to address in the proper case. This Court obviously is bound by the United States Supreme Court's jurisprudence on fair cross section claims.

jury selection system is irrelevant (137a-138a). *Duren* did indeed so hold, but it is important to look at the entire footnote 26 from *Duren*:

In arguing that the reduction in the number of women available as jurors from approximately 54% of the community to 14.5% of jury venires is prima facie proof of “unconstitutional underrepresentation,” petitioner and the United States, as amicus curiae, cite *Castaneda v Partida*, 430 US 482, 496; 97 S Ct 1272, 1281, 51 L Ed 2d 498 (1977); *Alexander v Louisiana*, *supra*, [405 US 625; 92 S Ct 1221; 31 L Ed 2d 536 (1972)], 405 US, at 629, 92 S Ct, at 1224; *Turner v Fouche*, 396 US 346, 359; 90 S Ct 532, 539; 24 L Ed 2d 567 (1970); and *Whitus v Georgia*, 385 US 545, 552; 87 S Ct 643, 647; 17 L Ed 2d 599 (1967). Those equal protection challenges to jury selection and composition are not entirely analogous to the case at hand. In the cited cases, the significant discrepancy shown by the statistics not only indicated discriminatory effect but also was one form of evidence of another essential element of the constitutional violation – discriminatory purpose. Such evidence is subject to rebuttal evidence either that discriminatory purpose was not involved or that such purpose did not have a determinative effect. See *Castaneda*, *supra*, 430 US, at 493-495; 97 S Ct, at 1279-1280; *Mt. Healthy City Bd. of Ed. v Doyle*, 429 US 274, 287; 97 S Ct 568, 576; 50 L Ed 2d 471 (1977). In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement.

The irrelevant intent in *Duren* was not a reduction in potential jurors from an identifiable group from 8.25% to 4.3%. It was a reduction of jurors from 54% to 14.5%. At some point the results become so overwhelming that discriminatory intent becomes irrelevant. But discriminatory intent is certainly relevant to an equal protection claim.

Where there is intentional discrimination designed to reduce the number of members of an identifiable group, the error is a violation of the Equal Protection Clause of the 14<sup>th</sup> Amendment, not a fair cross-section claim. *Arnold v North Carolina*, 376 US 773; 84 S Ct 1032; 12 L Ed 2d 277 (1964); *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 2411 (1991).

A classic example was presented in *Amadeo v Zant*, 486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1988). In that case, there was record evidence of collusion between the prosecutor and the jury clerk to artificially depress the number of African-Americans to jury duty, but just enough so that the numbers would not result in an absolute disparity that would give rise to a fair cross section challenge. That, of course, is intolerable. The absolute disparity test has no place in addressing an equal protection violation. For example, the use of peremptory challenges to strike a potential juror from the venire based on race gives rise to an equal protection challenge. *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Knight*, 473 Mich 324; 701 NW2d 715 (2005). Even a single such action would be error, regardless of whether it resulted in a measurable disparity of the number of jurors of a potential group in a defendant's venire.<sup>12</sup>

An Equal Protection Clause violation requires a purposeful intent to discriminate. *Washington v Davis*, 426 US 229; 96 S Ct 2040; 48 L Ed 2d 597 (1976). We are aware of only one published Michigan decision that has addressed the Equal Protection Clause in the context of an alleged shortfall of jurors in a distinctive group. In *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302; 553 NW2d 377 (1996), the Court of Appeals found no equal protection violation in a civil trial when Wayne County's system of excusing Detroit Records Court jurors from jury service for a year, as well as some other factors, artificially reduced the number of African-American jurors.

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<sup>12</sup> An interesting example, though with a twist, was presented by this Court's decision in *Pellegrino v AAPCO System Parking*, 486 Mich 330; 785 NW2d 45 (2010). The issue there was the denial of a peremptory challenge to excuse a juror, denied not because of an alleged discriminatory intent on the party making the challenge, but because the trial court wanted to maintain racial balance on the jury. The Court held this to be error, and per se reversible.

This case does not involve an Equal Protection Challenge. No one has ever suggested that Kent County engaged in a deliberate program to reduce the number of African-American jurors. In fact, Mr. Bentley concluded the opposite. But this discussion is relevant for this reason: if there is wholesale exclusion of jurors from jury venires, if there were no African-Americans or only 1% African-Americans in venires where the African-American population were 11%, the inference of a deliberate intent to discriminate would be powerful. And if there were no investigation undertaken to determine why such a gross discrepancy occurred, an Equal Protection Clause violation would be viable. The state cannot “turn a blind eye” to conduct and then claim no Equal Protection violation. *Hildebrandt v Illinois Dept of Natural Resources*, 347 F 3d 1014 (CA 7, 2003).

The Equal Protection Clause would prevent the prosecution from relying on an absolute disparity test where there was an inference that there was skullduggery or deliberate ignorance.<sup>13</sup> Had Kent County done nothing about the computer glitch when it was discovered, and had the computer glitch been shown to be the source of a shortfall of African-American jurors, a defendant convicted under such a system would have a powerful argument for reversal, even if the absolute disparity had been minimal. But the absolute disparity test remains the most sensible test for a fair cross section claim, where the numbers involved are not that great, and the net result is not a gross discrepancy between the expected number of prospective jurors from an identifiable group and the actual numbers from that group.

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<sup>13</sup> “Ignorance, when it is voluntary, is criminal; and he may properly be charged with evil who refuses to learn how he might prevent it.” Samuel Johnson, *Rasselas*.

### Conclusion

An unintended computer error resulted in jurors being disproportionately over drawn from some zip codes and under drawn from other zip codes. This may have resulted in a shortfall of African-American jurors, though no one can say for sure precisely what the effect was. Statistical estimates are that this shortfall may have resulted in an absolute disparity of African-American jurors of 4.2%. This did not result in a gross discrepancy between the expected number of African-American jurors and the actual number of African-American jurors, certainly not the sort of gross discrepancy found in *Taylor v Louisiana* and *Duren v Missouri*. We respectfully ask that this Court conclude that, under the standards of *Taylor* and *Duren*, that the defendant was not deprived of a jury drawn from a fair cross section of the community, and that the decision of the Court of Appeals to the contrary be reversed.

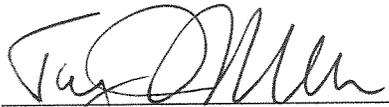
**RELIEF REQUESTED**

WHEREFORE, for the reasons stated herein, the People respectfully pray that decision of the Court of Appeals, reversing the convictions and sentences entered in this cause by the Circuit Court for the County of Kent, be reversed.

Respectfully submitted,

William A. Forsyth (P 23770)  
Kent County Prosecuting Attorney

Dated: August 10, 2011

By:   
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Chief Appellate Attorney