STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Murphy, P.J. and Hoekstra, and Markey, J.J.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

GREGORY M. RICE,

Defendant-Appellant.

Supreme Court Docket No. 125101

Court of Appeals No. 225865

Wayne County Circuit Court 99-002073

BRIEF ON APPEAL--DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction pursuant to its granting of leave June 3, 2004. The final order in the circuit court was entered September 17, 1999. An appeal of right was taken and the Court of Appeals affirmed October 14, 2002. This Court remanded to the Court of Appeals on June 19, 2003 in lieu of granting leave to appeal. The Court of Appeals issue its judgment on October 7, 2003 again affirming the conviction. Application for leave was again timely filed in this Court, and leave was granted June 3, 2004.

QUESTIONS PRESENTED

I. **WHETHER THE PROSECUTOR'S RACE-NEUTRAL REASONS FOR DISMISSING JURORS NO. 2 AND 9 WERE SUFFICIENT TO AVOID A FINDING OF PURPOSEFUL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES.**

Defendant-Appellant answers	"no"
Plaintiff-Appellee would answer	"yes"
The Court of Appeals answered this question	"yes"

II. **WHETHER THE TRIAL COURT CORRECTLY FOUND THAT JURY SELECTION DID NOT VIOLATE *BATSON V. KENTUCKY*, 476 US 79; 106 S CT 1712; 90 L Ed 2d 69 (1985), BECAUSE "THE SAME NUMBER IF NOT MORE" UNCHALLENGED AFRICAN-AMERICAN JURORS REMAINED ON THE JURY THAT HEARD THE CASE.**

Defendant-Appellant answers	"no"
Plaintiff-Appellee would answer	"yes"
The Court of Appeals did not expressly answer this question	

III. **WHETHER THE TRIAL JUDGE ERRONEOUSLY CONTINUED THE TRIAL WITH THE EXISTING PANEL AFTER SHE EXPRESSED DISSATISFACTION WITH THE PROSECUTOR'S "RACE-NEUTRAL" REASONS FOR EXCUSING TWO AFRICAN-AMERICAN JURORS WHO COULD NOT BE RECALLED.**

Defendant-Appellant answers	"yes"
Plaintiff-Appellee would answer	"no"
The Court of Appeals did not expressly answer this question	

STATEMENT OF FACTS

Procedural Background on Appeal.

This appeal is by leave granted. This Court's Order of June 3, 2004 granted leave from the Court of Appeals' October 7, 2003 judgment (Joint Appendix ("JA"), 19b and 16b). The Court of Appeals judgment followed a remand from this Court in its Order of June 19, 2003 (JA 15b), directing the Court of Appeals to determine whether or not the trial judge erred in finding a *Batson* violation, and whether, if no error occurred, the *Batson* violation was cured by the composition of the final jury panel. The Court of Appeals found that the trial court had clearly erred and abused her discretion (JA 18b).

This Court limited review to three issues, as follows:

(1) whether the prosecutor's race-neutral reasons for dismissing jurors No. 2 and 9 were sufficient to avoid a finding of purposeful discrimination in the exercise of peremptory challenges;

(2) whether the trial court correctly found that jury selection did not violate *Batson v. Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1985), because "the same number if not more" unchallenged African-American jurors remained on the jury that heard the case; and

(3) whether the trial judge correctly continued the trial with the existing jury panel after she expressed dissatisfaction with the prosecutor's "race neutral" reasons for

excusing two African-American jurors who could not be recalled (JA 19b).

This case is consolidated with that of the co-defendant Jerome L. Knight, Docket No. 124996.

Both defendants were charged with first degree (premeditated murder, MCL 750.316. The case arose from the November 24, 1998 shooting death of twenty-one year-old Yahnika Hill, the mother of Mr. Knight's child. Ms. Hill died from multiple gunshot wounds (JA, pp. 216-217). There were ongoing custody disputes between Ms. Hill and Knight over the child, and the prosecution alleged that Knight procured Mr. Rice to commit the killing. Both defendants were convicted as charged, and were sentenced as mandated to life in prison.

Each defendant appealed by right to the Court of Appeals, which subsequently affirmed Knight's case on October 15, 2002, Docket No. 231845 (JA 1b), and affirmed Mr. Rice's case also on October 15, 2002, Docket No. 225865 (JA 11b). Each defendant applied to this Court for leave to appeal, and on June 19, 2003, in lieu of granting appeal, this Court issued Orders vacating that portion of the judgments of the Court of Appeals relating to the *Batson*-issue, and remanded for reconsideration, as described above (JA 6b and 15b).

Voir dire.

Jury selection lasted three days. On the third day, trial counsel for the co-defendant raised a *Batson* objection, to which Mr. Rice's counsel joined, and argued that the prosecutor was removing black males from the panel (JA 42b). The prosecutor responded that of the seven challenges she had exercised, three were of African-Americans (JA, 45b). The prosecutor contended, and the trial court agreed, that no pattern had been established to meet the threshold for a *Batson* inquiry; she said "... I don't think that either counsel has met the threshold that needs to be established that there is a pattern." (JA 45b and 46b). The trial court agreed: "There have been four whites excluded, exempted by the prosecution and three blacks. So just based on that I don't see a Batson problem" (JA 46b), and added that it did not "see a pattern of the prosecution improperly excluding African American males, because they've only excluded one, or African American females where two have been excluded. I think the reasons are acceptable. So I don't see a problem there." (JA 58).

Later that morning a second, or renewed, *Batson* objection was raised after the prosecutor excused three African-American females, two of whose dismissals are at issue in this appeal. (JA 86). The potential jurors, Ms. Johnson and Ms. Jones, apparently left the building during the sidebar conference and could not be recalled (JA 64b). The prosecutor had not questioned either of the jurors, as the trial court pointed-out:

THE COURT: Why didn't you ask her that? You didn't ask any questions of any

of these jurors. You just simply are excusing them (JA 62b).

The prosecutor explained her race-neutral reasons in the following discussion:

> MS. MILLER [Assistant Prosecuting Attorney]: Ms. Johnson indicated that – looking at her body language when she was seated and the tone of her voice and the look that she gave when she indicated that she could be fair; she was hesitant in her demeanor. And she also indicated that she had a close relative who was convicted of a drug charge. And although she indicated that she could be fair, she was very reticent in terms of her demeanor.
>
> Miss Jones, the person that was last dismissed, is a person that has a child that's close in age to the victim in this case. She's a person that is a working person that is in some type of professional position at Blue cross. In this case we have a young woman who is not –
>
> THE COURT: So is Miss Berg, who is white. A white female.
>
> MS. MILLER: Right, that's is (sic) correct. However, she has not indicated that she has a daughter that is of the age of the victim in this case. And Miss Jones is not similarly situated as our victim. She has a daughter that may be different from our victim. And she may view the life style of this victim and compare and contrast that with her own child. I don't think that that should enter into it. She indicated that she could be fair.
>
> But the reason that she was stricken is because this young woman whose life-style in this case maybe significantly varying from her own daughter and from the background she is from. So therefore she was stricken ... (JA 58b – 59b).

The trial court in responding said, as to Miss Jones, "I do not see a reason other than – I mean, it seems to me for the prosecution to say, she has a daughter the same age as the victim, that would seem to work in the prosecution's favor, just in terms of thinking in the jury selection. So I don't accept that." (JA 59b – 60b).

During the discussion the trial court indicated it thought they "were getting close to a ...sensitive issue ... a serious issue" (see JA 59b; 60b), and cautioned the attorneys to "be very careful" from that point on (JA 66b). The trial court essentially concluded the matter by stating that: "... I'm not satisfied with the prosecution's response as to potential jurors Jones and Johnson. But I think they've already left ... I'm just saying, I let Jones and Johnson go without holding them, especially Jones. I guess I should have held her and I didn't do that. I'll take the fault for that. But from this point on let's try to be careful with this jury selection. We are close to getting this jury selected ... I don't think it is serious enough at this point. We do have some minorities left on the jury panel and I'll be watching this closely" (JA 66b – 67b).

Subsequently, after the panel was established, the trial court stated that "with the panel that we ended up with, I think that any Batson problems that may have been there have bee cured. We have the same number if not more jurors, African-American female jurors on the panel as if we had kept Miss Christina Johnson and Miss Ruby Jones.

I don't think either side ended up selecting this panel for any reason other than I think that these are the ones who will be fair and impartial persons to hear and try the case" (JA 71b – 72b).

ARGUMENT I

THE PROSECUTOR'S RACE-NEUTRAL REASONS FOR DISMISSING JURORS NO. 2 AND 9 WERE INSUFFICIENT TO AVOID A FINDING OF PURPOSEFUL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES. FURTHER, THE TRIAL COURT'S FINDING WAS NOT CLEARLY ERRONEOUS.

Standard of Review Applicable to the Three Questions on Review

A trial court's finding of purposeful discrimination in jury selection is reviewed, with great deference, for **clear error**. *Anderson v. Bessemer City*, 470 U.S. 564, 575-576; 105 S. Ct. 1504; 84 L. Ed. 2d 518 (1985). However, the trial court's rejection of a claim of purposeful discrimination is reviewed for an **abuse of discretion**. *People v. Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997). The constitutional legal questions inherent within the Fourteenth Amendment issue should be reviewed **de novo**. *Batson*, supra; *People v. Swint*, 225 Mich App 353; 572 NW2d 666 (1997), lv. den 459 Mich 931 (1998).

Discussion

When a *Batson* issue is raised, the proponent of the challenge must articulate an adequate and race-neutral explanation. If such an explanation is provided, the opponent then must show it to be a pretext for purposeful discrimination. *Batson*, 476 U.S. at 98; *Purkett v. Elem*, 514 U.S. 765, 768; 131 L Ed. 2d 834; 115 S Ct. 1769 (1995). The persuasiveness and credibility of the prosecutor's explanation is the essential question.

See *Purkett*, 514 U.S. at 768; *Hernandez v. New York*, 500 U.S. 352, 364-365; 111 S. Ct. 1859; 114 L. Ed. 2d 395 (1991).

The primary focus of the requisite inquiry is thus upon the reason or reasons for the challenge; for example, the number of African-Americans struck may be relevant, but the number alone of those dismissed is not determinative. See, for example, *United States v. Pherigo*, 327 F. 3d 690 (8th Cir. 2003) (the only two African-Americans were dismissed for reasons related to their employment; the dismissals were upheld as valid, as the employment was a legitimate basis for the challenges); *United States v. Matha*, 915 F. 2d 1220, 1222 (8th Cir. 1990) ("the movant cannot carry the burden of establishing a prima facie case with numbers alone"); *United States v. Horsley*, 864 F. 2d 1543, 1544 (11th Cir. 1989). In *Horsley* the sole African-American in the thirty-two person venire was removed on the basis of the prosecutor's "feeling"; the 11th Circuit found such a "vague" explanation legally insufficient to rebut the prima facie showing. Additionally, the *Horsley* court noted that if such "general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" 864 F. 2d at 1546, citing *Batson*, 476 U.S. at 98, in turn quoting from *Norris v. Alabama*, 294 U.S. 587, 598; 55 S Ct. 579, 584-584; 79 L. Ed. 1074 (1935).

Batson set-forth a three-prong process for use when it is alleged racial discrimination

is involved in the selection of a jury. The *Batson* Court set-forth the following factors: (1) a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. (2) when that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. (3) the trial court then must determine whether the defendant has shown purposeful discrimination. 476 U.S. at 97-98.

The trial court's determination of the third-prong is entitled to great deference, as the issue necessarily involves an assessment of the prosecutor's credibility and demeanor. See *Batson,* supra, 476 U.S. at FN 21; and *Hernandez*, supra, 500 U.S. at 365 ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies .peculiarly within a trial judge's province"); and *Anderson v. Bessemer City*, 470 U.S. 564, 575-576; 105 S. Ct. 1504; 84 L. Ed. 2d 518 (1985), where, reviewing the trial court's findings under Federal Rule of Civil Procedure ("FRCP") 52(a) in a Title VII of the Civil Rights Act of 1964 action, the United States Supreme Court said:

"Because a finding of intentional discrimination is a finding of fact ... [i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly

erroneous ... **When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said** ..." (Slip Op. pp. 18-19)(emphasis supplied).

In *Miller-El v. Cockrell,* 537 U.S. 322; 123 S. Ct. 1029; 154 L Ed. 2d 931 (2003), the United States Supreme Court reaffirmed that "implausible or fantastic justifications [underlying the exercise of a peremptory challenge claimed as a *Batson* violation] may (and probably will) be found to be pretexts for purposeful discrimination." The Court also noted that "the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible," and further noted that three of the prosecutor's stated 'race-neutral' rationales pertained just as well to some white jurors not struck from the panel. The *Miller-El* court thus recognized a comparative juror analysis helpful in a determination of whether or not a purported race-neutral reason was actually a pretext. *Miller-El*, supra, 123 S. Ct. 1043-1044. Such comparative analysis had been in use throughout the federal circuits[1], and the trial court below engaged in, at least partially, such an analysis, by pointing-out to the prosecutor that at least one of the white potential jurors was professionally employed. The prosecutor then relied upon the similarity in

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[1] See, for example, *Caldwell v. Maloney*, 159 F.3d 639, 653 (1st Cir. 1998); *Jordan v. Lefevre*, 206 F.3d 196, 201 (2d Cir. 2000); *Jones v. Ryan*, 987 F.2d 960, 963 (3rd Cir. 1993); *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir. 1997); *Hicks v. Johnson*, 186 F.3d 634, 637 (5th Cir. 1999); *United States v. Hatchett*, 918 F.2d 631, 636 (6th Cir. 1990); *Henderson v. Walls*, 296 F.3d 541, 548 (7th Cir. 2002); *Ford v. Norris*, 67 F.3d 162, 168 (8th Cir. 1995); *McClain v. Prunty*, 217 F.3d 1209, 1215, 1222 (9th Cir. 2000); *United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987); *Hollingsworth v. Burton*, 30 F.3d 109, 112 (11th Cir. 1994); *United States v. Wynn*, 20 F.Supp.2d 7, 13-15 (D.D.C. 1997).

ages between the victim and Ms. Jones' daughter as a reason for Ms. Jones to be excluded (JA 58b – 59b).

However, the prosecutor failed to question another juror, Ms. Acosta, and failed to dismiss her; Ms. Acosta was excused by counsel for Mr. Knight after the prosecutor excused a different juror (JA 64; 69). Ms. Acosta was questioned by defense counsel, not the prosecutor, about any impact her 23-year-old daughter may have on the case (JA 49b). Additionally, in the final stages of jury selection, after the *Batson*-issue discussions, and after the trial court cautioned the attorneys that it would be "watching this closely" (JA 67b), the prosecutor let a young female, Ms. Harrison, who was "close in age" to the victim, and who also had small children, remain on the jury (Supplemental Appendix ("SA"), SA 2a – 3a).

Common-sense leads to the recognition, and this Honorable Court might even take judicial notice, that a race-based challenge would only rarely, if ever, be blatantly expressed on the record. Such racial discrimination will necessarily be hidden behind some expressed rationale, and will not otherwise be open and obvious to judicial scrutiny. Accordingly, care must be taken to avoid acceptance of such feigned rationales, lest the requirement to rebut a prima facie showing "be but a vain and illusory requirement." *Norris*, supra, 294 U.S. at 598. As Justice Marshall stated in *Batson*:

"Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial

courts are ill-equipped to second-guess those reasons ... Nor is outright prevarication by prosecutors the only danger here ... [It] is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *Batson*, supra, 476 U.S. at 106 (MARSHALL, J., concurring)(internal citations omitted).

The prosecutor's "race-neutral" reasons were weighed by the trial court, and were found wanting. The trial court expressly stated that it did not accept the prosecutor's explanation, and, especially in light of the great deference due the trial court on this issue, the court's determination cannot be said to be clearly erroneous. The trial court was in the best position there and then -- and not this Honorable Court approximately five and one-half years later -- to assess the prosecutor's demeanor and credibility, for "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said," and "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson,* supra; see, also, *Batson,* supra, 476 U.S. at FN 21.

The *Batson* third-prong was properly satisfied by the trial court, although the court was belated in its determinations and, not unlike closing the barn-door after the horse had bolted, cautioned the attorneys about any further venturing into the sensitive issue. The court erred, however, but not in its credibility assessment; rather, the court's error was in its final conclusion that the *Batson* violation had been cured, as there were as many, if not more, African-American females on the final panel. The "all is well that ends well"

approach is not viable relative to structural errors in the proceedings. The trial court's belated and initially erroneous response to the objections, raised first as to the prosecutor's dismissing African-American males, and subsequently dismissing African-American females, perhaps stemmed from an inaccurate reading of the requirements of *Batson*. Both the prosecutor and the trial court seemed to believe that a "pattern" of discrimination had to be established prior to there being a prima facie showing (JA 45b and 46b). Such a pattern may have been required prior to *Batson*, e.g., *Swain v. Alabama*, 380 U.S. 202 (1965), but more recent and thought-out decisions do not require a fixed or minimum number of illegal dismissals before the conduct may be recognized for what it is. *Horsley*, supra.

ARGUMENT II

THE TRIAL COURT INCORRECTLY FOUND THAT THE FINAL PANEL CURED THE *BATSON* VIOLATIONS.

The "same number if not more" cannot reasonably be a standard by which this Court would measure *Batson* violations by the state. This Court would then be obligated to fashion a numerical barometer for use by the trial courts, and define just how many persons from a given racial group would be necessary to satisfy the standard. One? Two? Those facetious questions point-out the difficulty in attempting to quantify such an issue. To merely focus upon the end-result, or the final-tally of a jury panel, is to suggest

that a quota need be established, and it also veers from the real danger of such violations; that is, the Fourteenth Amendment does not set-forth a mere game of numbers, but instead recognizes through the Due Process and Equal Protection Clauses limitations upon the governmental authority from intruding upon the fundamental constitutionally protected rights of the citizens.

The unlawful exclusion of members of a defendant's racial group is, of course, a violation of the defendant's constitutional right to equal protection of the law, due process and a fair trial, but it **also discriminates** against the excluded qualified juror, who has both a right and obligation to sit. See, for example, *Strauder v. West Virginia*, 100 U.S. 303, 308; 25 L. Ed. 664 (1880); and *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 128 (1994)(wherein the United States Supreme Court held that gender, like race, is an "unconstitutional proxy for juror competence and impartiality," and the Court "... recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." 511 U.S. at 129, 128.

The *Strauder* court, construing the then-newly-enacted Fourteenth Amendment, explained that "the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race," and appropriately found

the state's statute at issue illegally discriminatory [the statute read as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided"]. The Fourteenth Amendment provides in relevant part as follows:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Similarly, the *Batson* court observed that "[e]xclusion of black citizens from service constitutes a primary example of the evil the Fourteenth Amendment was designed to cure," and, also, that the harm of such discrimination "extends **beyond that inflicted upon the defendant and the excluded juror to touch the entire community.**" *Batson*, supra, 476 U.S. at 87 (emphasis supplied); see, also, *Swain*, supra, 380 U.S. at 203-204 (a "[s]tate's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause;" and the principle has been "consistently and repeatedly" re-affirmed).

The harms inherent in such purposeful exclusion are readily seen in our jurisprudence as **structural errors** which defy harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-310; 111 S. Ct. 1246; 113 L. Ed. 302 (1991); *Vasquez v. Hillery*, 474 U.S. 254; 106 S. Ct. 617; 88 L. Ed. 2d 598 (1986); *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)

(where the Supreme Court held that racial discrimination in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole."). Not only is the individual accused adversely affected by such discrimination, but so, too, are the dismissed juror, society as a whole, the integrity of the judiciary process, and "public confidence in the fairness of our system of justice." *Batson*, supra, citing *Ballard v. United States*, 329 U.S. 187, 195 (1946).

A "same if not more" 'standard' thus ignores much of the harmful impact upon the society generally, the integrity of the judicial system, and those potential jurors illegally dismissed. Such a standard does nothing to curb an overzealous prosecutor or limit future abuse; instead, arguably, it would encourage a prosecutor to "push the envelope" as far as possible, as there would be no effective remedy and no consequence for such improper action if undertaken This Court should reject any attempt to fashion a rule or exception allowing such behavior, in contravention of many years of established jurisprudence.

ARGUMENT III

THE TRIAL COURT ERRONEOUSLY CONTINUED THE TRIAL WITH THE EXISTING PANEL AFTER REJECTING THE PROSECUTOR'S "RACE-NEUTRAL" REASONS.

As noted above in Argument II, the constitutional harm or damage had been done before the jury was impaneled. It cannot be a reasonable remedy for the illegal removal

of qualified jurors to do nothing. Initially, Miss Johnson and Miss Jones were not anonymous; admittedly, they had apparently left the building during the sidebar, but there was no real or diligent effort to locate or recall them, other than that done by the deputy, apparently on his own initiative, to try and catch-up with the two women. This Court, to allow the verdict from that panel to stand, would have to disregard the harm to Miss Jones, Miss Johnson, Mr. Rice, public perception and confidence in the system, and leave unfettered the prosecutor's arsenal of tools for shaping a criminal prosecution. This Court would further have to find, contrary to over one hundred years of jurisprudence pronounced by the United States Supreme Court, that such illegal behavior carries no consequence and is harmless error. That is not the current standard, and should not become a future standard.

While most constitutional errors may be subject to harmless-error analysis, a limited class of constitutional errors are structural and subject to automatic reversal. *Neder v. United States*, 527 U.S. 1, 8; 119 S. Ct. 1827; 144 L. Ed. 2d 35 (1999); *Arizona v. Fulminante,* 499 U.S. 279, 309-310; 111 S. Ct. 1246; 113 L. Ed. 2d 302 (1991); *Chapman v. California*, 386 U.S. 18; 87 S. Ct. 824; 17 L. Ed. 2d 705 (1967). Structural errors "infect the entire process", *Brecht v. Abrahamson*, 507 U.S. 619, 630; 113 S. Ct. 1710; 123 L. Ed 2d 353 (1993), "necessarily render a trial fundamentally unfair ... [and] deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal

punishment may be regarded as fundamentally fair." *Fulminante*, supra, citing *Rose v. Clark*, 478 U.S. 570, 577-578; 106 S. Ct. 3101; 92 L. Ed. 2d 460 (1986)(applying harmless-error analysis to erroneous malice jury instruction).

Generally, harmless errors are those which occur during the presentation of a case during trial, i.e., are "trial errors", and the impact may be quantitatively assessed in light of other evidence to determine whether or not the error was harmless beyond a reasonable doubt. *Fulminante*, supra, 499 U.S. at 309-310. The harmless-error doctrine has been applied to many different constitutional "trial errors", including overbroad instructions, erroneous instruction relating to evidentiary presumptions, instruction misstating the elements of an offense, restriction of a defendant's right of cross-examination, improper comment on the defendant's Fifth Amendment right to remain silent, evidence admitted in contravention of the defendant's Fourth Amendment protections, and others. See, for examples, *Fulminante*, supra, 499 U.S. at 309-310; and *Chapman*, supra. In contrast, structural errors constitute a structural defect in the trial mechanism and can never be harmless. *People v. Duncan,* 462 Mich 47; 610 NW2d 551 (2000).

The *Vasquez* Court rejected the Government's contention that retrying the defendant would be unduly burdensome as a "harsh penalty for a constitutional defect bearing no relation to the fundamental fairness of the trial;" the Court appropriately held that "intentional discrimination in the selection of grand jurors is **a grave constitutional**

trespass, possible only under color of state authority, and **wholly within the power of the State to prevent**. Thus, the remedy we have embraced for over a century -- the only effective remedy for this violation [i.e., reversal](internal citation omitted) -- is not disproportionate to the evil that it seeks to deter. If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it ... **alternative remedies are ineffectual**." *Vasquez*, supra, 474 U.S. at 262 (emphasis supplied). Similarly, the Court rejected an argument that any discrimination in the selection process was rendered "harmless" by the production at trial of overwhelming evidence of guilt, and an otherwise fair trial. The Court stated:

"On the merits, petitioner urges this Court to find that discrimination in the grand jury amounted to harmless error in this case, claiming that the evidence against respondent was overwhelming and that discrimination no longer infects the selection of grand juries in Kings County. *Respondent's conviction after a fair trial, we are told, purged any taint attributable to the indictment process.* Our acceptance of this theory would require abandonment of more than a century of consistent precedent. In 1880, this Court reversed a state conviction on the ground that the indictment charging the offense had been issued by a grand jury from which blacks had been excluded. We reasoned that deliberate exclusion of blacks "is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to

secure to all others." (citing *Strauder*, supra, 100 U.S. at 308)(emphasis supplied).

The *Vasquez* Court continued that "*the Court has repeatedly rejected all arguments that a conviction may stand despite racial discrimination in the selection of the grand jury* ...(internal citations omitted) [and] ... *the Court explicitly addressed the question whether this unbroken line of case law should be reconsidered in favor of a harmless-error standard, and determined that it should not.*" (citing *Rose*, supra)(emphasis supplied). That the instant case involves a petit jury, and not a grand jury, is of no legal concern, as the "basic principles prohibiting exclusion of persons from participation in jury service on account of their race "are essentially the same for grand juries and for petit juries."" *Batson*, supra, 476 U.S. at 84, FN3; see, also, *Martin v. Texas*, 200 U.S. 316, 321; 26 S. Ct. 338; 50 L. Ed. 497 (1906), wherein the United States Supreme Court held that "[w]hat an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empanelling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color;" and see *Norris v. Alabama*, which held, inter alia, that:

"in relation to exclusion from service on grand juries: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States (citations omitted) ... The principle is equally applicable to a similar exclusion of negroes from service on petit

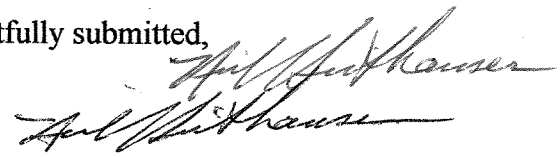
juries ..." 294 U.S. 587; 55 S. Ct. 579; 79 L. Ed. 1074 (1935).

Vasquez and *Rose* provide the answer to whether such a conviction can be maintained following such a structural error: it cannot.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant Gregory M. Rice respectfully requests this Honorable Court reverse his conviction.

Respectfully submitted,



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