

# Kentucky Supreme Court grants certification of law request to review jury selection practice in Jefferson County

Due to public interest concerning the unique jury selection practice of one circuit court judge in Kentucky, attached are copies of the certification of law request and Supreme Court order granting the request for oral arguments.

There are several important points to be emphasized.

1. Our request for guidance is important because we believe the right of a properly empaneled juror to serve is fundamental to our judicial process. Kentucky courts have consistently held the process used in Jefferson County is fair and insures all persons regardless of race or gender the opportunity to serve. *In Rodgers v. Com.*, 285 S.W.3d 740, 759 (Ky. 2009), the Kentucky Supreme Court clearly stated,

“It is not enough to allege merely that a particular jury or a particular venire failed to mirror the community, for . . . defendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”

The United States Supreme Court held in *Powers v. Ohio*, 499 U.S. 400, 404 (1991),

“[A] defendant has no right to a petit jury composed in whole or in part of persons of [the defendant’s] own race”; however, “he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.”

2. Our office values diversity. Despite assertions to the contrary, we **do not** advocate all white juries. **We do** advocate juries selected in accordance with our Supreme Court Rules. The rules require the initial group be selected in a nondiscriminatory process to allow for the best cross-section of the community. That group is qualified to serve until they are called for a specific case where individual jurors might be removed either by the court, at the request of a party, or randomly
3. For nearly two decades, I have served on local and state committees advocating changes to our statutes and Rules to increase juror participation. These changes include using any government issued ID to get on jury rolls, increased jury pay, and requiring employers to pay jurors’ salaries while in jury service. Such changes would benefit all jurors, generally, and economically disadvantaged jurors, specifically.
4. Because we are committed to the right of jurors to serve regardless of race or gender, we have asked the Kentucky Supreme Court to review the practice of setting aside a properly empaneled jury. This practice of setting aside a properly empaneled jury has been adopted in only one of the over 200 trial courts in the Commonwealth and is worthy of review.

Thomas B. Wine  
Commonwealth’s Attorney for the 30<sup>th</sup> Judicial Circuit

COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
2014-SC-\_\_\_\_\_

COMMONWEALTH OF KENTUCKY

MOVANT

VS.

DIVISION 6, JEFFERSON CIRCUIT COURT  
INDICTMENT NO. 13CR2070-003  
JUDGE OLU A. STEVENS

JAMES DOSS

RESPONDENT

**MOTION FOR CERTIFICATION OF THE LAW**

Comes the Commonwealth, by counsel, Attorney General Jack Conway and Special Assistant Attorney General, Dorislee Gilbert, and pursuant to § 115 of the Kentucky Constitution and CR 76.37(10), respectfully moves this Court to certify the law concerning the following:

**QUESTIONS**

- (1) May a trial court dismiss a jury based upon a claim that the fair cross-section requirement has been violated when there has been no evidence of systematic exclusion of a class of persons from jury service? Does it matter if there was only one African American juror on the panel and that juror was struck randomly?
- (2) Does the Commonwealth have a right to proceed with a duly selected jury when a *prima facie* case that the jury violates the fair cross-section requirement has not been made? Is the Commonwealth or a defendant's right contingent upon the racial makeup of the petit juror selected?

- (3) What, if any rights, do citizens who have been duly selected as jurors have to be sworn and hear a case when there is no evidence of systematic exclusion of a class of persons from jury service?
- (4) May a trial court disregard and instruct the parties to disregard prior sworn statements made on the record by prospective jurors during a previous *voir dire* proceeding? Should the trial court consider such statements in evaluating whether the juror should be struck for cause? May the parties rely on such prior statements as grounds for seeking removal for cause or as grounds supporting the exercise of a peremptory challenge?

#### **TIMELINESS OF CERTIFICATION REQUEST**

This motion is timely brought, pursuant to CR 76.37(10), after the final order of acquittal in Jefferson County case number 13CR2070-003, which was entered on December 11, 2014. A copy of that order is attached hereto as Exhibit 1.

#### **PARTIES AND COUNSEL**

Movant, the Commonwealth of Kentucky, is represented by Jack Conway, Attorney General, and Dorislee Gilbert, Special Assistant Attorney General, 514 W. Liberty St., Louisville, KY 40202.

Respondent, James Doss, is represented by Sean Pharr, Office of the Louisville Metro Public Defender, 200 Advocacy Plaza, 717-719 W. Jefferson St., Louisville, KY 40202.

#### **FACTS**

Respondent, an African American male, and two co-defendants were indicted for theft by unlawful taking over \$500 but less than \$10,000 and for falsely reporting an

incident. One co-defendant pled guilty, and the case against the other was dismissed without prejudice. Respondent's case was scheduled for trial on November 18, 2014. On that date, the parties appeared and announced ready for trial. VR 11/28/2014, 10:15:33.<sup>1</sup> The Commonwealth dismissed the false reporting charge. VR 11/18/2014, 10:58:57. The trial court entertained several pretrial motions, and a panel of prospective jurors was brought into the courtroom so that jury selection could begin. VR 11/18/2014, 10:15:45 and following.

Respondent objected and requested that the jury panel be dismissed. VR 11/18/2014, 11:04:28. He complained that the panel, which consisted of 41 persons and included only one African American male, did not represent a fair cross-section of the community in violation of his equal protection and due process rights to be judged by a fair cross-section of the community. VR 11/18/2014, 11:04:28 and following. The Commonwealth objected to the motion to dismiss the panel, explaining that the entire jury pool summoned for jury service in Jefferson County represented a fair cross-section of the community and that this particular panel had been selected at random. VR 11/18/2014, 11:05:07. At that time, the trial court said it would hold the motion in abeyance in order to avoid additional delay for the prospective jurors. VR 11/18/2014, 11:05:21. The trial court expressed surprise, indicating that this was the first time it ever had a panel with that composition. VR 11/18/2014, 11:05:44.

*Voir dire* commenced. VR 11/18/2014, 11:26:02. At its conclusion, the trial court addressed Respondent's motion to dismiss the jury panel. VR 11/18/2014, 01:23:34 and following. The trial court observed that the panel was not as representative of the community as panels normally are and that it had never had a panel with only one

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<sup>1</sup> A copy of the recorded proceedings referenced herein is attached as Exhibit 2.

African American juror. VR 11/18/2014, 01:23:34. The trial court was troubled by this occurrence, but found that the panel had been compiled using a random process that was no different than the process normally undertaken to assign a panel of jurors to a courtroom even though the particular panel was not as representative of the racial diversity of the community as panels usually are. VR 11/18/2014, 01:24:09. The trial court specifically inquired of Respondent whether he had any indication that the process was anything other than random. VR 11/18/2014, 01:24:51.

Respondent cited *Castaneda v. Partida*, 430 U.S. 482 (1977), in support of his claim and argued that the burden of proof had shifted to the Commonwealth to show that a fair process had been employed. VR 11/18/2014, 01:24:54 and following.

Respondent's counsel indicated that he had conducted a casual search of some unidentified census and it showed that Louisville's African American population was close to one quarter, about 23%. VR 11/18/2014, 01:26:30. Thus, he argued having one African American juror on a panel of 41 potential jurors established substantial underrepresentation. VR 11/18/2014, 01:26:35.

The trial court again remarked that the situation was "very unusual," and turned to the Commonwealth for a response. VR 11/18/2014, 01:27:28. The Commonwealth answered that, although the makeup of the specific panel before it was unusual, there was no indication that the process by which the particular panel was selected from the larger pool was not random and pursuant to the ordinary practices for assignment of a panel of jurors from the larger pool of available jurors. VR 11/18/2014, 01:27:37 and following.

The trial court reaffirmed that it was finding that there was no indication that the process used to select and assign the particular panel before it was no different than used

when other panels are randomly selected from the larger jury pool. VR 11/18/2014, 01:28:41. While recognizing that the composition of the panel was odd and that the panel was not as diverse as other panels, the trial court found that fact alone did not mean the jury panel did not represent a fair cross-section of the community. VR 11/18/2014, 01:28:41. The trial court found that the panel represented a fair cross-section, and denied Respondent's motion. VR 11/18/2014, 01:29:16.

The parties moved that certain jurors be struck for cause and exercised their peremptory strikes. VR 11/18/2014, 01:29:31 and following. Because of overlapping strikes, four jurors were required to be struck at random to finally select the petit jury. VR 11/18/2014, 02:48:51. The court clerk removed four jurors at random. VR 11/18/2014, 02:49:24. One of those jurors was the sole African American man on the panel. VR 11/18/2014, 02:50:45.

Respondent renewed his motion to strike the jury incorporating all arguments he made previously. VR 11/18/2014, 02:50:45. The trial court expressed that although it was really troubled by what had occurred, the juror had been struck randomly; the trial court overruled the renewed request. VR 11/18/2014, 02:51:48.

Respondent again objected, expressing that even though the process was random, relief was still warranted. VR 11/18/2014, 02:52:50. Respondent argued that intentional conduct to prevent the jury from being a fair cross-section of the community was not required for relief because the defendant had a fundamental right to be judged by members of his community. VR 11/18/2014, 02:53:20. Respondent complained because there were no African American jurors but only Caucasian jurors. VR 11/18/2014, 02:53:50. He expressed that he believed the jury make-up was prejudicial to him because

it was unfair for him to have only white people on his jury when racial biases are obvious in society. VR 11/18/2014, 02:54:02. He claimed that he had shown substantial underrepresentation of a class on the jury and the burden shifted to the Commonwealth to put on affirmative evidence. VR 11/18/2014, 02:54:35.

The Commonwealth responded that Respondent had received due process, and that although the result was odd in this particular case, there was no basis for thinking what occurred was the result of anything but randomness. VR 11/18/2014, 02:55:45. The Commonwealth contended that to set aside the jury and to require what Respondent was seeking would require an undoing of the whole jury selection procedure. VR 11/18/2014, 02:56:08. Additionally, the Commonwealth disagreed that there was no diversity amongst the remaining jurors, noting that there was at least one juror who appeared to speak English as a second language and may have been of Latin American descent. VR 11/18/2014, 02:56:25.

The trial court expressed that the issue was difficult because of the underlying assumption that people of races think alike or are fairer to someone of their own race, but pointed out that was not the issue in this case, rather the issue was Respondent's right to have a jury that was representative of the community, which the court believed had been violated because no African American juror remained on the petit jury. VR 11/18/2014, 02:56:46. The trial court disagreed with the statistics previously offered by Respondent and expressed its belief that African Americans made up 18-20% of Jefferson County's population. VR 11/18/2014, 02:57:41. The trial court again expressed that it had never seen anything like this. VR 11/18/2014, 02:57:41. The trial court described that its concern was not intent, but rather the result—namely, that Respondent did not have a jury

representative of the community because there was not one single African American person on the jury. VR 11/18/2014, 02:57:56. Because Respondent was an African American man, the trial court was concerned about the lack of any African American juror. VR 11/18/2014, 02:58:04. The trial court granted the motion, and set aside the jury entirely, explaining that the panel would be dismissed, that a new panel would be requested for the next morning, and that jury selection would begin anew. VR 11/18/2014, 02:58:27.

The Commonwealth made a motion to continue the trial until the current pool of jurors was released and a new pool was available because of concern over some of the same individuals who had sat through jury selection being part of the second panel that would undergo jury selection the following day. VR 11/18/2014, 03:00:21. The trial court denied the motion. VR 11/18/2014, 03:00:21.

The following day a new panel of jurors was made available. VR 11/19/2014, 09:34:33 and following. The Commonwealth voiced concern about jurors who had taken part in jury selection the previous day and what effect their statements in the prior *voir dire* had on the current proceedings. VR 11/19/2014, 09:50:26. The trial court opined that the jury selection the day before “didn’t happen” and that the parties should “erase” what happened in the preceding day’s *voir dire* from their minds. VR 11/19/2014, 09:51:25 and following. The trial court instructed that the parties would not be able to incorporate any questions from the day before (VR 11/19/2014, 09:51:56), that they should not make any motions based on anything the jurors said the previous day (VR 11/19/2014, 09:46:46), that they could not impeach jurors with their statements from the day before (VR 11/19/2014, 09:53:02), and that they should not use anything a juror said



the day before as a basis for striking a juror (VR 11/19/2014, 09:53:57). The trial court refused to incorporate the *voir dire* from the day before into the trial record and referred to the day the second panel was brought forward as the first day of trial on the record. VR 11/19/2014, 09:34:33, 09:53:15.

The new panel of 41 included 4 African American jurors. VR 11/19/2014, 01:39:20. Respondent renewed his motion to strike the jury panel because of his claim that it did not represent a fair cross-section of the community. VR 11/19/2014, 09:55:16. Respondent expressly stated that he was not blaming the Commonwealth or even necessarily calling into question the procedure. VR 11/19/2014, 09:58:40. The trial court denied the motion pointing out that the panel was more diverse than the panel the day before, though not as diverse as usual. VR 11/19/2014, 09:59:14. The trial court noted that it was not unusual to have only one of 14 jurors on a petit jury be African American in Jefferson County and offered this as the reason it did not grant Respondent's motion to strike the jury panel on the previous day until the lone African American juror was removed from the panel randomly. VR 11/19/2014, 09:59:36.

The Court found that the second jury panel was sufficiently constituted. VR 11/19/2014, 09:59:47. A petit jury was seated. VR 11/19/2014, 02:08:00. It included all four African American jurors on the panel. VR 11/19/2014, 01:43:08. The trial commenced. VR 11/19/2014, 02:12:04. Respondent was ultimately found not guilty. VR 11/20/2014, 06:07:00; Exhibit 1. An order to that effect was entered on December 11, 2014. See Exhibit 1. The Commonwealth seeks certification of the law from that final order of acquittal.

## REASONS CERTIFICATION SHOULD BE GRANTED

Kentucky law is clear that a trial court does not commit reversible error when it fails to dismiss a jury due to an alleged violation of the constitutional requirement that a jury be selected from a fair cross-section of the community if the defendant has not made a *prima facie* case by showing “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Johnson v. Commonwealth*, 292 S.W.3d 889, 894 (Ky. 2009) quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979). Less clear is whether absent this *prima facie* showing and over the objection of the Commonwealth, the trial court has authority to dismiss a jury based on a claim that the fair cross-section requirement has been violated. In the absence of evidence of a systematic exclusion of a group of eligible citizens or discriminatory action on the part of the Commonwealth, the prosecution and the Court of Justice have a vested interest in the trial proceeding with the selected jury. Doing so preserves the defendant’s constitutional rights (since there has been no evidence that the fair cross-section requirement was violated), spurs judicial economy, and imbues jurors and potential jurors who participated in the original jury selection with confidence that the system of jury selection is designed in a way that provides all parties with equal opportunity to participate in the selection of a fair jury. Moreover, allowing the trial to proceed preserves the rights of the constitutionally

selected jurors to participate in the criminal justice system by serving on a jury.<sup>2</sup> It prevents them from being excluded from jury service because they were not of a certain race. Nonetheless, there does not appear to be any case law regarding the rights of the Commonwealth and potential jurors when a defendant does not meet his burden of proof when alleging a fair cross-section violation.

The Court has repeatedly affirmed that a defendant's constitutional right to select a jury from a fair cross-section of the community is not violated when he is unable to show that the representation of a distinctive group of people in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community and that the underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Johnson*, 292 S.W.3d at 894. In *Johnson*, for example, the Court affirmed the trial court's rejection of the defendant's claim that his jury was not comprised of a fair cross-section of the community because the defendant failed to provide statistics comparing the percentage of the allegedly underrepresented group with the percentage of the group in the county's jury pools over a period of time. *Id.* at 895. More than two decades earlier, in *Commonwealth v. McFerron*, 680 S.W.2d 924 (Ky. 1984), the Court affirmed the trial court's denial of the defendant's motion to set aside the jury panel because of a claim of systematic exclusion of doctors and lawyers from jury pools because the defendant failed to establish a *prima facie* case of systematic exclusion. See also, *Mash v. Commonwealth*, 376 S.W.3d 548 (Ky. 2012) (affirming denial of the defendant's motion to set aside the jury panel because he failed to establish a *prima facie* case that the fair cross-section requirement was violated); *Rodgers v.*

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<sup>2</sup> See *e.g.*, *Powers v. Ohio*, 499 U.S. 400 (1992), for general discussion regarding the rights of citizens to serve on a jury.

*Commonwealth*, 285 S.W.3d 740, 759 (Ky. 2009) (affirming denial of the defendant’s claim that the fair cross-section requirement was violated because the defendant “made no attempt to show that [African Americans] are regularly underrepresented on Jefferson County venires or that the jury selection process systematically excludes them”).

In each of these cases, the trial court denied the motion to excuse the jury, the appellate court affirmed, and there was no discussion of the rights or interests of the Commonwealth to proceed to trial with the selected jury in the absence of evidence that the jury selection process was unconstitutional. Nor was there any discussion in any of these cases of the rights of the potential jurors to participate in the criminal justice system through jury service. By certifying the law, this Court could clarify the law on these issues. This Court could provide guidance to trial courts about the limits of their authority and the full panoply of concerns that must be considered when there is an invitation to strike a jury panel on the basis of underrepresentation of a group but no evidence of systematic exclusion of the group.

When the trial court first denied the motion to dismiss the panel in this case, it expressed being troubled by the composition of the panel before it. The trial court later recognized difficulty in its decision and the existence of an underlying assumption that people of the same race think alike or are fairer to someone of their own race. Undoubtedly, other trial judges may feel societal, political, and other pressures about the appearance of racial fairness on specific panels, especially when a defendant of a specific race argues that the absence of persons of that race on the jury is unfair and results in bias. A certification of the law from this Court could settle what role such concerns may play in the determination of whether a defendant’s rights regarding jury selection are

violated in a particular case. Certification would also make clear how the rights of the Commonwealth and prospective jurors play into the equation.

In this case, there was no evidence regarding the racial makeup of the entire pool of potential jurors or of any past pool or panel of potential jurors. The trial court and both parties agreed that it was unusual to see only one African American person on a jury panel in Jefferson County. There was no evidence that this rare occurrence was due to any systematic exclusion of African Americans from jury service.

The trial court twice denied the motion to dismiss the panel, finding that the fair cross-section requirement had been met. However, when the lone African American juror was struck at random, the trial court reversed course, and granted the motion to strike the panel. The fact that no African American juror was seated due to random selection changed the trial court's determination that the fair cross-section requirement had not been violated.<sup>3</sup> There was no evidence that the particular jurors selected to hear the trial could not be fair and impartial. Nonetheless, those jurors were stricken because of the perception that without a juror of the same race as Respondent, the jury could not be fair.

The Commonwealth and Respondent had the opportunity to make and object to motions to strike for cause. They also exercised peremptory challenges as they deemed appropriate. The Commonwealth selected what it believed would be a fair and impartial jury. In the absence of *prima facie* evidence of a fair cross-section violation, the trial court struck the jury based on nothing more than an unsupported fear or impression that

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<sup>3</sup> The next day the trial court explained that the random striking of the one African American juror on the panel made a difference because it was not unusual to see a petit jury in Jefferson County with only one African American juror on it. So, in the trial court's view, until that particular juror was randomly struck, the panel was constitutional.

the jury might not be fair because of its racial makeup. There was no consideration of whether the Commonwealth or the citizens who had sacrificed of their own lives to make themselves available for jury service had any rights or interests in continuing to trial with the jury as selected. This Court should certify the law and give guidance to trial courts, prosecutors, and defense attorneys. Answers might also preserve Court of Justice and citizen resources by identifying whether there is any problem in the manner in which the jury panel was assigned from the larger pool in this case and in other cases.

Finally, this case also presents the opportunity for this Court to articulate the law regarding the use of potential jurors' prior statements in other *voir dire* proceedings. As described above, in this case the trial court advised the parties that when they began *voir dire* the second time, the court was operating as if the *voir dire* the day before had never occurred. The trial court specifically instructed the parties not to reference statements made by jurors on the previous day, even if the same jurors appeared on the new panel and gave contradictory answers. This unwillingness to entertain questions or motions based upon the prospective jurors' sworn statements from the prior day's proceedings, especially where the parties were the same, unfairly limited the parties' efforts to obtain a fair jury. The trial court has great discretion in the manner in which it conducts *voir dire* largely due to its unique position to judge the demeanor of the jurors (see *e.g.*, *Sherroan v. Commonwealth*, 142 S.W.3d 7, 15 (Ky. 2004), and where, as here, the trial court observed prospective jurors' demeanor on two occasions, completely disregarding one of those occurrences should not be an option. However, Kentucky case law does not clearly provide instruction to trial courts as to what they should do in this instance or in the similar instance where although in different trials, the same prospective jurors appear

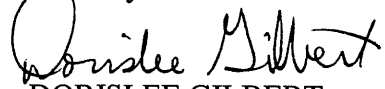
before the court, giving answers during *voir dire* on more than one occasion. If this Court certifies the law on this issue, trial courts and the parties will have better direction in the conduct of *voir dire* which will result in fairer juries.

### CONCLUSION

WHEREFORE, for all the reasons stated above, the Commonwealth specifically requests that this Court certify the law regarding (1) a trial court's authority to dismiss a jury based upon a claim that the fair cross-section requirement has been violated in the absence of evidence of systematic exclusion of a group from jury service; (2) the rights of the Commonwealth to proceed with a jury or jury panel when claims of a violation of the fair cross-section requirement are not adequately supported; (3) the rights of potential jurors to serve on a jury where they have been duly selected and there is no evidence of systematic exclusion of any group of jurors; and (4) the permissible uses for prospective jurors' prior sworn statements in an earlier *voir dire* proceeding.

Respectfully submitted,

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**NOTICE**

Notice is hereby given that the foregoing Motion for Certification of Law was filed with the Clerk of the Supreme Court by express mail on this 12<sup>th</sup> day of January 2015, to be considered at the Court's earliest convenience.



DORISLEE GILBERT  
Special Assistant Attorney General

**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing Motion for Certification of Law was delivered to the Hon. Olu A. Stevens, Judge, Jefferson Circuit, Division 6, Louisville, KY 40202; Hon. Sean Pharr, Counsel for Respondent, Office of the Louisville Metro Public Defender, Advocacy Plaza, 717-719 W. Jefferson St., Louisville, KY 40202.



DORISLEE GILBERT  
Special Assistant Attorney General



Supreme Court of Kentucky

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COMMONWEALTH OF KENTUCKY

OFFICE OF  
COMMONWEALTH'S ATTORNEY  
APPELLANT

V.

REQUEST FOR CERTIFICATION OF THE LAW  
BY COMMONWEALTH OF KENTUCKY  
JEFFERSON CIRCUIT COURT NO. 13-CR-2070-003

JAMES DOSS

APPELLEE

**ORDER GRANTING CERTIFICATION OF LAW  
AND SET FOR ORAL ARGUMENT**

The Commonwealth's motion requesting review and certification of the law in the above-styled action is GRANTED.

The case shall proceed in the same manner as other appeals. The parties shall comply with the briefing schedule as specified in CR 76.12. Oral argument will be scheduled by later Order.

Minton, C.J.; Abramson, Barber, Cunningham, Noble, and Venters, JJ., concur. Keller, J., dissents.

ENTERED: September 24, 2015.

  
CHIEF JUSTICE