

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED
July 9, 1996

Plaintiff-Appellee,

v

No. 185008
LC No. 90-001462-FC
ON REMAND

OTIS CLARK,

Defendant-Appellant.

Before: Markey, P.J., and Holbrook, Jr., and M.J. Matuzak,* JJ.

PER CURIAM.

This is the second time this appeal has been before this Court for a determination of the question of whether defendant was deprived of his constitutional right to a jury drawn from a representative cross-section of the community. We previously found that defendant was not deprived of this constitutional right. *People v Clark*, unpublished opinion per curiam of the Michigan Court of Appeals, issued April 26, 1994 (Docket No. 142293). The Supreme Court has remanded this case to us, however, so that we might reconsider this case in light of our decisions in *People v Hubbard*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 145054, 175352, issued ___/___/96), and *People v Smith*, unpublished per curiam opinion of the Michigan Court of Appeals, issued _____, 1996 (Docket Nos. 134469, 175350). 448 Mich 884. On reconsideration, we reluctantly conclude that indeed defendant was deprived of his Sixth Amendment right to a jury drawn from a fair cross-section of the community. Accordingly, we reverse and remand for a new trial.

A criminal defendant is entitled to an impartial jury drawn from a fair cross-section of the community, but not to a petit jury that mirrors the community and reflects the various distinctive groups in the community's population. *Taylor v Louisiana*, 419 US 552, 526-531, 538; 95 S Ct 692; 42 L Ed 2d 690 (1975). Instead, the Sixth Amendment guarantees an opportunity for a representative jury

* Circuit judge, sitting on the Court of Appeals by assignment.

by requiring that 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 of the community. *Id.*; *United States v Jackman*, 46 F3d 1240, 1244 (CA 2, 1995). To establish a prima facie violation of the fair-cross-section guarantee, the defendant must demonstrate "(1) that the group alleged to be excluded is a distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant argues that the process used by Kalamazoo County at the time of his trial to allocate prospective jurors from a general source list to the circuit court venires systematically excluded African Americans from those venires. Defendant further argues that the level of racial disparity present in the venires was of sufficient magnitude to constitute substantial underrepresentation under the Sixth Amendment. We agree.

We interpret the Supreme Court's order of remand as requiring us to adopt the evidentiary record created in *Hubbard and Smith*¹ for the purpose of re-examining the issue before us. In those cases, we concluded that the evidence established that the juror allocation process used by the county before July 1992 resulted in a constitutionally significant underrepresentation of African Americans in the circuit court venires. *Hubbard*, ___ Mich App at ___; *Smith*, slip op at . We further concluded that the evidence established that this underrepresentation resulted from a systematic exclusion of significant duration. *Hubbard*, ___ Mich App at ___; *Smith*, slip op at .

Defendant was tried after defendant Smith, but before defendant Hubbard. Given that the evidentiary record created in *Hubbard* and *Smith* established that the juror allocation system was constitutionally flawed during the period relevant to this case, we must conclude that the jury that tried and convicted defendant was drawn from a venire that unconstitutionally underrepresented the African American community in Kalamazoo County.

Accordingly, we vacate defendant's convictions and sentences and remand to the circuit court for a new trial.

/s/ Jane E. Markey

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Matuzak

¹We remanded *Hubbard* and *Smith* by separate orders on motions of these defendants to the trial court for the purpose of allowing these defendants the opportunity to create an evidentiary record with respect to their claims that they were denied an impartial jury. Unpublished order of the Court of Appeals, entered March 11, 1993 (Docket No. 134460); unpublished order of the Court of Appeals, entered December 22, 1992 (Docket No. 145054). On remand, the trial court consolidated *Hubbard*

and *Smith* and conducted a joint evidentiary hearing.