

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 184297

Jackson Circuit Court

ISAAC DARNELL GOODMAN-BEY,

LC No. 94-070845-FH

Defendant-Appellant.

Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

MARKEY, J. (concurring in part and dissenting in part)

I respectfully dissent in part. The majority's treatment of defendant's Sixth Amendment challenge to the underrepresentation of minorities on his jury venire is too cursory. By holding that defendant failed to establish a *prima facie* case supporting his Sixth Amendment challenge *at the moment when defendant timely objected to the composition of his venire*, the majority has created a new hurdle for defendants seeking to protect their constitutional right to an impartial jury drawn from a fair cross section of the community. *People v Hubbard*, 217 Mich App 459, 472; 552 NW2d 493 (1996).¹

First, the realities of trial procedure preclude most defendants from viewing the jury venire before the date scheduled for trial. As we observed in *Hubbard, supra* at 465-466, "the circuit court possessed no data from which defendant could ascertain the minority representation on the [juror] source list or in the venire. Absent such data, defendant could not ascertain whether there was a need to challenge the juror allocation process before defendant actually viewed the array." Thus, a defendant is unable to anticipate that his venire will not reflect a representative cross-section of the community until the day of trial. *Id.* How can we expect a defendant to make a *prima facie* showing before trial that his Sixth Amendment rights are being violated, according to the test we recently enunciated in *Hubbard, supra* at 472-473?

In *Hubbard, supra* at 463, this Court initially remanded the case to the trial court for an evidentiary hearing "to allow defendant to develop a record with regard to his claim that the process

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

used at the time of his trial to allocate prospective jurors from a master source list to the Kalamazoo Circuit Court venires violated his Sixth Amendment guarantee of an impartial jury drawn from a fair cross section of the community.” At the evidentiary hearing on remand, the defendant had the opportunity to question the court administrator, jury coordinator, and others regarding the methods used to contact, secure, and allocate jurors to the district and circuit courts in the county. Absent this evidentiary hearing, the defendant in *Hubbard, supra*, would have had no means of attacking the alleged systematic exclusion of minorities inherent in the county’s jury selection process because there was no other avenue available for easily discovering or determining how the county acquired and allocated jurors.

In the case at bar, I find that a remand for an evidentiary hearing is also merited. Defendant made a timely objection to the composition of the jury venire and now wishes to pursue his Sixth Amendment challenge. The majority cites no case or statutory authority, and I find none, supporting the proposition that a defendant must make a prima facie showing in order to either timely preserve a challenge to the jury venire *or* entitle that defendant to an order remanding the matter to the trial court for a *Hubbard*-style hearing.² Indeed, we are putting the proverbial cart before the horse by requiring the defendant to provide statistics or other evidence of how the county’s jury selection process systematically excludes minorities from jury venires when the defendant has no independent means of determining this without a *Hubbard*-style evidentiary hearing.

Accordingly, I would remand the case for an evidentiary hearing in light of defendant’s timely objection to the venire, accord *Hubbard, supra* at 464-466, and the apparent disparity that defendant asserted in his brief on appeal between the percentage of African-Americans in the county and the percentage of African-Americans in defendant’s jury venire.³

I concur in all other aspects of the majority’s decision.

/s/ Jane E. Markey

¹ As we recognized in *Hubbard, supra* at 472-473:

This fair-cross-section requirement does not entitle the defendant to a petit jury that mirrors the community and reflects the various distinctive groups in the population. Instead, the Sixth Amendment guarantees an opportunity for a representative jury 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 constitute a fair cross section of the community. [Citations omitted.]

² Remand hearings need not be granted in every case. For example, if other defendants in Kalamazoo County timely challenge their jury venires under the Sixth Amendment, the trial court may take judicial notice of the hearing held in *Hubbard, supra*, refer the defendants to those hearings (a transcribed copy of which may be obtained from the clerk’s office), and proceed with trial or delay the proceedings, at the court’s discretion, while the defendants review those transcripts. Although the conclusions of law

drawn from the *Hubbard* evidentiary hearing will not bind other defendants, the facts elicited at the hearing regarding the methods used to obtain and allocate jurors are applicable to all defendants being tried in Kalamazoo County for the relevant period of time covered in the hearings. Additionally, the court may order a supplemental evidentiary hearing if the court is aware that the juror procurement or allocation procedures have changed since the last evidentiary hearing. Thus, the concern that every defendant will request and receive an evidentiary hearing at great expense to the trial court is unfounded. Once one of the *Hubbard*-style hearings is held in a county, that hearing should suffice, subject to the limitations discussed above, in providing other, subsequent defendants with an evidentiary basis for challenging their jury venires.

³ In his brief on appeal, defendant asserted that, according to the most recent census, 149,756 people live in Jackson County and that 11,822 or 7.89% are African-Americans. Out of 42 jurors in defendant's venire, only one person, or 2% of the venire, was African-American. These demographic statistics are confirmed by the 1995-1996 *Michigan Manual*.