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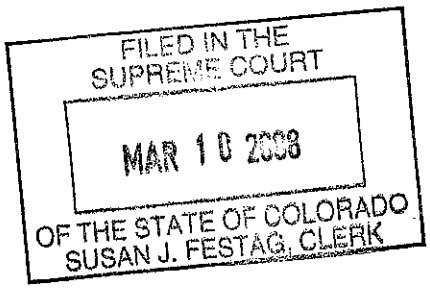
SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	 **COURT USE ONLY**
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 03CA1895 District Court, Arapahoe County, 98CR2459	
TREVON D. WASHINGTON, Petitioner, v. THE PEOPLE OF THE STATE OF COLORADO, Respondent.	Case No.: 07SC614
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PEOPLE'S ANSWER BRIEF

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ISSUE PRESENTED FOR REVIEW

Whether the trial court and the court of appeals erred in declining to vacate Petitioner's convictions based upon the State's non-compliance with the "fair cross-section" requirement of the Sixth Amendment to the United States Constitution.[1]

STATEMENT OF THE CASE

This Court granted certiorari review in People v. Washington, ___ P.3d ___, 03CA1895, 2007 WL 1557923 (Colo. App. May 31, 2007).

The defendant, Trevon D. Washington, was found guilty by a jury of three counts of First Degree Murder after deliberation; four counts of Aggravated Robbery; and one count each of Attempted First Degree Murder, Second Degree Kidnapping, Aggravated First Degree Sexual Assault; Conspiracy to Commit First Degree Murder; and Accessory to a Crime. The defendant was also convicted of three Counts of Felony Murder. At sentencing, the trial court dismissed the Felony Murder counts (v. VIII, pp. 2154-2186; v. LXXX, pp. 30-31).

The defendant appealed the judgment of conviction to the Court of Appeals and raised five issues on appeal. As pertinent here, the defendant claimed that the

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[1] In the opening brief, the defendant's statement of the issue includes a claim under the Colorado Constitution and one under the Uniform Jury Selection Act. However, the issue accepted by this Court, as set forth here, is limited to the Sixth Amendment to the United States Constitution.

trial court erred when it declined to vacate the defendant's conviction because of the state's non-compliance with the fair cross-section requirement of the Sixth Amendment of the United States Constitution. The defendant contended that the State's method of constituting jury panels for Arapahoe County systematically excluded a disproportionate number of African-Americans and Hispanics, such that his jury was not selected from a fair cross-section of the community.

The Court of Appeals affirmed the judgment. The Court held, in pertinent part, that the defendant's evidence was legally insufficient to establish underrepresentation of African-Americans and Hispanics in jury panels at the time of his trial. Washington, supra.

The defendant filed a Petition for Writ of Certiorari, which was granted on the issue set forth above, and denied as to all other issues. The defendant has filed an opening brief, and the People now file the Answer brief in this matter.

STATEMENT OF THE FACTS

On September 10, 1998, the defendant, Randy Canister, and Dante Owens murdered David Howard, Paul S. and Naomi Prince. The men also tried to murder M.N. (hereinafter, "May") by shooting her four times in the back and once in the

head.[2] However, May survived to tell of the sadistic attack on her, her two brothers, and her friend at the hands of the defendant, Canister, and Owens. However, May was rendered a paraplegic because of the attack (v. Supp. VII, p. 4).[3]

David, Paul and May were step-siblings. Naomi, who was known as "Peaches," was David's girlfriend. In September of 1998, David was 17 years old, Paul was 18, Naomi was 18, and May was 22. They shared a one-bedroom apartment where David and Naomi slept in the bedroom and May and Paul shared the living room; May slept on a couch (v. LXXI, pp. 4-5, 11, 21-23, 38, 40-41; v. Supp. VII, pp. 4-5).

On the evening of September 10th, David picked up May from her job at New York Bagel Boys and drove her home. He dropped her at the apartment and drove off to meet Randy Canister, who was known as "Rambo." This upset May because David had said that he was not feeling safe around Canister. David and

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[2] May and Paul S. were victims of sexual assault, and they are not identified in this brief by their full names. See, section 24-72-304(4)(a), C.R.S. (2007). They will be identified in this brief as "May" and "Paul." For consistency, the other victims will be identified by their first names, David and Naomi.

[3] Supplemental volume II contains testimony from July 10, and July 11, 2003. The July 10 proceedings are identified as "Supp. VII."

Canister had been friends, but they also sold cocaine together (v. Supp. VII, pp. 7-9; v. LXVII, pp. 117, 119, 125).

When May arrived home, Paul was there cleaning the apartment. May left to go buy a bottle of beer. As she was leaving, she saw Canister in his car with a "light-skinned dude," and David was sitting in the middle. Naomi was following them in David's car (v. Supp. VII, pp. 10-12, 13-14).

When may returned from the liquor store, David and Paul along with Canister, the "light-skinned dude," and a "dark-skinned dude" were seated at the dining table in the apartment. May had known Canister for several years and knew him as "Rambo." Although she did not know them then, May was able to later identify the dark-skinned dude as the defendant and the light-skinned dude as Dante Owens (v. Supp. VII, pp. 12, 17-21; v. LXVII, pp. 125-126, 154-155).

May was upset when she saw the men, and she sat near Peaches in the living room. The men at the table spoke privately for about an hour. Owens had gotten up and gone outside a couple of times during the conversation, and the last time he said, "Let's go." The defendant, Canister, and Owens started getting ready to leave (v. Supp. VII, pp. 23-24).

Canister, Washington, and Owens started toward the door. David was walking with them and Canister was directly behind him. Suddenly, the defendant

began fumbling with his jacket and he pulled out a large silver gun. The defendant said, "We're not leaving without taking all of this shit" (v. Supp. VII, p. 25). The "shit" the defendant referred to may have been some cocaine that David had withheld from Canister.[4]

Canister stood very close behind David as if he was holding something at David's back and he led David to the bedroom. The defendant made the others – May, Paul, and Naomi – sit in the living room. The defendant gave the gun to Owens and told Owens to hold a gun on them. Then, the defendant went to the back bedroom. A short time later, the defendant returned and asked, "Where's the shit? Where's the shit?" May, Paul, and Naomi shook their heads because they did not have anything (v. Supp. VII, pp. 26-27).

The defendant harassed Paul, and he searched him. He took the gun from Owens and ordered Paul to take off his clothes. After Paul undressed, the defendant ordered him to sit on the couch. The defendant and Owens started

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[4] According to David's friend Robert Johnson, David and Paul had recently gone to California where they met up with Canister in order to obtain some cocaine. David and Paul transported the cocaine back to Colorado, and Canister was supposed to pay Paul for transporting the drugs. However, Canister had failed to pay Paul when they returned, so David had withheld some of the drugs to cover the payment to Paul. David and Paul had returned about 7 days before they were murdered. (v. LXXV, pp. 100-104, 106-110).

making jokes about the size of Paul's penis. The defendant asked Paul if he "wanted some head," and the two men continued to antagonize him (v. Supp. VII, pp. 28-29).

The defendant ordered May to perform oral sex on Paul. May refused and Paul said that May was his sister, "Don't do that. That ain't right." The defendant pointed the gun at May and ordered her to "get over there and suck his dick now." Looking at that gun, May realized she had no choice. She got on her knees and performed oral sex on her brother Paul (v. Supp. VII, pp. 29-30).

The defendant and Owens laughed and continued to make jokes. Owens ordered May to "give Paul head right." The men told Paul he had better "get hard" or they would shoot him. The defendant gave the gun to Owens and went back to the bedroom where Canister had David. Owens forced May to continue to perform oral sex on Paul (v. Supp. VII, p. 30).[5]

May could hear the defendant, in the bedroom, demanding to know whether David had a gun. Apparently they found David's gun because she heard the

[5] Subsequent testing of a swab taken from Paul's pubic area revealed DNA from Paul and May and the presence of a digestive enzyme, amylase, that is found in the mouth (b. LXXVI, pp. 135-136; v. LXVII, p. 23).

defendant yelling, "I thought you didn't have no gun." Then the bedroom door was slammed and May could not hear them (v. Supp. VII, p. 35).

Owens again told May she was not performing oral sex right, and he told her "Well, I'll give you a dick to suck," and he exposed his penis. Owens sat on the couch and forced her to perform oral sex on him. Canister came out of the bedroom and gave Owens a condom. Owens forced May to remove her clothes and engage in sexual intercourse with him (v. Supp. VII, pp. 30-31).

The defendant and Canister brought David out of the bedroom. Owens pushed May off of him. Canister began pulling things out of a closet. The defendant and Owens went to the bathroom. Canister had David's black gun. Owens left the bathroom, and the defendant ordered May to come into the bathroom with him. May pretended she did not know that he was talking to her, but the defendant pointed the gun at her and said, "You. You." May went into the bathroom where the defendant forced her to perform oral sex on him (v. Supp. VII, pp. 33-36).

The defendant ejaculated on May's chest, and he threw a rag at her and told her to clean herself off. She wiped herself off with the rag. Subsequent DNA testing of blood and semen found on a gray washcloth matched the defendant and

May. The defendant allowed May to wash out her mouth (v. Supp. VII, p. 37; v. LXVII, pp. 30-31).

When May returned to the living room, David, Paul, and Naomi had each been tied up with their hands and feet together. The defendant made May lie on the floor and he tied her up, too. The defendant saw Naomi moving and wanted to know who had tied her; Owens said he had, and the defendant re-tied Naomi himself (v. Supp. VII, pp. 37-38).

The defendant, Canister, and Owens began acting like they were going to shoot them. The defendant put a sock in May's mouth and one in Naomi's mouth. Someone put socks in David's and Paul's mouths, too. The three men continued "stalking" around the victims (v. Supp. VII, p. 39). One of the men put a song on the stereo. It was the "Ten Crack Commandments" from the album "Life After Death" by Notorious B.I.G. The volume was turned up loud and the song was programmed to play over and over (v. Supp. VII, pp. 39-40; v. LXXI, pp. 69, 73).

Canister told David, "California comes back on you ten times worse," and shot David in the head. May saw her brother killed:

> I just seen blood go straight up, like a waterfall. It just went up and then it fell back down into his head. And as I went to turn back up there and look at them like, What the hell. You know, I kind of glanced at Paul. Me and Paul was just in shock, you know. And I glanced back at

> them. By then, the [defendant] has the gun and he's pointing it at Paul, and he shoots him.

(v. Supp. VII, p. 40).

The defendant "shot [Paul] in half of his face, and then he took the rest of his face off" (v. Supp. VII, p. 40).

May realized they were shooting everyone in the head, and she moved to try to protect her head. The defendant shot her in the back.

> [May:] I just felt this pain just come through my back, and I just was screaming. I just felt just screaming. And my head was up under the table. And all I seen was darkness at the moment while I was screaming, until I calmed down from – from the pain.

(v. Supp. VII, p. 41).

May saw the three men move toward the sliding door. Canister had a bag that Owens had been holding earlier. The men started to leave, but Canister called them back. Canister gave Owens a gun and pointed. May thought that he was going to shoot Naomi, but he shot May. May saw the bullet come out of her own mouth (v. Supp. VII, pp. 41-42).

May pretended to be dead and lay still until the men walked out the door and were gone.

> [May:] And then Paul and my brother was gone. I knew David was gone, I knew Paul was gone. I went to try and walk, I couldn't walk. So you know, I fell right back down, and I scooted to Peaches. She – she was just right there, at the other end. I shook her. I was hoping that she was still alive but I couldn't tell. And I just hugged her and I just began to pray and just – I don't know. I just laid there ready to die. And my body just felt cold and I just wanted to die.

(v. Supp. VII, p. 43).

Fortunately, David's friends Aaron Kerford and Merlene DeLeon came to the apartment immediately after hearing multiple shots fired. Mr. Kerford entered the apartment and found his friends murdered and May critically wounded. He exited the apartment, crying "Oh my God." Help was called and May was ultimately taken to the hospital (v. Supp. VII, pp. 43; LXXII, pp. 115-116, 119-127, 130-138, 130).

The scientific and other evidence at trial corroborated May's account of the horrible events surrounding the crime. Additionally, the evidence showed that David had six puncture wounds to his chest, evidence that he had been tortured (v. LXXIV, p. 96). There was also evidence that Paul had not died immediately from his wounds and that he had been taken back to the bedroom. A sock with his blood on it was found in the bedroom. Paul also suffered several bruises and contusions

before he died (v. LXXIV, pp. 62, 78-79, 96; v. LXXVI, pp. 144, 148-149; v. LXVII, p. 25).

The record on appeal includes a video of the crime scene showing the bodies of the three victims, the placement of various pieces of furniture and objects described at trial, and an overview of the entire apartment (People's ex. 7).

SUMMARY OF THE ARGUMENT

The jury was drawn from a fair cross-section of the community. In upholding the trial court's ruling on this issue, the Court of Appeals correctly applied two statistical measures commonly used in determining whether the representation of a particular group is "fair and reasonable" in relation to the group's population in the community: absolute disparity and comparative disparity. The test relied on by the defendant, the standard decision theory, was properly rejected by the Court of Appeals. That test only measures the probability that any underrepresentation of a group was the result of chance, and not whether the group is fairly and reasonably represented.

The defendant raises two issues on appeal that are not encompassed by the issue presented and accepted for certiorari review. The first concerns application of the Colorado Constitution and the second the application of the Colorado

Uniform Jury Selection and Service Act. Each is raised as an independent basis for reversal. Because there issues are not properly raised, they should not be considered.

ARGUMENT

I. The jury was drawn from a fair cross-section of the community. The Court of Appeals correctly relied on the "absolute disparity" and "comparative disparity" statistical measures in its review.

The defendant contends that the Court of Appeals erred when it held that he was tried by a jury that was drawn from a fair and reasonable cross-section of the community. He argues that the Court should have relied on the statistical decision theory, which measure the probability than any underrepresentation of a particular group was the result of chance, in determining whether the representation of African-Americans and Hispanics was fair and reasonable in relation to the representation of members of these groups in the community.

However, as discussed below, the Court properly assessed the issue under the absolute disparity and comparative disparity measures and determined that the groups were properly represented.

II. Jury wheel selection process before and after 2003.

The defendant's trial was held in July of 2003. As discussed below, the testimony on the jury wheel selection process focused in part on a change to the process that occurred prior to his trial.

The term "jury wheel" refers to a group of persons who are eligible for jury duty. In Colorado, the jury wheel is comprised of the persons obtained from the records of the Motor Vehicle Division of the Department of Revenue and from Voter Registration records through the Secretary of State. Those names go into the statewide jury wheel. A computer randomly assigns each name a number between one and eight-million that is used to rank the jurors for selection (v. LXXIX, pp. 13-15, 16-17, 29).

After the numbers are assigned, the names are sorted by the County in which the individuals reside. In the year 2003, there were 398,359 available prospective jurors for Arapahoe County. Under an agreement with the City of Aurora, the Office of the State Court Administrator creates a jury wheel for the City of Aurora for use in its municipal court. In the year 2003, about 21,000 Aurora residents were allocated from the 398,359 for the Aurora jury wheel (v. LXXIX, pp. 14, 17, 37-38, 45-46).

In addition to random number ranking, the names are assigned an additional ranking number based on prior jury service pursuant to the "Rules for Determining the Service Rank for a Juror in the New Wheel Year." The Rules were created because of a change in the applicable statute and explain how to give service rank, or weight, to a prospective juror for prior jury service. Under this system, such a juror's ranking would be weighted and the juror would be moved down the priority list for being summoned for jury service (v. LXXIX, pp. 20-21, 34).

Under the Rules, the prior service history for a prospective juror covers a five-year period. A service credit rank of 25 is assigned to a juror for service in a given year. That service rank is used in the next year's jury pool selection process. The service rank number is reduced by 5 each of the following years until it reaches zero in the fifth year. In selecting prospective jurors for summoning, the ones with the lowest service rank will be selected first (LXXIX, p.21; LXXXI, 25-26, 40-41, 43-44).

Prior to March of 2003, names placed in the Aurora jury wheel would not simultaneously be included in the Arapahoe County jury wheel. Consequently, those Aurorans would not be available for service in the Arapahoe District and County courts. However, in 2003, that process was changed, and those jurors were

returned to the Arapahoe County jury wheel regardless of whether they served in Aurora (v. LXXIX, pp. 25-28, 39, 45-46).

The defendant called Dr. Robert Bardwell, a statistical consultant, to testify as an expert on jury composition and demographics. Dr. Bardwell prepared a report analyzing the composition of Arapahoe County juries under the jury wheel system (v. LXXXI, pp. 12, 15; Env. 10, Def's. Ex. A). Dr. Bardwell did not review any actual statistics of what jurors appeared for jury duty, did not look at the master jury list (which is available to the public), and was unaware of the actual racial composition of the jury wheels in Arapahoe County and in Aurora (v. Supp. X, pp. 7-9, 14-15).

Instead, his report was prepared by interpolating the 1990 and 2000 censuses for Arapahoe County and Aurora, and projecting the impact of the jury wheel system – before and after March of 2003 – on the possible racial composition of juries in Arapahoe County. In particular, he focused on the impact of removing jurors from the Arapahoe County wheel for inclusion in the Aurora jury wheel and on the impact of service rank. He studied the period from 1993 forward (v. LXXXI, pp. 16, 21).

The minority population of Arapahoe County is principally concentrated in Aurora. (LXXXI, pp. 21). Consequently, Dr. Bardwell concluded that both Black

and Hispanic citizens of Arapahoe County would be underrepresented in the Arapahoe County jury wheel for two reasons: first, their exclusion from the wheel during the year they were allocated to Aurora's jury wheel, and second, because they could be given service credit for jury service whether it was in the City of Aurora or in Arapahoe County (v. LXXXI, pp. 22-24).

Dr. Bardwell also concluded that in 2003, after the Aurora jurors were added back into the Arapahoe jury wheel, there was a positive spike in the percentage of African American and Hispanic persons in the Arapahoe wheel (v. LXXXI, p. 42). According to Table 3 in his report, in 2003 (when the defendant's trial was held) African Americans comprised 7.7% of the population of Arapahoe County and comprised 7.4% of the jury pool. According to Table 4, in 2003, Hispanics comprised 12.9% of the population and 12.6% of the jury pool. So the projected underrepresentation was .3 percent for each group (Env. 10, Def's. ex. A, pp. 25-26; v. Supp. X, pp. 33-37). Those tables indicate that before 2003 the underrepresentation of these groups of potential jurors was significantly greater.

Dr. Bardwell also concluded that the underrepresentation of the two groups was the natural result of the jury selection system as it was designed and implemented, and that the underrepresentation could not be remedied solely by discontinuing the process of removing Aurorans from the Arapahoe jury wheel (v.

LXXXI, p. 45). It was his opinion that this was both systemic, meaning ongoing, and systematic, meaning that it is a result of the system (v. LXXXI, pp. 51-52).

The trial court asked Dr. Bardwell why he considered the .3 percent difference in 2003 to be significant. The doctor indicated that the .3 percent would not be an expected random deviation, and that it indicated that the deviation was the result of the systematic nature of the selection process (v. Supp. X, pp. 54-57).

After hearing argument, the trial court denied the defendant's claim. The court reviewed the applicable case law from the United States Supreme Court. The court found that Dr. Bardwell's statistical models were correct and that he did not have to do an actual analysis. The court found that there were 90 to 100 jurors in the venire for the defendant's trial. Around eight to ten appeared to be people of color.[6] The court also found that the venire substantially reflected the community based on the numbers given by Dr. Bardwell (v. Supp. X, pp. 94-96).

The court held that there was not the systematic exclusion of people of color from the defendant's venire. The 21,000 people taken out were put back in the Arapahoe County jury wheel of 398,539 around March, which means that they

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[6] Defense counsel asserted that her recollection was that there were 8 African Americans, 9 Hispanics, and three biracial jurors in the venire (v. Supp. X, pp. 77-78).

were available for the defendant's venire on July 7th. There was not systematic discrimination and the venire substantially represented the community (v. Supp. X, pp. 96-97).

Additionally, the court found that there were several compelling state interests in the existing jury selection system. First, it fulfills the commitment to jurors that they will not have to serve repeatedly on juries during a twelve-month period. Additionally, an economical system by which jury wheels are created for Aurora and other municipal courts is a compelling state interest. And there is a compelling state interest in not subjecting citizens to two simultaneous juror summons because jury service impacts both their personal and work lives (v. Supp. 10, pp. 98-99).

III. The Sixth Amendment right to a jury drawn from a fair cross-section of the community.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right 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, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

More than sixty years ago, the United States Supreme Court held that the Sixth Amendment right to trial by an "impartial jury" contemplated a jury that is representative of the community. Glasser v. United States, 315 U.S. 60 (1942). "Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial." Glasser, 315 U.S. at 85.

> Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 [(1940)].

Glasser, 315 U.S. at 85. Under this standard, the officials charged with choosing jurors may exercise some discretion to the end that competent jurors may be called, "[b]ut they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community." Glasser, 315 U.S. at 86.

In Glasser, the Supreme Court addressed the constitutional right to an impartial jury in the context of criminal proceedings in federal court. In Taylor v. Louisiana, the Supreme Court held that this Sixth Amendment right was binding

on the States by virtue of the Fourteenth Amendment. Taylor v. Louisiana, 419 U.S. 522, 697-698 (1975) ("We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment...."); see Duncan v. Louisiana, 391 U.S. 145 (1968).

Under the Sixth and Fourteenth Amendments, then, a defendant in a criminal trial has the right to a trial by a jury that is drawn from a fair cross-section of the community in which the trial is held. Duren v. Missouri, 439 U.S. 357, 358-359 (1979); People v. Rubanowitz, 688 P.2d 231, 241 (Colo. 1984). But there is no requirement that the petit jury actually chosen must mirror the community and reflect the various distinctive groups in the population. Taylor, 419 U.S. at 538. Nor does the Sixth Amendment "augur or authorize the fashioning of detailed jury selection codes" by courts. The "fair cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." Taylor, at 537-538.

In order to establish a prima facie violation of the fair-cross-section requirement, the 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 systematic exclusion of the group in the jury-selection process. Duren, 439 U.S. at 364; Taylor v. Louisiana, 419 U.S. 522 (1975); People v. Rubanowitz, 688 P.2d 231, 241 (Colo. 1984); People v. Sepeda, 581 P.2d 723, 196 Colo. 13 (1978).

Where a defendant satisfies all three parts of the test, the State may justify the infringement by showing attainment of a fair cross section to be incompatible with a significant state interest. Duren, 439 U.S. at 368-369.

In the case at hand, the defendant contends that African-American and Hispanic members of the community were underrepresented. Each of these groups undeniably constitutes a "distinctive group" for purposes of Sixth Amendment analysis.[7] See, e.g., United States v. Weaver, 267 F.3d 231, 240 (2001), and cases cited therein.[8] Thus, the first part of the test is met.

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[7] Under the Sixth Amendment, a defendant need not be a member of the identified group to raise a fair cross-section claim. Taylor, 419 U.S. at 695.

[8] Not every group that can be identified necessarily constitutes a "distinctive group." For example, College students have been held not to constitute a distinctive group; Ford v. Seabold, 841 F.2d 677 (6th Cir. 1988); and persons charged with a felony may be excluded without running afoul of the fair cross-section requirement. United States v. Barry, 71 F.3d 1269 (7th Cir, 1995).

However, as the Court of Appeals held, the defendant failed to demonstrate that these groups were not fairly and reasonably represented. In reaching this determination, the Court of Appeals applied two statistical measures: "absolute disparity" and "comparative disparity." This analysis was also applied in United States v. Orange, 447 F.3d 792 (10th Cir. 2006). "Absolute disparity" refers to the difference between the percentage of a group's representation in jury panels and its percentage of representation in the community. Orange, 447 F.3d at 798. The example provided by the Court of Appeals illustrates this calculation:

> For example, if members of a group comprise 10% of the relevant population (the "community"), but 5% of jury panels, the absolute disparity is 5% (10% (percentage of the relevant population) -5% (percentage in jury panels)).

Washington, 2007 WL 1557923 at *5.

Comparative disparity is determined by dividing absolute disparity by the percentage of that group in the general population and then multiplying by 100 (to create a figure expressed in terms of a percentage). Orange, 447 F.3d at 798; Washington, 2007 WL 1557923 at *5. "In effect, comparative disparity imagines how many members of the group in question would be on the wheel if there were full representation, and then calculates the percentage decrease from this figure due to the underrepresentation. Another way to think of the comparative disparity is as

the percentage decrease in the probability that someone in the underrepresented group will be selected for the jury wheel due to underrepresentation." Peter A. Detre, Note, A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel, 103 Yale L.J. 1913, 1918 (1994).

The Court of Appeals also provided an example illustrating the comparative disparity calculation:

> For example, if members of a group comprise 10% of the relevant population but 5% of jury panels, the comparative disparity is 50% ((5% (absolute disparity) / 10% (percentage of relevant population)) x 100).

Washington, 2007 WL 1557923 at *5.

In Orange, the court applied a disparity analysis to measure the likelihood that members of a distinct group would be called for a jury. In that case, the highest absolute disparity was 3.57%, well below the disparity level in Duren (39%) and other cases. The court upheld this low level of disparity.

According to Table 3 in Dr. Bardwell's report, in 2003 Arapahoe County had an African American population of 7.7% and the Jury Wheel included 7.4% (Env. 10, Def's ex. A, p. 25). This would provide an absolute disparity of .3% and a comparative disparity of 3.9%. According to Table 4, in 2003 the County had a Hispanic population of 12.9% and the Jury Wheel included 12.6% (Env. 10, Def's.

Ex. A, p. 26). This would provide an absolute disparity of .3% and a comparative disparity of 2.3%.

These percentages do not indicate an unfair or unreasonable representation of African Americans or Hispanics in the Jury Wheel. See Orange, 447 F.3d at 798-799 (upholding 3.57% absolute and 51.22% comparative disparity, and noting that higher disparities have been upheld).

Here, the defendant failed to satisfy the second prong of the prima facie test. Consequently, the court correctly held that the defendant was not denied of a jury selected from a fair cross-section of the community.

The defendant contends that a third test, known as the "statistical decision theory," should be applied and that this measure demonstrates that the second part of the Sixth Amendment analysis – 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 – is satisfied. However, the statistical decision theory determines the probability that the observed underrepresentation of the group was the result of chance. Typically, this probability is expressed in terms of a number of "standard deviations" or in terms of a percentage of the likelihood the disparity is attributable to chance. Washington, 2007 WL 1557923 at *7.

The defendant contends that all he need show is that the difference between the expected number and the actual number of jurors in a group is greater than two or three deviations. However, as Dr. Bardwell testified, such a deviation is indicative of whether the difference is not random, see Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977), and not whether the group is fairly represented in the jury wheel. For this latter determination, the absolute disparity and comparative disparity measure are the more appropriate considerations. Orange, citing Castaneda.

As the Court of Appeals held, while the statistical decision theory measures the probability that any underrepresentation is random, it does not measure whether a group is fairly and reasonably represented. Washington, 2007 WL 1557923 at *8. The Second Circuit also criticized the application of this analysis to the jury wheel system in this context:

> It is illogical to apply a theory based on random selection when assessing the constitutionality of a qualified wheel. By definition, the qualified wheel is not the product of random selections; it entails reasoned disqualifications based on numerous factors. It is irrational to gauge the qualified wheel -- an inherently non-random sample – by its potential for randomness.

United States v. Rioux, 97 F.3d 648 (2nd Cir. 1996).[9]

The Court of Appeals found that it was unnecessary to address either the third prong of the test or whether there compelling state interests that any underrepresentation served a compelling state interest. Nevertheless, the trial court properly held that there were compelling state interests in the structure of the jury wheel system. These included not overtaxing citizens by requiring duplicate service, an economically feasible system of providing jurors for municipal courts along with county and district courts, and assuring jurors that they would not have to serve repeatedly as provided by statute.

Section 13-71-108, C.R.S. (2005) recognizes the need to equitably distribute the responsibility for jury service among the qualified population, and avoid repeatedly summoning the same individuals for jury service. Consequently, those who have the least jury appearances or services are to be summoned prior to those who have appeared or served more. In addition to meeting the goals identified by

[9] Indeed, in designing the jury wheel, officials should create a structured system that consistently promotes inclusion of a fair cross-section of the community. Although a system that seeks to create a jury pool that perfectly mirrors the racial composition of the community may run afoul of the Equal Protection Clause. See United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998); W.R. LaFave, 6 Criminal Procedure, § 22.2(d) at 67 (3rd Ed. 2007).

the trial court this system also insures that a fair cross-section of the community will serve by promoting the distribution of jury service among the entire community.

The court properly held that the fair cross-section requirement was not violated.

IV. The defendant's claims under the Colorado Constitution and the Colorado Uniform Jury Service and Selection Act.

The defendant seeks to raise a claim under the Colorado Constitution, and he argues that it should be read to provide greater protection than the United States Constitution. He contends that the Colorado Constitution requires that jurors be selected from a "random draw" and that the statistical decision theory be applied to determine whether this standard is satisfied.

However, the defendant's claim is not properly before the Court on certiorari review. This Court accepted this case for review under the Sixth Amendment to the United States Constitution. Additionally, the defendant did not raise a claim under the Colorado Constitution in his Petition for Writ of Certiorari.

Only those issues that are set forth in the petition for writ of certiorari, or any subsidiary issue fairly comprised therein, will be considered on review. Such

issues will not be considered. C.A.R. 53(a)(3); Vigoda v. Denver Urban Renewal Authority, 646 P. 2d 900 (Colo. 1982).

Here the Colorado Constitution issue was neither raised in the petition nor accepted for certiorari review. Further, it cannot be said that this is a subsidiary issue that is fairly comprised within the Sixth Amendment issue. The defendant's claim is that the Colorado Constitution provides a different and independent right from the one covered by the United States Constitution. However, the People would note that this Court has indicated 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. Fields v. People, 732 P.2d 1145, 1151 (Colo. 1987).

For the same reasons, the defendant's claim under the Colorado Uniform Jury Selection and Service Act is not properly presented here. However, the Act should not be read to require absolute randomness in the selection of jurors. When read as a whole, the Act serves several appropriate and constitutional goals. One is to assure that jurors are draw from a fair cross-section of the community. Additionally, the Act seeks to assure that jurors are appropriately qualified to serve on a jury and fulfill the duties attendant thereto. See section 13-71-105, C.R.S. (2007). Those parts of the Act cited by the defendant that refer to "random

selection" do so in a qualified manner. None requires absolute randomness in the selection of jurors.

CONCLUSION

For the foregoing reasons and authorities, the Court of Appeals should be affirmed.

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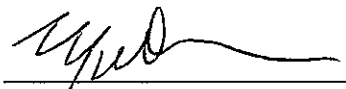

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S ANSWER BRIEF** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 10th day of March addressed as follows:

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