THE COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case Number 03CA1895 Opinion by: Judge J. Jones Marquez and Taubman, JJ., concur	FILED IN THE SUPREME COURT MAR 28 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Petitioner: TREVON DEON WASHINGTON, a/k/a VENDA JOHNSON, JR. v. **Respondent:** THE PEOPLE OF THE STATE OF COLORADO	▲ **COURT USE ONLY** ▲
Attorney for Petitioner: Anthony Viorst, Bar No. 18508 THE VIORST LAW OFFICES, P.C. 950 South Cherry Street, Suite 300 Denver, Colorado 80246 Telephone: (303) 759-3808	Case No.: 07SC614

PETITIONER'S REPLY BRIEF

ARGUMENT

I. THE TRIAL COURT ERRED IN DECLINING TO VACATE MR. WASHINGTON'S CONVICTIONS BASED UPON THE STATE'S FAILURE TO SELECT THE JURY VENIRE AT RANDOM, IN VIOLATION OF THE FAIR-CROSS-SECTION REQUIREMENTS OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 16 OF THE COLORADO CONSTITUTION, AS WELL AS THE PROVISIONS OF THE COLORADO UNIFORM JURY SELECTION AND SERVICE ACT

A. Factual Background

In its answer brief, the State asserts that "Dr. Bardwell testified that [the statistical significance test] is indicative of whether the difference is not random ... and not whether the group is fairly represented in the jury wheel. For this latter determination, the absolute disparity and comparative disparity measures are the more appropriate considerations." Answer Brief at 25. However, these assertions misconstrue the testimony of Dr. Bardwell, who explicitly eschewed the "absolute disparity" and "comparative disparity" tests for measuring under-representation, finding that where, as here, "the minority population is small, both of these measures are weak" (Envelope #10, Ex. A, p10). Instead, Dr. Bardwell relied upon the statistical significance test, which posits that in a nondiscriminatory situation, as a sample size gets larger, the percentage deviation should get smaller (supp. v10, p55).

The level of statistical significance is equivalent to the probability that the disparity in question would occur by chance in a nondiscriminatory setting (Env. #10, Ex. A, p10). Two standard deviations, equivalent to a significance level of .05 (or one chance in 20), is generally considered the threshold for statistical significance (Env. #10, Ex. A, p10 & footnote 22). Here, the level of statistical significance was much greater than two standard deviations, or a one-in-20 likelihood of the disparity occurring by chance (v81, p35). Dr. Bardwell opined that, with respect to African-Americans, the probability of the .3% disparity being attributable to chance was .008 (or eight chances in 100,000) (Env. #10, Ex. A, p25). With respect to Hispanics, Dr. Bardwell opined that the probability of the .3% disparity being attributable to chance was .12% (or 120 chances in 100,000) (Env. #10, Ex. A, p26).

C. Mr. Washington's Jury Venire Violated the Fair Cross-Section Requirement of the United States Constitution

In its answer brief, the State asks this Court to adopt the Court of Appeals' criticism of the statistical significance test, that "statistical decision theory measures the probability that any underrepresentation is random, not whether a group is fairly and reasonably represented." Answer Brief at 25 (citing Washington, 2007 WL 1557923 at *8). However, for the reasons stated in his

opening brief, Mr. Washington posits that a "fair cross-section" is synonymous with a "random cross-section." Indeed, the ruling requested by the State would be inconsistent with this Court's reasoning in *Fields v. People*, 732 P.2d 1145, 1149 (Colo. 1987), in which this Court cited with approval the following proposition: "[A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits."

D. Mr. Washington's Jury Venire Violated the Fair Cross-Section Requirement of the Colorado Constitution

The State argues that this issue is not properly before the Court, because it was not explicitly addressed in Mr. Washington's petition for certiorari. Answer Brief at 27. However, at the trial court level, Mr. Washington's jury-pool challenge was grounded not only upon the federal constitution, but also upon the Colorado constitution, and the Colorado Uniform Jury Selection and Service Act, §13-71-101 et seq. (supplemental record filed in Court of Appeals in August of 2005). And, the trial court denied the motion in its totality (supp. v10, p95-99). As the Colorado-Constitution and statutory grounds were raised in the trial court, those grounds may now be properly considered by this Court. *Cf. Steedle v. Sereff*, 167 P.3d 135, 139 n.7 (Colo. 2007) (arguments not presented to trial court may not

be considered for first time on certiorari review). Further, C.A.R. 53(a)(3) provides that the statement of an issue presented on certiorari "will be deemed to include every subsidiary issue clearly comprised therein". Under these circumstances, the Colorado-Constitution and statutory arguments are properly before this Court.

In its answer brief, the State, citing *Fields v. People, supra*, also argues that "the United States and Colorado Constitutions contain the same right to an impartial jury drawn from a representative or fair cross-section of the community." Answer Brief at 28 (citing *Fields v. People*, 732 P.2d 1145, 1151 (Colo. 1987)). However, the State misinterprets the *Fields* case, which states that both constitutions grant "the right to a jury drawn from a representative or fair cross-section of the community," but does not suggest that the two rights are co-extensive. Further, the *Fields* case suggests that the Colorado fair-cross-section guarantee provides greater protections to criminal defendants than those guaranteed by the federal constitution, as the *Fields* Court cited with approval the notion that "several state courts [have] relied on state constitutional provisions" as a means to provide greater jury-related protections than the federal constitution. *Id.* at 1149.

E. Mr. Washington's Jury Venire Violated the Colorado Uniform Jury Selection and Service Act, C.R.S. §13-71-101 et seq.

The Colorado Uniform Jury Selection and Service Act, C.R.S. §13-71-101 et seq., establishes a comprehensive mandatory system for determining and listing eligible jurors, and for ensuring that those eligible jurors are selected "at random," from a fair cross-section of the population, to serve on jury venires in their county of residence.

Specifically, the Act provides for the creation of a master list of juror names, to be placed on an automated master juror wheel that determines which jurors will be called in any given year. C.R.S. §§13-71-107, 108. The Act provides, on no less than 3 occasions, that the method of placing jurors on the master juror wheel "shall" be "random." *See* C.R.S. §13-71-104(2) ("All trial and grand jurors **shall be selected at random** from a fair cross-section of the population of the area served by the court.") (emphasis supplied); C.R.S. §13-71-109 ("If all prospective jurors on the master juror list are not needed, selection of the names or identifying numbers of prospective jurors to be placed on the master juror wheel **shall be by a random selection method which ensures equal probability of selection.**") (emphasis supplied); C.R.S. §13-71-110 ("The state court administrator **shall . . . randomly select** the specified number of jurors required from the master juror

wheel and shall issue a summons to each selected prospective juror . . .") (emphasis supplied).

Notwithstanding this explicit language, the State argues that random selection is not required, because "[t]hose parts of the Act cited by the defendant that refer to 'random selection' do so in a qualified manner." Answer Brief at 28-29. The State has misinterpreted the applicable law. As quoted above, the Act provides, on no less than 3 occasions, that the method of choosing the trial and jurors "shall" be "random." *See* C.R.S. §13-71-104(2); C.R.S. §13-71-109; C.R.S. §13-71-110. The mandatory nature of these statutory subsections is reflected in the use of the word "shall." *See Hodges v. People*, 158 P.3d 922, 926 (Colo. 2007) ("'Shall' is a word of command, denoting obligation and excluding the idea of discretion.") (citing Black's Law Dictionary 1407 (8th ed. 2004)); *People v. District Court,* 713 P.2d 918, 921, n.6 (Colo. 1986) (generally accepted meaning of term "shall" indicates that this is a mandatory term).

The "plain meaning" canon of statutory construction precludes the adoption of the State's proposed interpretation of the Act. *See Hernandez v. District Court*, 814 P.2d 379, 381 (Colo. 1991) ("The mandatory language of the statute, that 'the court shall, upon motion of either party, or may, upon its own motion, order ... an

evaluation,' is unambiguous, and its plain meaning must be given effect."); *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1987) ("In accordance with the plain meaning of these terms, the phrase "shall be immune from criminal prosecution" can only be construed to mean that the statute was intended to bar criminal proceedings . . ."); *People in Interest of T.L.D.*, 809 P.2d 1120, 1122 (Colo. App. 1991) ("[A]pplying the plain meaning of words of the statute, we conclude that the phrase 'shall be commenced in the county in which the child resides or is present,' is subject only to one interpretation.").

Based upon these legal principles, and the absence of random selection in the instant case, the Colorado Uniform Jury Selection and Service Act requires that Mr. Washington's convictions be reversed.

F. No Significant State Interest

In its answer brief, the State asks this Court to uphold the trial court's ruling that the minority under-representation applicable to this case was justified by compelling state interest. Answer Brief at 26. The State describes those interests as "not overtaxing citizens by requiring duplicate service, an economically feasible system of providing jurors for municipal courts . . ., and assuring jurors that they would not have to serve repeatedly . . ." Answer Brief at 26.

Contrary to the State's assertion, no cognizable significant state interest was present in this case. Avoiding the overtaxing and duplicate service of prospective jurors does not qualify as a significant state interest, because the exemption does not apply on a statewide or county-wide basis, to district or county court jurors, but instead applies arbitrarily to one discrete municipality in a county comprised of many such entities. The exemption of certain Aurora jurors is designed for the convenience of municipal court jurors, rather than state or county jurors, thereby favoring one municipality over others, and failing to further any significant state interest. And, because the municipality in question serves as the residence of most minority jurors in the county, the exemption unduly limits the number of minority jurors available for jury service.

Finally, to the extent that the trial court found a significant state interest in the cost savings realized by creating an economically feasible jury-selection system for both Aurora and Arapahoe County, this rationale was also invalid. Any cost savings in creating an integrated wheel were realized by the City of Aurora, rather than by the state, and no other municipalities received a comparable benefit. Furthermore, "an infringement on constitutional rights cannot be justified merely by the State's interest in saving money." *Pamela P. v. Frank S.*, 110 Misc.2d 978,

984, 443 N.Y.S.2d 343, 347 (N.Y. Family Ct. 1981) (citing *Goldberg v. Kelly*, 397 U.S. 254, 265-66, 90 S.Ct. 1011, 1019, 25 L.Ed.2d 287 (1970)).

CONCLUSION

For the foregoing reasons, as well as those stated in his opening brief, Mr. Washington asks this Court to reverse his convictions, and to remand this case for a new trial.

Dated this 28th day of March, 2008.

THE VIORST LAW OFFICES, P.C.

Anthony Viorst

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2008, a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** was served via Courtlink and/or placed in the U.S. Mail, postage prepaid, addressed to the following:

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