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Case Number 03CA1895
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<tr><td>Petitioner: TREVON DEON WASHINGTON, a/k/a VENDA JOHNSON, JR.

v.

Respondent: THE PEOPLE OF THE STATE OF COLORADO</td></tr>
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<tr><td colspan="2">PETITIONER'S OPENING BRIEF ON APPEAL</td></tr>
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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 OPENING BRIEF ON APPEAL	

INTRODUCTION

In this case, Mr. Washington was convicted by a jury that was not chosen at random, and was not representative of the community, in that significant numbers of African-American and Hispanic jurors were excluded. Under these circumstances, Mr. Washington's convictions were invalid, due to the state's

failure to select the jury venire at random, in violation of the fair-cross-section requirement of the federal and state constitutions, as well as the provisions of the Colorado Uniform Jury Selection and Service Act.

STATEMENT OF THE ISSUES PRESENTED

I. Whether 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 Sixth Amendment to the United States Constitution, Article II, Section 16 of of Colorado Constitution, and the provisions of the Colorado Uniform Jury Selection and Service Act.

STATEMENT OF THE CASE

In September of 1998, the prosecution charged Mr. Washington with three counts of first degree murder (counts one through three), three counts of felony murder (counts four through six), one count of attempted first degree murder (count seven), one count of conspiracy to commit first degree murder (count eight), one count of first degree sexual assault (count nine), one count of second degree kidnapping (count ten), and four counts of aggravated robbery (counts eleven through fourteen) (v1, p5-22, 158; v8, p2154-2185). Thereafter, on November 13, 2000, the prosecution declared its intent to seek the death penalty against Mr. Washington (supp. v2). On May 21, 2003, following an evidentiary hearing, the

trial court ruled that Mr. Washington suffered from mild mental retardation, and that he was therefore ineligible to receive the death penalty (v7, p1946-1955). On July 23, 2003, following a jury trial, Mr. Washington was convicted of all counts, as well as a lesser non-included charge of accessory to murder (v8, p2154-2186; v78, 7/24/03). At the sentencing hearing on August 21, 2003, the trial court vacated the three felony murder counts (counts four through six) (v80, p30-31). The trial court sentenced Mr. Washington to consecutive life sentences on the three first degree murder counts (counts one through three), and to a consecutive 48-year sentence on the attempted murder count (count eight) (v8, p2206-2207). The trial court also imposed consecutive sentences on the remaining counts (*id.*).

Mr. Washington filed a timely appeal. On May 31, 2007, in a published opinion, the Court of Appeals affirmed Mr. Washington's convictions. *People v. Washington*, ___ P.3d ___, 2007 WL 1557923 (Colo. App. May 31, 2007).

STATEMENT OF THE FACTS

A. Undisputed Facts

Before his untimely death, on September 10, 1998, 17-year-old D.H. was a cocaine dealer (v72, p146-150; v75, p98). Several weeks earlier, D.H. and his friend/roommate P.S. had gone to California to pick up a kilogram of cocaine, which was taped to P.S.'s back during the bus ride back to Colorado (supp. v7,

7/11/03, p144-45). The cocaine was brought back to D.H.'s apartment, at the Trails Apartments complex, where D.H. lived with his girlfriend N.P., also known as "Peaches," his sister M.N., and P.S. (supp. v7, 7/10/03, p5-6, 114-15). On the afternoon of September 10, 1998, two customers of D.H., Aaron Kerford and his girlfriend Marlene DeLeon, were in the parking lot outside D.H.'s apartment (v72, p127-28). They had knocked on D.H.'s apartment door, and gotten no answer, so they had decided to wait in the parking lot for a few minutes before knocking again (v72, p126-27). After approximately five minutes, they heard 12 to 18 gunshots (v72, p131). They then ran toward D.H.'s apartment (v72, p131). As they approached the apartment, they saw three black males running from the area (v72, p132-35). Aaron Kerford and Marlene DeLeon knocked on the front door of D.H.'s apartment, but no one answered (v72, p138). Kerford then went around to the back of the apartment, entered the apartment, and started screaming (v72, p138-39, 141).

The apartment had been ransacked (v72, p140). P.S. was naked, "all beat up," and appeared to be dead (v72, p140, 142). D.H. was tied up and "his brains were all over the wall" (v72, p140). N.P. was also bound, at the hands and feet, and she appeared to be dead as well (*id.*). M.N. was lying on her back, naked but

alive, and was begging for help (*id.*). Marlene DeLeon observed five or six gunshot wounds in her back (v72, p141).

Responding to the screams of Aaron Kerford, other residents of the apartment complex approached the apartment (v72, p141). Several persons called the police (*id.*).

The police arrived and investigated the scene. Among the items taken into evidence was a wash cloth found in the living room of the apartment (v73, p60-62).

B. M.N.

1. *Pretrial Interviews*

M.N. was severely injured, and she was transported to the hospital for treatment (v77, p117-18). At the hospital, Officer Brian Saupe asked M.N. if she knew any of the people who had injured her (v73, p131). Although she was unable to speak at that time, M.N. nodded affirmatively, and spelled the name "Rambo" in the air (v73, p133). On September 14, 1998, M.N. was contacted at the hospital by Detective Dana Hatfield, and asked to view a photo line-up. At that time, M.N. identified co-defendant Randy Canister as the person she knew as "Rambo" (v77, p117-19). Thereafter, on September 21, 1998, M.N. was shown a photo lineup containing a photograph of Mr. Washington, at which time she indicated that the

photograph depicted another one of the persons involved in the shootings (v77, p125-26). On October 16, 1998, M.N. chose a photograph of co-defendant Dante Owens from a photo lineup, and stated that he was the third participant in te incident at David D.H.'s apartment (v77, p154-55).

2. *Trial Testimony*

M.N. testified as a prosecution witness at Mr. Washington's trial (supp. v7, 7/10/03). She stated that on September 10, 1998, she worked her regular day shift at New York Bagel Boys restaurant (supp. v7, 7/10/03, p7). At the end of the shift, D.H. picked her up in his car, and took her home to the Trails Apartments (supp. v7, 7/10/03, p8). As soon as M.N. arrived home, she grabbed N.P.'s car keys, and drove to the liquor store, where she bought herself a beer (v7, p10-12). When M.N. returned to the apartment, the other three residents (D.H., P.S., and N.P.) were there, along with Randy Canister, a drug dealer who M.N. knew as "Rambo," and two other men (supp. v7, 7/10/03, p9, 12, 17). M.N. described the other two men as "the dark-skinned dude" and the "light-skinned dude" (supp. v7, 7/10/03, p19). At trial, M.N. identified Trevon Washington as the "dark-skinned dude" who was present that day (supp. v7, 7/10/03, p21).

M.N. testified that they were all sitting around the dining room table talking amicably for approximately an hour (supp. v7, 7/10/03, p19, 23). Canister and the

other two men then got up to leave (v7, p24), but when they got to the door the "dark skinned dude" pulled out a silver gun and said "We're not leaving without taking all this shit" (supp. v7, 7/10/03, p25). M.N. testified that Canister then took D.H. into the bedroom, while the others remained in the living room (supp. v7, 7/10/03, p26).

According to M.N., a series of nightmarish events ensued: The "dark skinned dude" forced the other three residents to give up their money and/or jewelry (supp. v7, 7/10/03, p46); the "light-skinned dude" made P.S. strip, and forced M.N. to perform fellatio on P.S. (supp. v7, 7/10/03, p28-30); the "light-skinned dude" forced M.N. to give him oral sex (supp. v7, 7/10/03, p31); the "light skinned dude" made M.N. strip naked, and have vaginal sex with him (supp. v7, 7/10/03, p32); the "dark skinned dude" then called M.N. into the bathroom, where she was forced to give him oral sex as well (supp. v7, 7/10/03, p35-37).

M.N. testified further that, when she came out of the bathroom, Canister was holding D.H.'s black gun (supp. v7, 7/10/03, p34). The other three residents of the apartment were tied up, lying on their stomachs, in the living room (supp. v7, 7/10/03, p37-38). M.N. was then forced to lie down on the floor, at which time she was tied up the same way, and a sock was placed in her mouth (supp. v7, 7/10/03, p38-39). According to M.N., Randy Canister then shot D.H. in the head (supp. v7,

7/10/03, p40). The "dark skinned dude" proceeded to shoot P.S. in the head, at which time M.N. managed to maneuver her head under the coffee table, in order to "save her head" (supp. v7, 7/10/03, p41). The "dark skinned dude" shot her in the back instead (supp. v7, 7/10/03, p41). Canister then handed the black gun to the "light-skinned dude" who shot N.P., and also shot M.N. in the head (supp. v7, 7/10/03, p42). The bullet went through M.N.'s head, through her mouth, and onto the floor (supp. v7, 7/10/03, p42). As a result of her gunshot injuries, M.N. was rendered a paraplegic, and had to have her jaw replaced (supp. v7, 7/10/03, p4).

On cross-examination, M.N. acknowledged numerous inconsistencies between her trial testimony, and previous statements to the police (supp. v7, 7/11/03, p9-82). M.N. also acknowledged that some months prior to the death of N.P., N.P. had had a falling out with Randy Canister's girlfriend, which created tension between D.H. and Canister (supp. v7, 7/11/03, p133-37). In addition, M.N. admitted that, less than a year before the shootings, she had offered to kill Canister herself, based upon her concern that Canister was interfering with D.H.'s drug business (supp. v7, 7/11/03, p137-39, 153-54).

C. Statements of Drug Customers

1. *Robert Johnson*

Robert Johnson testified that D.H. was his cocaine dealer (v75, p98-99). He would often meet D.H. at the Trails Apartments to conduct these transactions (v75, p99). M.N. had also sold cocaine to Johnson, at the Trails Apartments, on several occasions (v75, p124-25). Johnson had also purchased cocaine directly from P.S., and from N.P. (v75, p136).

Johnson testified that he came to know D.H. during the time that D.H. served as his drug dealer (v75, p99). He was aware that D.H. owned a gun, and that he was fully capable of acting in a violent manner (v75, p134-35). He also knew that P.S. served as D.H.'s "muscle," suggesting that P.S. was capable of violence as well (v75, p135).

Johnson stated that D.H. sold him cocaine the morning that D.H. returned from California (v75, p102). Johnson observed the large quantity of cocaine that D.H. had secreted in his closet, and also saw the red marks on P.S.'s torso where he had taped the cocaine to his body (v75, p104-105). Johnson testified that D.H. was very angry that while he was in California, Randy Canister and his friends had failed to show him proper respect (v75, p107, 152), and because Randy Canister had not paid D.H. and P.S. for transporting the drugs from California (v75, p108-

109). Johnson stated that D.H. had withheld a portion of Canister's share of the cocaine, as compensation for transporting the cocaine from California (v75, p109-110).

2. *Aaron Kerford*

Aaron Kerford told the police that, on the night of D.H.'s death, he had gone to D.H.'s apartment to purchase marijuana (v78, p12-13). He stated that D.H., N.P., and M.N. were all dealing drugs out of that apartment (v78, p13). M.N., in particular, was "heavy into dealing" (v78, p16).

Kerford reported to the police that D.H. owned at least two guns (v78, p15). Kerford had overheard D.H. threaten to kill someone who had "shorted" him on a drug deal (v78, p16-17).

D. Mr Washington's Mental Retardation

Mr. Washington presented testimony from Dr. Michael Schmidt, a clinical psychologist with a specialty in neuropsychology (v78, p74). As a neuropsychologist, Dr. Schmidt focused upon IQ testing and adaptive behavior testing (v78, p82). In his IQ testing of Mr. Washington, Dr. Schmidt found that Mr. Washington's IQ score was 71 (v78, p108). In his adaptive behavior testing of Mr. Washington, Dr. Schmidt examined Mr. Washington's executive functions, or higher-level abilities, which consist of such skills as insight, foresight, planning,

judgment, self-regulation, and self-awareness (v78, p91). Dr. Schmidt stated that these higher-level abilities are an important aspect of adaptive behavior, because they offer:

> . . . the ability to know that if I do this, these are going to be the consequences, this is how things are going to turn out, the ability to kind of see the future, to plan ahead, to work things out in your mind before you actually do them in the world around you.

On the tests that evaluated these higher-level abilities, Dr. Schmidt concluded, Mr. Washington did "consistently bad" (v78, p92). Dr. Schmidt diagnosed Mr. Washington as mildly mentally retarded (v78, p95).

E. <u>Physical Evidence</u>

The police found certain physical evidence at the scene, upon which further tests were conducted. Although M.N. testified that the "light skinned dude" put a condom on his penis, and that she never touched the condom or its wrapper (supp. v7, 7/11/03, p42), prints lifted from the condom wrapper matched M.N.'s right thumb and left index finger (v75, p79-80). On a washcloth located in the apartment living room, police identified a semen stain whose DNA was consistent with that of Mr. Washington (v77, p30-36).

The bodies of the four gunshot victims were examined for the presence of gunshot residue (v78, p68-69). Gunshot residue was found on the right hand of

M.N., and on the left hand of P.S. (v78, p69-70). This finding indicated that M.N. and P.S. either discharged a firearm, were in the vicinity of a firearm when it was discharged, or came in direct contact with an item containing gunshot residue (v78, p72).

SUMMARY OF THE ARGUMENT

I. In a post-trial hearing, Mr. Washington proved, by means of expert testimony, that prospective Black and Hispanic jurors were systematically excluded from the jury selection process in this case, and that the resulting jury pool failed to be reasonably representative of the community. Mr. Washington also showed that the jury selection process which led to the under-representation of Black and Hispanic jurors was not supported by a significant State interest. Under these circumstances, Mr. Washington's convictions were invalid, due to the state's failure to select the jury venire at random, in violation of the fair-cross-section requirements of the federal and state constitutions, as well as the provisions of the Colorado Uniform Jury Selection and Service Act.

STANDARD OF REVIEW

This Court undertakes a *de novo* review of a trial court's legal determination whether a defendant established a violation of the constitutional fair-cross-section requirement. *See People v. Washington,* ___ P.3d ___, 2007 WL 1557923 (Colo.

App. May 31, 2007) (and cases cited therein). A trial court's erroneous fair-cross-section ruling constitutes a structural error that requires automatic reversal. *See People v. Willcoxon*, 80 P.3d 817, 819 (Colo. App. 2002). Likewise, a trial court's erroneous failure to uphold the provisions of the Uniform Jury Selection and Service Act also requires automatic reversal. *See State v. LaMere*, 298 Mont. 358, 2 P.3d 204, 217 (Mont. 2000).

ARGUMENT

I. THE TRIAL COURT ERRED IN DECLINING TO VACATE MR. WASHINGTON'S CONVICTION 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

On July 8, 2003, prior to the start of the trial in this case, Mr. Washington's counsel filed a motion, along with supporting affidavit and census figures, challenging the jury pool in this case (supplemental record filed in Court of Appeals in August of 2005). In that motion, Mr. Washington alleged that the jury pool assembled in his case had systematically excluded African-American and Hispanic persons, in violation of the United States Constitution, the Colorado

Constitution, and the Colorado Uniform Jury Selection and Service Act, §13-71-101 et seq. (id.).

On July 10, 2003, the prosecution filed a response in opposition to Mr. Washington's motion (v7, p1984-86). On July 14, 2003, Mr. Washington's counsel filed a supplement to her jury-pool challenge, which consisted of an affidavit executed by Judy Lucero, an attorney assisting in the defense of co-defendant Dante Owens, and supporting documents in support thereof (supplemental record filed in Court of Appeals in August of 2005). The trial court held Mr. Washington's motion in abeyance pending the outcome of the trial.

Following the trial, on August 21, 2003, a hearing was held on Mr. Washington's motion (v79). At that hearing, the trial court received testimony from Jackie Senese, a management analyst at the Office of the State Court Administrator ("State Judicial") (v79, p13). Ms. Senese explained that State Judicial was responsible for creating a "master jury list" and a "master jury wheel" -- an automated system that determines which jurors will be called in any given year -- for each county in the State, including Arapahoe County (v79, p14, 29). In addition, during the relevant time frame State Judicial had a contract with the City of Aurora, to create a jury wheel for that city (v79, p14). As the bulk of Aurora is located in Arapahoe County, the contract called for 85% of the approximately

24,000 prospective Aurora jurors, or roughly 21,000 persons, to come from Arapahoe County (v79, p18). Ms. Senese stated that the master list of eligible voters for each wheel are taken from motor vehicle and voter registration records (v79, p15). The total number of Arapahoe County residents named on the master jury list, during the relevant time frame, was approximately 398,500 (supp. v10, p63; Envelope #10, Ex. A, p7).

Ms. Senese explained further that, from at least 1993, until early 2003, the computer program establishing the Arapahoe County and Aurora jury wheels had excluded persons who lived in Aurora from eligibility for jury duty in Arapahoe County (v79, p18-21). In early 2003, Aurora jurors were added back into the Arapahoe County jury wheel (id). With regard to trials that began after the return of the Aurora jurors, Ms. Senese stated that the jury wheel continued to assign service rank to those jurors, which lasted for a period of five years (id). Based upon service rank, a juror who served in Aurora was unlikely to serve again, in either Aurora or Arapahoe County, during that five-year period (v79, p20-21; Envelope #9, Ex. B).

The trial court also received testimony from Judy Lucero, whose testimony essentially tracked the affidavit she had previously submitted to the court, regarding information she had obtained about the creation and administration of

the Arapahoe County and Aurora jury wheels (v79, p47-58). After Ms. Lucero testified, the trial court continued the hearing for the purpose of receiving expert testimony (v79, p71).

In September of 2003, defense expert Robert Bardwell submitted a report to the trial court, entitled "Preliminary Report on the Composition of Juror Pools in the Arapahoe Courts, Colorado, 1993 - 2003" (Envelope #10, Ex. A). In that report, Dr. Bardwell reviewed the impact of the exclusion of Aurora jurors upon Arapahoe County jury pools, and concluded that those jury pools failed to represent a fair cross-section of the community (Envelope #10, Ex. A).

The continued hearing resumed on December 2, 2003, at which time Dr. Bardwell testified (v81). Dr. Bardwell, who held a Ph.D. in mathematical statistics, and had extensive experience in the field of jury composition and demographics, was qualified as an expert in that field (v81, p12-15). He explained that, until March of 2003, the Arapahoe County jury selection process was flawed, based upon the removal of Aurora Municipal Court jurors from the list of potential Arapahoe County jurors, and the assignment of service rank to Aurora Municipal Court jurors for a period of five years (v81, p16-17; Envelope #10, Ex. A, p5-6). Dr. Bardwell stated that these two aspects of the jury selection process resulted in an under-representation of Aurora jurors on Arapahoe County juries (v81, p23).

And, because census data showed that most of the minority population in Arapahoe County resided in Aurora (v81, p21), those two aspects of the jury selection process resulted in an under-representation of minority jurors on Arapahoe County juries (v81, p23, 45).

Dr. Bardwell testified further that in March of 2003 State Judicial had terminated the one-year removal of Aurora Municipal Court jurors from the list of potential Arapahoe County jurors, and apparently had added those jurors back into the list of potential jurors (v81, p17-20; Env. #10, Ex. A, p9). However, State Judicial did not drop the service-rank system for those jurors, or for any of the other Aurora Municipal Court jurors who had served in the past five years (v81, p20; Env. #10, Ex. A, p7-8).

By retaining the assignment of service-rank to Aurora Municipal Court jurors, Dr. Bardwell testified, State Judicial had failed to remedy the flaws in the selection process for Arapahoe County jurors:

> . . . [S]ervice rank essentially removes a large proportion of Aurorans from potential jury service in the county irrespective of . . . the removal of the 24,000 Aurorans each year (v81, p29).

Dr. Bardwell opined further that the under-representation of minority jurors could not be rectified unless the service-rank system was also terminated (v81, p45-46; supp. v10, p31-32; Env. #10, Ex. A, p16-17).

Dr. Bardwell computed that Blacks comprised 7.7% of the Arapahoe County population, but only 7.4% of the Arapahoe County jury pool (supp. v10, p35-36; Env. #10, Ex. A, p25). Dr. Bardwell also estimated that Hispanics comprised 12.9% of the Arapahoe County population, but only 12.6% of the Arapahoe County jury pool (supp. v10, p36; Env. #10, Ex. A, p26). The disparity of .3% for both of these minority groups, in Dr. Bardwell's opinion, was statistically significant (supp. v10, p54-56; Env. #10, Ex. A, p10, 25-26 & footnote 22). Further, in Dr. Bardwell's opinion, the disparity resulted in a jury pool that failed to constitute a fair cross-section of the population:

> In this case, there's [a] structural flaw that clearly results in underrepresentation of Aurorans and . . . of minorities on these juries.
>
> But just to give you an idea of how severe this would be, if we were looking at this as a system that actually selected jurors randomly – which this system does not – this system removes large proportions of Aurora jurors initially and then selects randomly. But that's not a random selection, because the – the essential nature of random selection is it's fair, everyone has an equal chance.

> And in this case, it's not random and it's not fair, because many Aurorans are removed before the selection is made (v81, p34-35).

In rendering his opinions, Dr. Bardwell 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).

At the close of evidence, defense counsel argued that the assignment of service credit for Aurora Municipal Court jurors "should have stopped when the jurors were added back" in March of 2003 (supp. v10, p68). The termination of service credit was necessary because when an Aurora resident serves jury duty "the odds are way too good that they will be a person who belongs to a recognizable racial group who's some minority, either Hispanic [or] African American . . ." (supp. v10, p68).

Following the arguments of counsel, the trial court found that the defense had failed to show a statistical systematic exclusion of prospective minority jurors, because at the time of Mr. Washington's trial in July of 2003, the 21,000 Arapahoe County residents designated for Aurora Municipal Court had been returned to the Arapahoe County jury wheel (supp. v10, p96-97). The trial court also found that the resulting jury pool was reasonably representative of the community because, of the 100 prospective jurors who appeared for Mr. Washington's trial (supp. v10, p78, 95), approximately eight to ten of them were "people of color," meaning minorities (supp. v10, p95). In addition, the trial court found that even if the service-credit system resulted in the under-representation of prospective minority

jurors on Mr. Washington's jury pool, the under-representation was justified by a significant state interest in ensuring that prospective jurors are not overused, and in saving costs by creating a jury wheel for both the Aurora and Arapahoe County (supp. v10, p97-99). For all of these reasons, the trial court denied Mr. Washington's motion (supp. v10, p99).

B. Applicable Law

The Sixth Amendment to the United States Constitution guarantees an accused the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed." This provision has been interpreted to require that a petit jury in a criminal case be selected from a representative cross-section of the community. *Smith v. Texas*, 311 U.S. 128, 130, 61 S.Ct. 164, 165, 85 L.Ed. 84 (1940). The language of the Colorado Constitution is virtually identical to its federal counterpart. Article II, §16 of the Colorado Constitution provides that a criminal accused has the right to "an impartial jury of the county or district in which the offense is alleged to have been committed."

The constitutional fair-cross-section requirement serves not only to safeguard the constitutional rights of the accused, but also to legitimize the judicial process, and to advance the interests of society as a whole:

> The representativeness principle furthers important societal interests in addition to the right of litigants to a fair trial and the right of citizens to serve on juries. The concept of the jury as representative of a cross section of the community has long been linked both to notions of representative government and democracy and to the constitutional guarantees of due process, equal protection, and trial by an impartial jury. The jury provides a vehicle for direct citizen participation in an arena otherwise dominated by professional advocates and government officials. In criminal cases, the jury performs a protective function, interposing a group of citizens between an accused and the punitive mechanism of the state. Thus the representative, popular character of the jury lends legitimacy, integrity, and impartiality to the judicial process. A lack of representativeness tends to compromise the jury as an institution and to undermine the judicial process . . .

David Kairys, Joseph Kadane & John Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists, 65 Cal. L. Rev. 776, 782 (1977).

In addition to the requirements of the federal and state constitutions, Colorado has adopted the Uniform Jury Service and Selection Act, found at C.R.S. §13-71-101 et seq., which 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.

As shown below, Mr. Washington's convictions were invalid, due to the state's failure to select the jury pood at random, in violation of the fair-cross-section requirements of the federal and state constitutions, as well as the provisions of the Colorado Uniform Jury Selection and Service Act.

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

A State violates the fair cross-section requirement of the Sixth Amendment where it is shown that: (1) a distinctive and cognizable group exists; (2) the group is systematically excluded from the jury selection process; and (3) the resulting jury pool fails to be reasonably representative of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (Colo. 1978). A State's failure to satisfy the fair-cross-section requirement may be upheld only if the state can show that "attainment of a fair cross-section [is] incompatible with a significant State interest." *Duren v. Missouri*, 439 U.S. 357, 368, 99 S.Ct. 664, 671, 58 L.Ed.2d 579 (1979).

In order to show that a jury pool is not reasonably representative of the community, the defendant need not show discriminatory intent by the State. *Duren v. Missouri, supra*, 439 U.S. at 368 n.26, 99 S.Ct. at 670 n.26, 58 L.Ed.2d at 579 n.26 (whereas an equal protection challenge to jury selection requires evidence of

discriminatory intent, "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."). Rather, the defendant need only show, by means of statistical evidence, that the representation of the group "is not fair and reasonable in relation to the number of such persons in the community." *Duren, supra*, 439 U.S. at 364; *see also United States v. Weaver*, 267 F.3d 231, 240 (3rd Cir. 2001) (demonstrating under-representation, in the context of a fair-cross-section claim, "is, at least in part, a mathematical exercise, and must be supported by statistical evidence").

In its opinion, the Court of Appeals noted that the most common statistical measures utilized in assessing an unreasonable representation claim are the "absolute disparity" and "comparative disparity" measures. Slip Op. at 12. Mr. Washington acknowledges that, in this case, the absolute disparity between the percentage of black and Hispanic jurors in the community, and the percentage on jury panels during the relevant time frame, was .3% for both minority groups. Slip Op. at 24-25. Mr. Washington likewise does not dispute that the comparative disparity, which 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 the figure due to the under-representation,[1] is 3.9% for African-Americans and 2.3% for Hispanics. Slip Op. At 26. Finally, Mr. Washington acknowledges that this Court has declined to find unreasonable representation under comparable circumstances. *People v. Sepeda*, 196 Colo. 13, 581 P.2d 723 (Colo. 1978) (representation was fair and reasonable where absolute disparity did not exceed 5%).

Nonetheless, both the "absolute disparity" and "comparative disparity" standards have been criticized for unfairly mis-characterizing the impact of minority under-representation. *See* Peter A. Detre, Note, A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel, 103 Yale L.J. 1913, 1921-22 (1994). Indeed, the Court of Appeals opinion in the instant case describes the drawbacks of these two tests, and cites supporting legal authority. Slip Opinion at 14-15. Therefore, this Court should be hesitant to adopt either of these measures of minority under-representation.

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[1] Peter A. Detre, Note, A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel, 103 Yale L.J. 1913, 1918 (1994).

As he did in the Court of Appeals, Mr. Washington asks this Court to utilize a third measure of unreasonable representation, the statistical significance test.[2] This test measures representativeness by calculating the probability of the disparity occurring by chance in a random drawing of the population. David Kairys, Joseph Kadane & John Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists, 65 Cal. L. Rev. 776, 792 (1977). If that probability is low, the conclusion may be drawn that the disparity is not the result of chance but results from bias or discrimination. *Id.* Two standard deviations, equivalent to a significance level of 5% (one chance in twenty), is generally considered the threshold for a finding that the disparity is "statistically significant," meaning that it was unlikely to have occurred by chance. *Id.*[3]

In *Alston v. Manson*, 791 F.2d 255 (2nd Cir. 1986), the Second Circuit noted that in jury-wheel cases based upon equal protection grounds "[t]he Statistical Decision Theory analysis is ideally suited for shedding light on [the issue of

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2 The Court of Appeals declined Mr. Washington's request to adopt the statistical significance test, holding that "statistical decision theory measures the probability that any underrepresentation is random, not whether a group is fairly and reasonably represented." Slip Op. at 20 (citing *Ford v. Seabold*, 841 F.2d 677, 684 n.5 (6th Cir. 1988)).

3 This was the threshold utilized by Dr. Bardwell to determine that the under-representation of blacks and Hispanics in the instant case was statistically significant (Env. #10, Ex. A, p10 & footnote 22).

discriminatory intent] because it reveals the possible role of chance and works well where a small sample is involved." *Id.* at 258. The Court went on to suggest that statistical significance test is the proper measure in fair-cross-section cases as well:

> . . . [I]f this Court should subsequently apply modern statistical theory to the sixth amendment as well as the fourteenth, then the two constitutional analyses would be more congruent. In that case, it would be unlikely that a jury selection system would be found to violate the equal protection clause, but not the sixth amendment.

Id.

Although no court has adopted the statistical significance test as the sole means to determine whether unreasonable representation of minorities has occurred, many courts have found that this test is an appropriate tool in making that determination. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.1, 97 S.Ct. 1272, 1281 n.1, 51 L.Ed.2d 498 n.1 (1977); *McGinnis v. Johnson*, 181 F.3d 686, 691 n.6 (5th Cir. 1991); *Hirst v. Gertzen*, 676 F.2d 1252, 1258 n.14 (9th Cir. 1982); *People v. Buford*, 182 Cal. Rptr. 904, 909 (Cal. Ct. App. 1982); *State v. Paz*, 798 P.2d 1, 7 (Idaho 1990), overruled on other grounds, *State v. Card*, 825 P.2d 1081 (Idaho 1991); *People v. Smith*, 615 N.W.2d 1, 2-3 (Mich. 2000); *see also United States v. Osorio*, 801 F.Supp. 966, 978-79 (D. Conn. 1992) (finding violation of Sixth Amendment fair-cross-section requirement based upon "[t]he lack of random

selection in the compilation of names for the Qualified Wheel"); *People v. Hubbard*, 552 N.W.2d 493, 503 (Mich. App. 1996) (same).

Here, Dr. Bardwell carefully examined the statistical evidence, and concluded that the disparity in minority representation on jury venires was statistically significant, in that the probability of the .3% African-American disparity being attributable to chance was .008 (or eight chances in 100,000) (Env. #10, Ex. A, p25), and the probability of the .3% Hispanic disparity being attributable to chance was .12% (or 120 chances in 100,000) (Env. #10, Ex. A, p26). Dr. Bardwell opined further that, based upon the application of the statistical significance test, Mr. Washington's jury venire failed to be reasonably representative of the community. Based upon the legal principles cited above, the trial court erred in failing to adopt the statistical significance test, and in failing to conclude that the application of this test proved that minorities were unreasonably under-represented in Mr. Washington's jury pool.[4]

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[4] The trial court's finding that eight to ten percent of Mr. Washington's prospective jurors were minorities actually supports Mr. Washington's position on appeal, as the total percentage of minorities in Arapahoe County in 2003 was greater than twenty percent (Blacks 7.7% and Hispanics 12.9%) (Env. #10, Ex. A, p19, 26). In any event, a Sixth Amendment "fair cross-section" challenge must be based upon venire panels as a whole over time, and not upon one specific venire panel. *See Taylor v. Louisiana, supra*, 419 U.S. at 538, 95 S.Ct. at 702 (emphasizing that "jury wheels" or "pools of names" from which juries are drawn must not systematically exclude distinctive groups in the community); *State v.*

For all of these reasons, Mr. Washington's convictions must be vacated, based upon the State's failure to select the jury venire at random, in violation of the fair-cross-section requirement of the Sixth Amendment to the United States Constitution.

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

Article II, §16 of the Colorado Constitution is the state analogue to the Sixth Amendment of the United States Constitution. As the two constitutional provisions are virtually identical, the rights vested by Colorado's fair-cross-section guarantee are, arguably, neither greater nor lesser than those of the federal constitution. However, the Courts of this state have traditionally interpreted the Colorado Constitution as providing greater protections to criminal defendants than those guaranteed by the federal constitution. *See People v. Young*, 814 P.2d 834 (Colo. 1991); *People v. Oates*, 698 P.2d 811 (Colo. 1985); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983); *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980); *People v. Paulsen*, 198 Colo. 458, 601 P.2d 634 (1979); *People ex rel.*

Schmidt, 865 S.W.2d 761, 763 (Mo. App. 1993) (denying "fair cross-section" challenge where defendant offered statistics related only to his particular venire panel, and "did not present statistical evidence regarding venire panels as a whole over time" in the county).

Juhan v. District Court, 165 Colo. 253, 439 P.2d 741 (1968). This judicial history reflects recognition that the Colorado Constitution "is a source of protection for individual rights that is independent of and supplemental to the protections provided by the United States Constitution." *People v. Young, supra*, 814 P.2d at 842.

To an even greater extent than its federal counterpart, the Colorado Constitution guarantees the right to trial by jury in criminal cases. This right is found not once, but twice, in the Colorado Constitution's Bill of Rights. *See* Colo. Const. Article II, § 16 ("In criminal prosecutions the accused shall have the right to ... a speedy public trial by an impartial jury . . ."); Article II, §23 ("The right of trial by jury shall remain inviolate in criminal cases"). And, whereas the federal constitution simply states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury," the Colorado Constitution emphatically decrees that "[t]he right of trial by jury shall *remain inviolate* in criminal cases." *Compare* U.S. Const., Amend. VI *with* Colo. Const. Art. II, §16 (emphasis supplied).

Further, the constitutional right to a jury trial has been reinforced by Colorado case law and statutes. In *Oaks v. People*, 150 Colo. 64, 68, 371 P.2d 443, 446-47 (1962), the Colorado Supreme Court recognized that:

> . . . Among the rights guaranteed to the people of this state, none is more sacred than that of trial by jury . . . It will be a sad day for our system of government if the time should come when any person, whoever he may be, is deprived of this fundamental safeguard.

This sentiment has been repeated by the appellate courts of this State on numerous occasions. *See, e.g., Harris v. People*, 888 P.2d 259, 263 (Colo. 1995); *People v. Rodgers*, 756 P.2d 980, 985 (Colo. 1988); *Wafai v. People*, 750 P.2d 37, 44 (Colo. 1988). It has also been codified by statute. *See* C.R.S. § 16-10-101 ("[T]he right of a person who is accused of an offense . . . to have a trial by jury is inviolate and a matter of substantive due process of law as distinguished from one of "practice and procedure" . . .").

In addition to recognizing that the Colorado's constitutional right to a jury trial is separate and distinct for the analogous right granted by the federal constitution, this Court has recognized that the constitutional right to an "impartial" jury, Article II, §16, is likewise separate and distinct from its federal counterpart. *City of Aurora by and on behalf of People v. Rhodes*, 689 P.2d 603,

611 (Colo. 1984) (the "impartial" jury requirement of Article II, §16 is satisfied "if the summoning and selection procedures are calculated to provide the defendant with a fair opportunity for obtaining a representative cross section . . . on the jury.").

Based upon the authorities cited above, Mr. Washington maintains that Article II, § 16 of the Colorado Constitution, which guarantees criminal defendants the right to a "trial by an impartial jury," provides greater protections to criminal defendants than those guaranteed by the federal constitution.

Mr. Washington maintains further that Article II, § 16 of the Colorado Constitution requires that criminal jury venires be chosen by "random draw," and that therefore the statistical significance test, which measures the probability that the jury was chosen at random, is the appropriate test to determine whether unreasonable representation of minorities has occurred. In support of this position, Mr. Washington asks this Court to consider its opinion in *Fields v. People*, 732 P.2d 1145, 1148-49, 1152 (Colo. 1987). In *Fields, supra*, this Court cited with approval the case of *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 903, 583 P.2d 748, 762 (1978), where the California Supreme Court held that the state constitutional guarantee of a fair cross-section was independent of the Sixth Amendment, and that it guaranteed a "jury that is as near an approximation of the

ideal cross-section of the community as the process of *random draw* permits" (emphasis supplied). In *Fields, supra,* 732 P.2d at 1145, 1148-49, 1152 (Colo. 1987), this Court examined the *Wheeler* Court's legal analysis, and approved of its determination that, unlike the federal constitution, the state constitution requires that a criminal jury venire be chosen by "random draw."

Because the statistical significance test is the appropriate means, under the Colorado Constitution, to determine whether minorities were unreasonably under-represented on a jury venire, and because the application of this test shows that unreasonable under-representation occurred in Mr. Washington's case, Mr. Washington's convictions must be reversed.

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

which 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 must 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).

The Act explicitly authorizes a litigant to challenge a jury pool, when there has been a "substantial failure" to comply with the Act. Such a challenge is very different from a constitutional challenge based upon the fair-cross-section guarantee. "Although the statutory procedures for jury selection are designed to protect the constitutional, fair cross-section guarantee, the substantial compliance standard [in the Montana jury selection statute] and the constitutional test have as their object of inquiry entirely different subject matters." *State v. LaMere*, 2 P.3d

204, 219 (Mont.2000). The fair-cross-section test exists to challenge a jury selection system that systematically excludes an identifiable class of citizens, whereas the statute allows for a challenge premised on the State's failure to comply with the statutorily mandated system. *Id.*

Under the Act, a challenging party must file a written motion, and supporting affidavits, prior to the swearing in of the jury. C.R.S. §13-71-139(1). If the affidavits present a prima facie case of a substantial failure to comply with the provisions of the Act, the challenging party is required to prove his claim at an evidentiary hearing. *Id.* Here, although Mr. Washington complied with all of the Act's procedural requirements, and proved that the state had substantially failed to comply with the Act, the trial court concluded that no violation had occurred. For the reasons provided below, the trial court's failure to find that the Act was violated, and to reverse Mr. Washington's convictions, constituted reversible error.

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).

In conjunction with the term "shall," the above-cited statutory subsections mandate that the state choose jury venire members at "random." Assuming arguendo, as did the Court of Appeals, that the Sixth Amendment to the United States Constitution does not require "random" selection of a jury venire, such a requirement does clearly exist under the Uniform Jury Selection and Service Act. *See United States v. Kennedy,* 548 F.2d 608,612 (5th Cir.1977), overruled on other grounds, *United States v. Singleterry,* 683 F.2d 122 (5th Cir. 1982) ("A departure from the [federal jury-selection statute] that directly affects the random nature of selection establishes a substantial violation independently of the departure's consequences in a particular case."). And, as shown by the testimony of Dr. Bardwell, and through application of the statistical significance test, the jury venire in Mr. Washington's case was not selected at random.

Under these circumstances, the Colorado Uniform Jury Selection and Service Act requires that Mr. Washington's convictions be reversed. *See State v. LaMere, supra* (reversing criminal conviction on statutory grounds, based upon violation of Montana's jury-selection statute, even though defendant had not

proven a constitutional fair-cross-section violation); *United States v. Branscome*, 682 F.2d 484, 485 (4th Cir. 1982) (affirming district court finding that federal jury-selection statute was violated when jurors were chosen through a "non-random selection process").

F. No Significant State Interest

A State's failure to satisfy the constitutional fair-cross-section requirement may be upheld only if the state can show that "attainment of a fair cross-section [is] incompatible with a significant State interest." *Duren v. Missouri*, 439 U.S. 357, 368, 99 S.Ct. 664, 671, 58 L.Ed.2d 579 (1979). In *Duren,* the Court stated that "states [must] exercise caution in exempting" certain classes of jurors from service, but recognized a significant state interest in granting "appropriately tailored" exemptions based upon "community needs." *Duren, supra*, 439 U.S. at 370.[5]

Like the *Duren* Court's recognition of a "community needs" exception to juror service, the Colorado Uniform Jury Selection and Service Act recognizes a state interest in "more equitably distribut[ing] the responsibility for juror appearance and service throughout the qualified population of **each county** . . ."

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[5] Mr. Washington assumes that the application of the "significant state interest" exception would be the same under the Colorado Constitution.

C.R.S. §13-71-108(2) (emphasis supplied). In order to achieve this goal, the Act mandates that the state court administrator "implement reasonable procedures to match prior year records of juror selection, appearance and service **in the state courts**. . . [so as to ensure that] individuals with the least amount of jury appearances or service in the most recent years shall be summoned prior to individuals who have appeared or served more recently." *Id.* (emphasis supplied).

In its order denying Mr. Washington's challenge to the jury venire, the trial court found that even if the service-credit system resulted in the under-representation of prospective minority jurors on Mr. Washington's jury pool, the under-representation was justified by a significant state interest. The Court found that the state had a significant interest, articulated "in the Colorado statutes," in ensuring that prospective jurors are not overused (supp. v10, p97-98). The trial court also found that the cost savings realized by creating a jury wheel for both Aurora and Arapahoe County constituted a compelling state interest (supp. v10, p98-99).

In this case, the overuse of prospective jurors does not qualify as a significant state interest, under either the Sixth Amendment or the Colorado Uniform Jury Selection and Service Act, as the exemption of certain Aurora jurors

is not an "appropriately tailored" exemption, nor does it advance the state's interest in equitably distributing the service of state or county jurors. The exemption is not "appropriately tailored," as required by the Sixth Amendment, 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. 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. Furthermore, the statutory goal of equitably distributing the service of state or county jurors is not served, because 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.

Finally, to the extent that the trial court found a significant state interest in the cost savings realized by creating a jury wheel 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

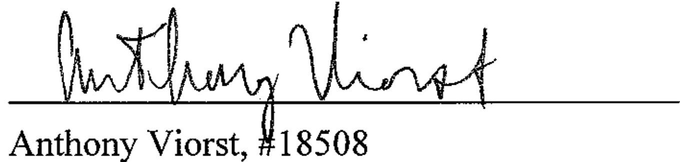
(N.Y. Family Ct. 1981) (citing *Goldberg v. Kelly*, 397 U.S. 254, 265-66, 90 S.Ct. 1011, 1019, 25 L.Ed.2d 287 (1970)).

CONCLUSION

For the foregoing reasons, Mr. Washington asks this Court to reverse his convictions, and to remand this case for a new trial.

Dated this 8th day of February, 2008.

THE VIORST LAW OFFICES, P.C.



Anthony Viorst, #18508

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2008, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF ON APPEAL** was served via Courtlink and/or placed in the U.S. Mail, postage prepaid, addressed to the following:

Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, CO 80203