

**ORIGINAL**

STATE OF MICHIGAN  
IN THE  
**SUPREME COURT**

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APPEAL FROM THE MICHIGAN COURT OF APPEALS  
STEPHEN L. BORRELLO, P.J., MICHAEL J. KELLY and MARK T. BOONSTRA, JJ.

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

v

Supreme Court  
No. 147261

LEVON LEE BYNUM,  
Defendant-Appellee.

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Court of Appeals No. 307028  
Circuit Court No. 2011-001705-FC

**REPLY BRIEF – APPELLANT**

DAVID E. GILBERT  
Calhoun County Prosecuting Attorney



**BY: MARC CROTTEAU (P69973)**  
Assistant Prosecuting Attorney  
161 East Michigan Avenue  
Battle Creek, MI 49014-4066  
(269) 969-6980

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**JURISDICTIONAL STATEMENT**

Plaintiff-Appellee, the People of the State of Michigan file this reply brief pursuant to MCR 7.302(E) and MCR 7.212(G).

## **COUNTER-STATEMENT OF FACTS**

The People agree that the fundamental basics outlined in Defendant's Statement of Facts are substantially complete and accurate; however, additional facts will be set forth below as they relate to the issues raised on appeal.

## REPLY ARGUMENT

### **I. DEFENDANT'S BRIEF MAKES REFERENCE TO POWERPOINT SLIDES THAT WERE NOT PRESENTED TO THE JURY AT TRIAL. THE PEOPLE REPLY IN ORDER TO END CONFUSION AND SET THE RECORD STRAIGHT.**

Defendant-Appellant's brief on appeal made multiple references to a PowerPoint presentation that was used by Officer Sutherland as demonstrative evidence during his testimony. Defendant included a version of that presentation in his Appendix, both in the form of a CD and as several printed pages. The People feel obliged to reply in order to correct a misunderstanding regarding that PowerPoint presentation. In particular, Defendant has included—and made reference to—a version of the presentation that *was not used at trial*. In fact, the presentation used by Officer Sutherland during his testimony was a significantly redacted version, and not what Defendant has included in his Appendix. As will be made clear, this has been a source of confusion during all appellate phases of this case.

The People did not address the confusion regarding the PowerPoint presentation in their initial brief for this Court because of the way this Court framed the issues it wanted the parties to address. Because the PowerPoint used at trial did not contain the images referenced by Defendant in his brief, the People do not believe that it is relevant to the determination of the issues at hand. The fact that it was demonstrative evidence, rather than the substance of Officer Sutherland's testimony, meant that it was not germane to the issues raised by this Court. However, Defendant references the incorrect version of the presentation in his brief and, thus, the People deal with the issue in this reply.

This confusion arose because the prosecutor who tried the case<sup>1</sup> did not save a copy of the redacted PowerPoint, as actually shown to the jury, in this defendant's file. The version used at trial did not include the more inflammatory images that Defendant complains of, such as the photos of Scarface and Tupac Shakur. See, e.g., Defendant's Appendix at 2b. Those images were redacted from the original after review by the trial court and defense counsel, and were never presented to the jury. See 251a-252a (trial judge mentioning that he reviewed the redacted demonstrative evidence and found it "rather innocuous"). The People have attached to this reply a CD containing the PowerPoint presentation as actually shown to the jury. See Exhibit D of Attachment A: Affidavit of Leah M. Apsey.<sup>2</sup> As an aside, that same version of the PowerPoint was sent to this Court as part of the People's application for leave to appeal.

When appellate counsel for Defendant requested the PowerPoint used at trial at the beginning of his appeal process, staff at the Prosecuting Attorney's Office sent him the original unredacted version, and told appellate counsel's staff that this was not the version used at trial. See Attachment A. This same information was conveyed in a letter to sent to appellate counsel with the trial exhibits. *Id.*

The confusion did not come to light until oral argument at the Court of Appeals. Perhaps not realizing that he had the wrong version of the demonstrative evidence used at trial, appellate counsel used the unredacted version of Officer Sutherland's PowerPoint presentation in writing Defendant's brief for the Court of Appeals. This led the Court of Appeals to focus on images

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<sup>1</sup> That prosecutor no longer works for the Calhoun County Prosecuting Attorney's Office (in fact, he has taken a job with the Campbell County Attorney's Office in Gillette, Wyoming).

<sup>2</sup> The attached CD contains the redacted PowerPoint presentation actually shown to the jury as part of Officer Sutherland's testimony at trial. It also contains the audio file of oral argument at the Court of Appeals and the video record of Officer Sutherland's testimony during the trial.

from the—erroneous—PowerPoint presentation during oral arguments, and may very well have had an effect on the outcome of the appeal at that level.<sup>3</sup> See Exhibit D of Attachment A.

The Court of Appeals did not directly reference the incorrect PowerPoint presentation in its ruling on this case. See Appellant's Appendix, at 10a-30a. The People mentioned the presentation in their application for leave to appeal to this court. However, this Court's order granting leave did not address the confusion regarding the PowerPoint among the four issues it asked the parties to brief. As a result, the People did not feel that mere confusion over a piece of demonstrative evidence warranted any attention in light of the more serious issues in play, and did not bring the issue up in their initial brief. However, since Defendant references PowerPoint slides in his argument that were not, in fact, used at trial it is important to set the record straight: the PowerPoint used by Officer Sutherland at trial contained 19 slides, none of which were the ones Defendant complains of. In particular, the slide containing photos of Scarface and Tupac Shakur was never shown to the jury.

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<sup>3</sup> The People have included the audio recording of the oral argument at the Court of Appeals with Attachment A to this reply brief. The Court of Appeals begins to reference the incorrect PowerPoint slides at approximately 11:08 of that recording. It is clear that at least one judge on the panel is significantly exercised by what he perceives as inflammatory evidence, in particular the photos of Scarface and Tpuac Shakur. Had those images actually been shown to the jury, this case would have an entirely different dimension.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff-Appellant, the People of the State of Michigan, respectfully request that this Honorable Court overturn the judgment of the Court of Appeals and affirm Defendant's conviction. In the alternative, the People request that this Court remand to the trial court for entry of a judgment of second degree murder, with the People having the option to retry the case on the issue of first degree murder if, after due consideration, they believe the interests of justice should require it. The People also request that this Court grant whatever other relief that justice should require.

Respectfully submitted,

**DAVID E. GILBERT (P41934)**  
Calhoun County Prosecuting Attorney

DATED: March 6, 2014

By:   
**MARC CROTTEAU (P69973)**  
Assistant Prosecuting Attorney  
161 East Michigan Avenue  
Battle Creek, MI 49014-4066  
(269) 969-6980

# **ATTACHMENT A**

*People v Bynum*

**Michigan Supreme Court Docket No. 147261**

**Affidavit of Leaha M. Apsey**

## AFFIDAVIT OF LEAHA M. APSEY

STATE OF MICHIGAN     )  
COUNTY OF CALHOUN    )

I, Leaha M. Apsey, being first duly sworn, deposes and says as follows:

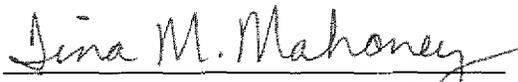
1. That said Affiant is employed as the sole appellate paralegal for the Prosecutor's Office of Calhoun County.
2. That on March 27, 2012, Affiant received a copy of Defendant's Motion for Production of Certain Trial Exhibits wherein appellate counsel requested People's Exhibits 1, 7, 8, 9 and 10 from defendant's trial counsel; however, counsel did not reply to his request. Therefore, he brought a motion in Circuit Court for the production of those documents. Attached to his motion was a Subpoena Duces Tecum. (See Exhibit A: Defendant's Motion for Production of Certain Trial Exhibits).
3. That upon review of the file for this case, Affiant learned that a redacted version of the PowerPoint used at trial was not made for purposes of file retention.
4. That on April 12, 2012, Affiant wrote a letter to appellate counsel detailing the cost of such exhibits which was signed by Jeffrey A. Kabot, who was the Assistant Prosecuting Attorney handling the case. (See Exhibit B: Letter dated April 12, 2012). In that letter, Affiant explained that a redacted version of the PowerPoint presentation was not being provided; therefore, a charge would not be incurred for the inclusion of the un-redacted DVD.
5. That after receiving a letter from appellate counsel on or about April 24, 2012, Affiant spoke with a member of appellate counsel's staff to determine how they would like to receive the exhibits (i.e., via mail or email). At that time, Affiant reiterated that a redacted version of the PowerPoint was not made and that they would only receive a copy of the un-redacted PowerPoint. In addition, Affiant stated that appellate counsel could contact the 37th Circuit Court for a DVD copy of the trial to determine exactly which slides were shown to the jury during the trial.
6. That on April 26, 2012, a copy of the PowerPoint was served upon appellate counsel along with the other requested exhibits. (See Exhibit C: Proof of Service).
7. That on January 3, 2013, the Michigan Court of Appeals sent a letter to appellate counsel with a carbon copy issued to the Calhoun County Prosecutor's Office. In this letter, the Court of Appeals requested a copy of the PowerPoint presentation.

8. That after Mr. Brandon S. Hultink returned from oral argument at the Michigan Court of Appeals on Tuesday, March 12, 2013, Affiant and Mr. Hultink realized that appellate counsel must have enclosed the un-redacted version of the PowerPoint to the Court of Appeals.
9. That after reviewing a DVD of the trial record in this matter, and reviewing exhibits in a co-defendant's file, Affiant was able to reconstruct the 19-slide PowerPoint presentation that was used as demonstrative evidence in this trial. This PowerPoint was attached to the People's application for leave in this matter and is being attached hereto as Exhibit D.<sup>1</sup>

Further, Affiant saith not.

  
Leaha M. Apsey – Affiant

Subscribed and sworn to before me this 6<sup>th</sup> day of March 2014.

  
Tina M. Mahoney, Notary Public  
Acting in Calhoun County, Michigan  
My commission expires: 11-01-2018

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<sup>1</sup> Attachment D: CD of PowerPoint Presentation, Oral Argument session for Docket No. 307028 – *People v Bynum*, and video of Officer Sutherland's testimony at trial.

# **EXHIBIT A**

*People v Bynum*

**37th Circuit Court Docket No. 2011-001705-FC**

**Defendant's Motion for Production of Certain Trial Exhibits**

times – once early in the trial as a fact witness, and again at the conclusion of trial as an expert witness.” [74 F.3d at 683].

Defendant respectfully submits that in his trial there was no demarcation between Officer Sutherland’s fact testimony and his testimony regarding prior experiences with street gangs. He was even allowed to offer an expert opinion on the ultimate question of guilt or innocence – invading the province of the jury. Permitting police to testify as experts in their own investigations, and give opinions on the significance of evidence they have collected, absent a cautionary instruction, threatens the fairness, integrity, and public reputation of judicial proceedings, and the plain error standard has been met, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130, 135 (1999).

### ***Conclusion***

The due process clauses of the state and federal constitutions entitle Michigan criminal defendants to a fair trial, US Const V, XIV; Mich Const 1963, art 1, § 17. The admission of improper evidence, ineffective assistance, Confrontation Clause error, and instructional error deprive defendant of his due process right to a fair trial, *United States v Agurs*, 427 US 97; 96 S Ct 2392; 49 L Ed 2d 342 (1976); *Walker v Engle*, 703 F2d 959, 962-963 (6th Cir. 1983).

### **MOTION FOR PRODUCTION OF CERTAIN TRIAL EXHIBITS OR NEW TRIAL**

The exhibits and the power point presentation listed below were an integral part of this trial. On March 16, 2012, the undersigned asked trial defense counsel to provide copies of Exhibits 1 and 7 through 10. No response has been received. Counsel cannot provide effective assistance on appeal without having copies of the following material to review while evaluating the record. In addition, the Court of Appeals may ask the defense to produce some of these exhibits for their review, in particular the DVD interview of defendant and the store video. In total the requested items are:

| Exhibit  | Identified | Received |
|--|------------|----------|
| • PX 1 – DVD, store video  | 96         | 97       |
| • PX 7 – “A” through “NN”  | 111        | 113      |
| • PX 8 – Computerized drawing of scene                           | 6          | 7        |
| • PX 9 – Store video enhanced                                    | 46         | 49       |
| • PX 10 – DVD Interview of defendant                             | 96         | 96       |
| • Copy of Images from the Prosecution’s Power Point Presentation |            |          |

Counsel has served subpoenas on both trial counsel and the prosecution, **Exhibits One and Two**. If said exhibits are delivered to the undersigned before the May 14, 2012 hearing, then this second issue would become moot. If, however, the items are not provided, the defense would move for a new trial on the following grounds.

Due process of law, under both our state and federal Constitutions, requires a new trial or at least an evidentiary hearing where material portions of a lower court file cannot be produced, or are otherwise not produced, pending an appeal where appellate counsel cannot meaningfully reconstruct the file after a diligent attempt. The undersigned did not represent Mr. Bynum at trial and a complete copy of the record is needed, including the listed items, if counsel is to serve as effective counsel under the Sixth Amendment, *Evitts v Lucy*, 469 US 387; 104 S Ct 830; 83 L Ed 2d 821 (1985); *People v Bass*, 457 Mich 866; 577 NW2d 667 (1998)(rejecting “good cause” requirement before obtaining jury selection transcript at public expense).

Where the record is missing or otherwise cannot be reconstructed, a defendant is entitled to a new trial where the unavailability of the record, or material portions of the record, “so impedes the enjoyment of the defendant’s constitutional right to an appeal,” *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). Stated differently, where portions of the record on appeal are missing, a defendant is entitled to a new trial “if it is impossible to review the

regularity of the proceedings," *People v Horton*, 105 Mich App 329, 331; 306 NW2d 500 (1981); see generally *Bransford v Brown*, 806 F2d 83 (CA 6, 1986). *Audison* and *Horton* involved missing transcripts, but the same principles would apply to video DVDs, or photos, or documents admitted into the trial record.<sup>8</sup>

In the case *sub judice*, the requested exhibits, especially the store security video, were central parts of the trial. The defense cannot pursue a meaningful appeal without reviewing the entire record. The requested exhibits are parts of the record counsel must review in order to serve as effective counsel under the Sixth Amendment. In short, we need said exhibits and they should be delivered long before said May 14, 2012, hearing date, so that this motion can be removed from the Court's calendar. If they cannot be provided, or for any reason are not provided, meaningful appellate review cannot occur and a new trial would be warranted, Const 1963, art 1, § 20; US Const, Am XIV.

**WHEREFORE**, for the reasons stated in the Defendant's motion and supporting brief, and any argument that may be made during the hearing in this matter, Defendant respectfully moves for the relief requested herein.

Respectfully submitted,

MICHAEL A. FARAONE PC



Michael A. Faraone (P45332)  
Attorney for the Defendant  
617 N. Capitol Avenue  
Lansing, Michigan 48933  
Telephone: (517) 484-5515

Dated: March 26, 2012

JUC

<sup>8</sup> This was addressed in *People v Melvin Kareem Williams*, Unpublished opinion of Court of Appeals, Docket No. 250913 (March 8, 2005), **Exhibit Three**. There, missing transcripts made it impossible for the Court to review the regularity of the proceedings and a new trial was ordered.

Original - Return  
 1st copy - Witness  
 2nd copy - File  
 3rd copy - Extra

Approved. SCAO

|   |   |  |
|---|---|--|
| STATE OF MICHIGAN<br>37th JUDICIAL DISTRICT<br>JUDICIAL CIRCUIT<br>COUNTY PROBATE | <b>SUBPOENA</b><br>Order to Appear and/or Produce | CASE NO.<br>2011-1705-FC<br>HON. CONRAD J. SINDT |
|---|---|--|

Police Report No. (if applicable) 161 East Michigan Ave., Battle Creek MI 49014 Court address Court telephone no. (616) 969-6518

|   |   |   |
|---|---|---|
| Plaintiff(s)/Petitioner(s)<br><input checked="" type="checkbox"/> People of the State of Michigan<br><input type="checkbox"/> _____<br><input type="checkbox"/> Civil <input checked="" type="checkbox"/> Criminal<br><input type="checkbox"/> Probate In the matter of _____ | v | Defendant(s)/Respondent(s)<br>LEVON LEE BYNUM<br>Charge _____ |
|---|---|---|

In the Name of the People of the State of Michigan. TO:

ATTORNEY RONALD S. PICHLIK

If you require special accommodations to use the court because of disabilities, please contact the court immediately to make arrangements.

**YOU ARE ORDERED:**

1. to appear personally at the time and place stated below: You may be required to appear from time to time and day to day until excused.

The court address above  Other:

|               |                      |                  |
|---------------|----------------------|------------------|
| Day<br>MONDAY | Date<br>MAY 14, 2012 | Time<br>11:00 AM |
|---------------|----------------------|------------------|

2. Testify at trial / examination / hearing.
3. Produce/permit inspection or copying of the following items: Trial exhibits PX 1, PX 7, PX 8, PX 9, and PX 10. Or, in lieu of appearing at said place and time, deliver said exhibits to the undersigned prior to said date.
- \_\_\_\_\_
4. Testify as to your assets, and bring with you the items listed in line 3 above.
5. Testify at deposition.
6. MCL 600.6104(2), 600.6116, or 600.6119 prohibition against transferring or disposing of property is attached.
7. Other: \_\_\_\_\_

8.

|  |                                 |              |
|--|---------------------------------|--------------|
| Person requesting subpoena<br>Michael A. Faraone | Telephone no.<br>(517) 484-5515 |              |
| Address<br>617 N. Capitol Avenue                 |                                 |              |
| City<br>Lansing                                  | State<br>MI                     | Zip<br>48933 |



**NOTE:** If requesting a debtor's examination under MCL 600.6110, or an injunction under item 6, this subpoena must be issued by a judge. For a debtor examination, the affidavit of debtor examination on the other side of this form must also be completed. Debtor's assets can also be discovered through MCR 2.305 without the need for an affidavit of debtor examination or issuance of this subpoena by a judge.

**FAILURE TO OBEY THE COMMANDS OF THE SUBPOENA OR APPEAR AT THE STATED TIME AND PLACE MAY SUBJECT YOU TO PENALTY FOR CONTEMPT OF COURT.**

03/23/2012 Michael A. Faraone 45332  Served  Not Served

Date Michael A. Faraone, Attorney for Defendant Judge/Clerk/Attorney Bar no.

# **EXHIBIT B**

*People v Bynum*

**37th Circuit Court Docket No. 2011-001705**

**Letter dated April 12, 2012**



2010004686

THE OFFICE OF  
**SUSAN K. MLADENOFF**  
**PROSECUTING ATTORNEY**  
 CALHOUN COUNTY

Calhoun County Justice Center  
 161 E. Michigan Ave.  
 Battle Creek, MI 49014-4066  
 Phone: (269) 969-6980  
 Fax: (269) 969-6967

EUSEBIO SOLIS  
 CHIEF ASSISTANT  
 PROSECUTING ATTORNEY

April 12, 2012

Mr. Michael A. Faraone  
 Attorney at Law  
 617 N. Capitol Avenue  
 Lansing, MI 48933

**RE: PEOPLE v LEVON LEE BYNUM**  
**Court of Appeals No. 307028**  
**37th Circuit Court No. 2011-001705-FC**

Mr. Faraone:

I am in receipt of your Subpoena Duces Tecum, dated March 23, 2012, which requests the People to produce the following items:

| <b>Requested Document</b>                             | <b>Format</b> | <b>Cost</b>    |
|---|---------------|----------------|
| People's Exhibit 1 - Sam's surveillance videos        | DVD           | \$20.00        |
| People's Exhibit 7 - photographs "A" through "NN"     | CD            | \$10.00        |
| People's Exhibit 8 - computerized diagram of scene    | 1 page        | \$1.00         |
| People's Exhibit 9 - enhanced store video             | DVD           | \$20.00        |
| People's Exhibit 10 - police interview with defendant | DVD           | \$20.00        |
| People's Demonstrative Exhibit                        | CD            | N/C            |
| <b>Total Cost</b>                                     |               | <b>\$71.00</b> |

Contrary to defense counsel's assertions, copies of all exhibits were provided to defense counsel throughout the discovery process and the trial. However, a redacted version of the Power Point presentation was not provided. Therefore, our office will provide this CD without the need for your office to bear the cost of copying such an exhibit.

Mr. Michael Faraone  
People v Levon Bynum  
Page 2

Although your Subpoena Duces Tecum and Motion to Produce are the first time this office was made of aware of your request to receive such items, we will be more than willing to provide these items to you once we have secured payment from your office. If you have any questions or concerns regarding this matter, please do not hesitate to contact my appellate secretary, Leaha, directly at 269-969-6951. Leaha will be better able to assist you in timely handling your request for these documents and items.

Thank you for your time and consideration in this matter.

Sincerely,



Jeffrey A. Kabot

Assistant Prosecuting Attorney

JK/lma

cc: Circuit Court Clerk  
Hon. Conrad J. Sindt  
Mr. Ronald S. Picklik

# **EXHIBIT C**

*People v Bynum*

**37th Circuit Court Docket No. 2011-001705**

**Proof of Service**

2010004686 S/c

STATE OF MICHIGAN  
IN THE 37th CIRCUIT COURT FOR THE COUNTY OF CALHOUN

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff,

HON. CONRAD J. SINDT

v

Court of Appeals No. 307028  
Court No. 2011-001705-FC

LEVON LEE BYNUM,  
Defendant-Appellant.

**JEFFREY A. KABOT (P41804)**  
Assistant Prosecuting Attorney  
161 East Michigan Avenue  
Battle Creek, MI 49014-4066  
(269) 969-6980

**MICHAEL A. FARAONE (P45332)**  
Attorney for Defendant-Appellant  
617 N. Capitol Avenue  
Lansing, MI 48933  
(517) 484-5515

**PROOF OF SERVICE**

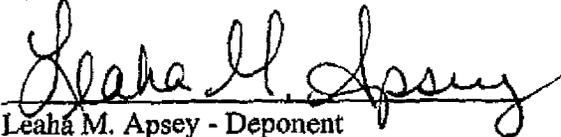
STATE OF MICHIGAN )  
COUNTY OF CALHOUN )

Leaha M. Apsey, being first duly sworn, deposes and states that on this 26th day of April 2012, she served Mr. Michael A. Faraone, Attorney for Defendant-Appellant, a copy of the following requested trial exhibits and documents:

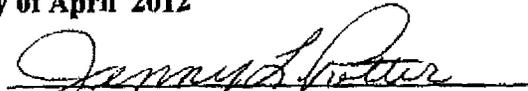
- |                                     |  |
|-------------------------------------|--|
| People's Exhibit #1 - Store Video   | People's Exhibit #7 - Photos           |
| People's Exhibit #9 - Enhance Video | People's Exhibit #10 - Bynum Interview |

at his address of record, as stated above, by mailing said documents in an envelope bearing first-class postage, fully paid. Further, a copy of People's Exhibit #8, and a copy of the demonstrative exhibit showing a Power Point presentation was sent to Mr. Faraone's, Attorney for Defendant-Appellant, email address: attorneyfaraone@faraonelegal.com.

Further, deponent saith not.

  
Leaha M. Apsey - Deponent

Subscribed and sworn to before me this 26th day of April 2012

  
Jenny Potter - Notary Public  
Calhoun County, Michigan  
My commission expires 11-07-2012

# **EXHIBIT D**

*People v Bynum*

**Court of Appeals Docket No. 307028**

**CD of PowerPoint Presentation, Oral Argument Session and Video of  
Officer Sutherland's Trial Testimony**