STATE OF MICHIGAN
IN THE SUPREME COURT
(on Appeal from the Michigan Court of Appeals)

ANTHONY PELLEGRINO, as Personal Representative of the Estate of SHIRLEY ANN PELLEGRINO, Deceased, and ANTHONY PELLEGRINO, individually,

Plaintiff-Appellee,

vs.

AMPCO SYSTEMS PARKING,

Defendant-Appellant.

Supreme Court Docket No 137111

COA Docket No. 274743
(Judges Gleicher and Borrello, O'Connell, Dissenting)

Wayne County Circuit Case
No. 03-325462-NI
Hon. Michael J. Callahan

BRIEF OF AMICI CURIAE OF MICHIGAN CIVIL RIGHTS COMMISSION AND MICHIGAN DEPARTMENT OF CIVIL RIGHTS

Submitted pursuant to MCR 7.306(D)(2)

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STATEMENT OF INTEREST

Amici are the Michigan Civil Rights Commission ("Commission") and the Michigan Department of Civil Rights ("Department"). The Commission was created under the Michigan Constitution of 1963 for the purpose of protecting individuals from discriminatory treatment. The Department, established two years later, acts as the investigative arm of the Commission, and is the lead agency that investigates and resolves discrimination complaints. It also works to prevent discrimination through educational programs that promote voluntary compliance with civil rights laws. Together, the Commission and the department utilize their constitutional and statutorily derived powers to help prevent and prosecute unlawful discrimination.

Amici believe that discrimination in jury selection is an important civil rights concern affecting the rights of the parties, potential jurors, and the entire community. The interest is at stake in *Pellegrino v Ampco Sys. Parking* is nothing less than that of the public's confidence in the fairness of our system of justice, particularly as it involves race. MCR 2.511(F) has confused rather than clarified Michigan's law and procedure for resolving disputes involving the consideration of race in jury selection. Moreover the rule's absolute prohibition of trial court consideration of whether a jury is at all representative of the community it represents does not serve the interests of justice. Amici urge this Court to repeal MCR 2.511(F).

The contents of this brief represent the opinions and legal arguments of the Michigan Civil Rights Commission and Michigan Department of Civil Rights. They do not necessarily represent the opinions of any other person or entity within Michigan's government.

Normally Michigan's Attorney General is would provide counsel and represent the

Michigan Civil Rights Commission in matters before this Court.[1] But, because the Attorney General is considering taking a position in this matter, and in recognition of the Michigan Civil Rights Commission's constitutional status as an independent entity within Michigan government,[2] the Attorney General has appointed the Michigan Department of Civil Rights Director of Law and Policy a Special Assistant Attorney General to represent the Commission and Department interests here.

Pursuant to MCR 7.306(D)(2), this brief is submitted by an agency of the State of Michigan and no motion for leave to file is required.[3]

[1] MCL 37.2602 provides that "(t)he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act."
[2] The Michigan Civil Rights Commission (MCRC) is a constitutionally created body charged with a duty "to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination." (Const 1963, Art 5, §29)
[3] "No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the people of the state of Michigan or the state of Michigan, or any of its agencies or officials, by the Attorney General…"

STATEMENT OF FACTS

Amici Michigan Civil Rights Commission and Michigan Department of Civil Rights accept the statement of facts as contained in the Court of Appeals opinion below.

SUMMARY OF ARGUMENT

The sole question before this Court is "whether defendant is entitled to a new trial based on a violation of MCR 2.511(F)(2)." Amici Michigan Civil Rights Commission (MCRC) and Michigan Department of Civil Rights (MDCR) respectfully submit that the court rule is so unclear, unhelpful, and unworkable that it is not possible to definitively answer the question posed. MCRC requests that this Court repeal MCR 2.511(F) and instead evaluate this matter based only upon case law.

As the case below[4] illustrates so dramatically, MCR 2.511(F), did not clarify the law regarding discrimination in the *voir dire* process as intended. The parties have presented diametrically opposed interpretations, yet each is apparently consistent with the rule's wording.

Appellee emphasizes Section 1 of the rule and argues that the rule's purpose is simply (and solely) to protect a potential juror against discriminatory dismissal. Appellant pointing to Section 2 argues that the rules purpose is to protect the parties by ensuring racial discrimination does not control whether a venire member will sit as a juror, thereby protecting the parties by securing a more 'balanced' jury. Reviewing the language of the two sections of MCR 2.511(F) in concert also provides no clear guidance on juror dismissal or jury panel composition. Section 1 prohibits discrimination against a juror based on race while Section 2 broadly prohibits any discrimination during *voir dire* – but only when done "for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury."

If the rule is interpreted only to protect prospective jurors from discrimination, then it is defective as it fails to ensure the parties a fair trial. Moreover, this also raises the question of

[4] *Pellegrino v Ampco Sys. Parking*, unpublished opinion per curiam of the Court of Appeals, 2008 Mich App LEXIS 1109 (2008). issued May 27, 2008 (Docket No. 274743)

whether prospective jurors also have a 'right' to avoid service, or if discrimination occurs only a juror's right to sit on a jury is denied. And what of the juror's own wishes -- can it really be subjecting a person to discrimination to give them what they want (whether that is to participate in jury service or avoid it)?

On the other hand, Section 2 appears intended to protect the parties' interests in receiving a fair trial by placing the focus on the jury as a whole rather than the individual persons that make it up, but by failing to provide any other definition of discrimination it would appear to reference Section 1 and require that it be against a person. Furthermore, Section 2 specifically applies only to actions taken for actions taken "for the purpose of" achieving a balanced, proportionate, or representative jury. That a trial court's benign motive would require retrial but a malicious or improper motive would pass judicial muster, defies both logic and justice. It also further substantiates that the rule is confusing and unworkable.

Finally, this case calls attention to the fact that the judicial system produces jury pools that often are not representative of the local population. This raises concerns about whether the parties are really being given their right to a "jury of their peers." Addressing this issue is critical because the cornerstone of any justice system is the people's faith in its fairness.

The question of whether a trial court should ever be permitted to make racially conscious decisions in order to prevent what it sees as an otherwise unbalanced, non-proportionate, nonrepresentative and thus discriminatory jury from being impaneled is not one that should be answered with a simple one sentence - one size fits all - prohibition by court rule. It is a complicated question that should be resolved on a fact-specific case by case basis under traditional standards of appellate review.

ARGUMENT

The Michigan Civil Rights Commission and Michigan Department of Civil Rights opposed the adoption of MCR 2.511(F) when it was first proposed.[5] It was feared that the rule as written would cause confusion and create unintended and irreconcilable grounds for appeal, precisely as has occurred here. This case epitomizes the dangers of relying on a simple court rule to control a vast and complicated area of legal jurisprudence.

The United States Supreme Court has noted, the "constitutional interests *Batson*[6] sought to indicate are not limited to the rights possessed by the defendant on trial," nor to potential jurors.[7] "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," because racially discriminatory selections of jurors "undermine public confidence in the fairness of our system of justice."[8] This Court has stated that "the goal of *Batson* and its progeny is to promote racial neutrality in the selection of a jury and to avoid the systemic and intentional exclusion of any racial group."[9] Amici MCRC/MDCR assert that these are the principles that should guide Michigan's jurisprudence in this complicated and sensitive area of law, not a blanket prohibition by court rule.

Amici believe that *Batson* and its progeny properly apply to inferences that may be drawn when there is no factual basis upon which to determine the motive behind a party's peremptory challenge to a prospective juror. Thus a trial court is able to act in the interests of protecting the judicial system from the appearance of racial bias when, but only when, the parties are unable to

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[5] *See* Comment to MCR 2.511(F) ("The Michigan Department of Civil Rights, writing also for the Michigan Civil Rights Commission, believes the amendment to be vague and ambiguous and one that will engender frequent legal challenges.") (Kelly, J., dissenting)
[6] *Batson v Kentucky*, 476 US 79 (1986)
[7] *Johnson v California*, 545US 162, 171-72 (2005)
[8] *Johnson* at 172 (quoting *Batson* at 87)
[9] *People v Knight*, 473 Mich 324, 349; 701 N.W.2d 715 (2005)

articulate a reasonable basis for striking a prospective juror. Still, no apparently unbiased venire member should ever be excluded because of their race. Nor should any apparently biased juror be permitted to sit because of their race. Because MCR 2.511(F), and in particular MCR 2.511(F)(2), is inconsistent with these principles, the court rule should be repealed and the case law should be followed instead.

A. MCR 2.511(F) is confusing and unworkable because it fails to offer a proper remedy for its violation, works at cross-purposes from *Batson* and its progeny, and yields results that are contrary to both logic and justice.

Racial discrimination in jury selection has a long and storied past in American judicial history. The Supreme Court of the United States has helped to play a role in rectifying some injustices by interpreting the Equal Protection Clause of the 14th Amendment to guarantee certain fundamental protections to a number of stakeholders in the judicial process, from the parties in a case, to the members of the jury, and even to potential jurors.[10] "Encompassed within" the Fourteenth Amendment's "mandate of fairness and due process is the right of a civil litigant to request, in certain cases, that legal matters be heard by a panel of impartial jurors."[11]

In *Batson v. Kentucky*, the U.S. Supreme Court held that the "[E]qual Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or the false assumption that members of his race as a group are not qualified to serve as jurors."[12] In so holding, the Court recognized that the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," because "selection procedures that purposefully exclude

[10] *See Swain v Alabama*, 380 US 202 (1965); *Johnson v. California*, 545 US 162 (2005); *Batson, supra*
[11] *People v. Bell*, 473 Mich 275, 283; 702 N.W.2d 128 (2005) (citing Michigan Const 1963, art 1, §14)
[12] *Batson*, 476 US at 86

black persons from juries undermine public confidence in the fairness of our system of justice."[13] *Batson's* reasoning has been extended to civil cases.[14] This Likewise, racial discrimination in jury selection is unacceptable under Michigan law and jurisprudence.[15]

In *People v. Knight*, this Court expressly underscored that in the context of racial discrimination in *voir dire*, the Equal Protection Clause was not limited to concerns over the rights of defendants and parties, but "the focus is also on the integrity of the judicial system, as well as the rights of the prospective jurors."[16] This Court noted that "ensuring the integrity of the judicial process and maintaining fair jury selection procedures" was of unquestionable importance and paramount concern.[17] The Court concluded, citing Batson, that "the striking of even a single juror on the basis of race violates the constitution."[18]

Batson and its progeny under Federal and Michigan law have, absent the implementation of MCR 2.511(F), provided clear, workable, fact-specific and cautiously-evolving standards for redressing claims of racial discrimination in jury selection. The *Batson* Court created a three-step test to determine if a party improperly used a peremptory challenge to disqualify a venire member on the basis of race, that was later clarified under Michigan law in *People v. Bell.*[19] Under this test, the party making the *Batson* challenge must initially present a prima facie showing of discrimination based on race.[20] After the contesting party makes a prima facie showing of discrimination, the burden shifts to the challenging party exercising its peremptory challenge to present a race-neutral explanation for using the challenge.[21] "The neutral

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[13] *Batson*, 476 US at 87
[14] *See Edmonson v. Leesville Concrete Co.*, 500 US 614 (1991)
[15] *See Bell*, *supra*; *People v. Knight*, 473 Mich. 324 (2005)
[16] *Knight,* 473 Mich at 342
[17] *Knight,* 473 Mich at 342
[18] *Knight*, 473 Mich 337, n.9 (citing *J.E.B. v. Alabama ex rel TB*, 511 US 127, 142 n. 13)
[19] *Bell*, 473 Mich at 282-83
[20] *Bell*, 473 Mich at 282
[21] *Bell*, 473 Mich at 283

explanation must be related to the particular case being tried and must provide more than a general assertion in order to rebut the prima facie showing."[22] If the challenging party fails to provide a race-neutral explanation the challenge must be denied based upon the unrebutted inference.[23]

Finally, if a race-neutral explanation is presented, "the trial court must decide whether the nonchallenging party has carried the burden of establishing purposeful discrimination."[24] This whole framework is "*designed to produce actual answers to suspicions and inferences* that discrimination may have infected the jury selection process."[25]

Trial courts are strongly urged to "clearly articulate their findings and conclusions on the record."[26] Trial courts "must meticulously follow *Batson*'s three-step test."[27] Here no such record was made. MCRC/MDCR believe this was in large part because both the parities and the court focused upon the court rule and its misleading simplicity rather than the more detailed case law.

Nonadherence does not result in automatic reversal. Strict adherence to the *Batson* procedure is not constitutionally mandated.[28] Should a trial court fail "to clearly state its findings and conclusions on the record, an appellate court must determine on the basis of a fair reading of the record what the trial court has found and ruled."[29] Prior to the adoption of the court rule, Michigan law was consistent with the United States Supreme Court's decision in *Ross v. Oklahoma*, which recognized that a right to a "peremptory challenge [is] not of constitutional

[22] *Bell*, 473 Mich at 283
[23] *Bell*, 473 Mich at 282
[24] *Bell*, 473 Mich at 282
[25] *Johnson*, 545 US at 172 (emphasis added)
[26] *Knight*, 473 Mich at 339
[27] *Knight*, 473 Mich at 339
[28] *See e.g. Bell*, 473 Mich at 297
[29] *Bell*, 473 Mich at 297

dimension," but rather "a means to achieve the end of an impartial jury."[30] The framework for determining whether a trial court had committed reversible error in ruling on a *Batson* challenge was settled law.

Although well intentioned, and apparently non controversial on the surface, MCR 2.511(F)'s potential effects are far from acceptable.[31]

First, the rule provides no remedy for its violation. Its absolute language, suggests reversal should be automatic whenever discrimination is found to have occurred against a person and/or for the purpose of ensuring a representative jury. It can only be presumed that because the rule says nothing about the procedure for determining whether discrimination occurred, the intent was to leave in place the *Batson* procedure.

Application of the rule is further complicated when strikes for cause are denied by the trial court. Although "the decision to grant or deny a challenge for cause is within the sound discretion of the trial court . . . the trial judge is not without constraint."[32] Sound discretion is defined as a "discretion excised not arbitrarily or willfully, *but with regard to what is right and equitable under the circumstances and the law*, and directed by reason and conscience of the judge to a just result."[33] If a trial court acts to prevent a disproportionate, unrepresentative or unbalanced jury, the court rule calls it reversible error regardless of the rightness or equity of the action. A trial court should not be denied the opportunity to exercise its sound discretion by a

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[30] *Ross v Oklahoma*, 487 US 81, 88 (1988)

[31] In full, MCR 2.511(F) states:
(1) No person shall be subjected to discrimination
during voir dire on the basis of race, color, religion, national origin, or sex.
(2) Discrimination during voir dire on the basis of
race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection. (MCR 2.511(F))

[32] *Poet v. Traverse City Osteopathic Hosp.*, 433 Mich 228, 236; 445 NW2d 115 (1989).

[33] *Poet* at 236-37 (quoting *Langes v. Green,* 282 US 531, 541 (1931) (emphasis added).

simple court rule, given its unique position to determine what is right and equitable under the circumstances.

Prior to the addition of MCR 2.511(F), the law was clear that an erroneously denied peremptory challenge was not a constitutional error, whereas and a *Batson* error was constitutional error requiring reversal:

> A *Batson* error occurs when a juror is actually dismissed on the basis of race or gender. It is undisputed that this type of error is of constitutional dimension and is subject to automatic reversal. In contrast, a denial of a peremptory challenge on other grounds amounts to the denial of a statutory or court-rule-based right to exclude a certain number of jurors. An improper denial of such a peremptory challenge is not of constitutional dimension.[34]

The effect of a violation of Court rule MCR 2.511(F), makes no such distinction and its intent is unclear. Does the rule, by covering all discrimination in the same provisions, intend to elevate all challenges to constitutional challenges and thereby require automatic reversal where, as here, the courts deny a peremptory challenge? Probably not. But the alternative, that the court rule intended to treat all challenges as not of constitutional dimension would be contrary to *Batson*, and thus unconstitutional.

Prior to the adoption of MCR 2.511(F), the standard for review was clear. Like all denied peremptory challenges, peremptory challenges erroneously denied following a *Batson* challenge were considered non-constitutional and subject to traditional appellate review.[35] A violation of the right to a peremptory challenge is reviewed for a miscarriage of justice if the error is preserved and for plain error affecting substantial rights if the error is forfeited.[36]

Thus, under normal conditions, an erroneous denial of a peremptory challenge does not warrant automatic reversal. Yet if Court Rule 2.511(F) is interpreted to prevent a trial court from

[34] *Bell,* 473 Mich at 293.
[35] *Bell,* 473 Mich at 293
[36] *Bell,* 473 Mich at 294

denying a peremptory challenge based on a particular motivation, we are left unaware of whether the rule is to be treated as automatic reversal, reversible error, or if some other standard altogether is to be applied.

Indeed, this case illustrates just how confusing and unworkable MCR 2.511(F) has proven to be. A race conscious decision to deny a peremptory challenge is a complicated question that is not amenable to a one-dimensional court rule. It should be resolved on a fact-specific case by case basis under traditional standards of appellate review. This Court should repeal MCR 2.511(F).

B. Discrimination in jury selection is a broad and complicated area of law and the flexibility necessary to allow a trial court to both ferret out racial discrimination and promote public confidence in Michigan's judicial system can only be maintained if challenges are decided and reviewed on a case by case basis.

As the Supreme Court reiterated in *Johnson v. California*, a party making a *Batson* challenge is "entitled to rely on the fact, *as to which there can be no dispute*, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"[37] As gatekeepers of the protections bestowed by the Equal Protection Clause of the 14th Amendment, courts must vigorously defend not just a potential juror's right to not be racially discriminated against in *voir dire*, but also a party's right to a jury selection process free of racial discrimination. Further, a trial court should be ever mindful of the importance of maintaining public confidence in the legal system, confidence that can be eroded by the appearance of discrimination even where none exists.

Although MCR 2.511(F) ostensibly works to realize these goals, in practice it prevents trial courts from utilizing the necessary tools before them to minimize racially discriminatory

[37] *Johnson v California*, 545 US 162, 169 (2005), (citing *Batson*, 476 US at 96) (emphasis added).

practices. As the Supreme Court has noted, the "constitutional interests *Batson* sought to indicate are not limited to the rights possessed by the defendant on trial," nor to potential jurors.[38] "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community," because racially discriminatory selections of jurors "undermine public confidence in the fairness of our system of justice."[39]

The U.S. Supreme Court has recognized the inherent practical difficulties in rooting out discrimination in jury selection. As *voire dire* is discretionary by nature, strikes for cause and peremptory strikes alike are "subject to myriad legitimate influences," which has made it incredibly difficult to ferret out discrimination.[40] The trial court's ability to make a full credibility determination regarding a *Batson* challenge free of MCR 2.511(F)'s restrictions is essential to maintaining success against racially-prejudiced jury selection. Indeed, the U.S. Supreme Court has acknowledged that *Batson*'s "weakness" is its emphasis on the striking party's rationale:

> Some stated reasons are false, and although some false reason are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson*'s explanation that a defendant may rely on '*all relevant circumstances'* to raise an inference of purposeful discrimination.[41]

In the context of *voir dire*, 'all relevant circumstances' ought to include the potential racial makeup of the jury in order to better ferret our purposeful racial discrimination. MCR 2.511(F) appears to foreclose that option.

Justice Breyer's concurring opinion in *Miller-El v Dtreke* provided numerous studies and anecdotal reports "suggesting that, despite *Batson*, the discriminatory use of peremptory

[38] *Johnson*, 545 US at 171-72.
[39] *Johnson*, 545 US at 172 (quoting *Batson* at 476 US 87)
[40] *Miller-El v. Dretke*, 545 US 231, 238 (2005)
[41] *Miller-El*, 545 US at 240 (quoting *Batson* at 476 US 96-97), (emphasis added).

challenges remains a problem."[42] Justice Breyer cited various studies indicating that racial discrimination in *voir dire* against minorities continues to be all too pervasive and resistant to *Batson*'s attempts to root it out.[43] Even post-*Batson*, peremptory challenges are too often used to eliminate jurors because of their race.[44]

The State of Michigan is further burdened, especially in diverse counties like Wayne, by the inability to produce a juror pool that adequately represents the racial makeup of the community 'represented'. In November 2005 the State Court Administrator's Office (SCAO) contracted with the National Center for State Courts (NCSC) to assess the juror qualification and summoning procedures utilized by the Third Circuit Court of Wayne County, Michigan.[45] The SCAO and the Third Circuit alike suspected that a disparity existed between the minority populations of the county and its representation in the jury pool.[46] Over a period of two years, a study was conducted to determine whether the jury pool accurately and proportionally reflected the demographic characteristics of Wayne County citizens.[47]

The study noted that while "most urban courts experience some disparity in minority representation . . . in most instances, these disparity rates range from 2 to 4 percent –

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[42] *Miller-El*, 545 US at 269 (Breyer, J., concurring)
[43] *Miller-El*, 545 US at 269 (citing Baldus, Woodworth, Zuckerman, Weiner & Broffitt, The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, *3 U. Pa. J. Const. L. 3, 52-53, 73, n. 197* (*2001*) (in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51% of black jurors and 26% of nonblack jurors . . . [and] race-based uses of prosecutorial peremptories declined by only 2% after *Batson*; Melilli, *Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges, *71 Notre Dame L. Rev. 447, 462-464* (*1996*) (*Batson* challenges' success rates [were] lower where peremptories were used to strike black, rather than white, potential jurors); Brand, The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters, *1994 Wis. L. Rev. 511, 583-89* (examining judicial decisions and concluding that few *Batson* challenges succeed)
[44] *See*., *e.g.*, Ellis & Diamond, *Symposium: II. The Jury and Race: Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi-Kent L. Rev. 1033 (2003) ("In an analysis of virtually all federal and state civil and criminal cases published between April 30, 1986 (when Batson was decided) and December 31, 1993, Kenneth Melilli found that a large majority of Batson challenges (82%) were unsuccessful because courts accepted race-neutral reasons, however flimsy, to justify challenged peremptory strikes.").
[45] National Center for State Courts (NCSC), Court Services Division, *Third Judicial Circuit of Michigan Jury System Assessment, Final Report*, August 2, 2006
[46] *NCSC report* at 1
[47] *NCSC report* at 6

significantly lower than the average disparity rate of 13.7% that [Wayne County's] Third Circuit experienced."[48] The study concluded that, overall, "the percentage of African-Americans reporting for jury service is more than one-third lower than expected based on Wayne County demographics."[49]

Although likely unintentional, this racial disparity hardly provides parties a pool that is a true random sampling of their community or a representative jury of their peers. Given the vast and frequent disparity between diverse communities (particularly urban) in Michigan and the juror pools that are to be their representatives in the justice system, this Court should not eliminate altogether a trial court's ability to ever consider whether it is possible to provide the parties with jurors who are both chosen free from racial discrimination and representative of the community.

The U.S. Supreme Court has held, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[50] Indeed, community participation in the administration of criminal law "is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."[51] The greater the diversity on our juries, the more faith the public will have in our judicial system. "The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."[52] As long as jury pools continue to under represent minority populations, and African Americans continue to be disproportionally struck peremptorily (as noted by Justice Breyer in *Miller-El*), trial courts should not be

[48] *NCSC report* at 6
[49] *NCSC report* at 6
[50] *Taylor v. Louisiana*, 419 US 522, 528 (1975)
[51] *Taylor*, 419 US at 530
[52] *Taylor*, 419 US at 530 (quoting *Thiel v Southern Pacific Co.*, 328 US 217, 277 (1946) (Frankfurter, J., dissenting))

prohibited by court rule from any effort intended to impanel a jury reflecting the "representative character" of the community. A blanket prohibition of this sort only serves to contribute to the erosion of confidence in the judicial system and contravene the Equal Protection Clause of the Fourteenth Amendment.

To be clear, Amici do not argue that a prospective juror should ever be permitted to remain on a jury in order to improve diversity if there is an articulable reason for removal. Otherwise, when there is a legitimate reason for excusing a juror the court must not consider race. Race should not here be used to trump a legitimate basis for trial counsel's seeking removal of a juror. In short, reasonable inferences and likely public perceptions should never be permitted to override demonstrable evidence of the appropriateness of retention or removal of a prospective juror. Still, *in the absence of such evidence* the consideration of such inferences and perceptions are very much in the interests of both justice and the justice system. *Batson* and the cases that follow provide the road map for negotiating this difficult terrain.

MCR 2.511(F)'s inflexible prohibition appears to prevent trial courts from considering ALL factors and excersizing its discretion to ensure the fairest possible result is reached. It also prevents the appellate courts from developing the type of nuanced approach that justice demands and *Batson's* progeny create.

Amici do not take a position in support of either Appellant or Appellee in this case, MCRC/MDCR does believe that there is a real possibility that an articulatably suspect juror was seated this case based solely upon racial consideration and in spite of a proper objection. Further, amici believe that confusion caused by MCR 2.511(F) has thus far prevented this question from being properly evaluated. Amici thus urge this court to either expand the scope of its review to include, or remand the case for the purpose of, such analysis and determination.

CONCLUSION AND RELIEF REQUESTED

Should it stand, MCR 2.511(F) will continue to puzzle trial courts that hope to eradicate racial discrimination from the jury selection process, and serve at cross-purposes from *Batson* and its progeny, possibly even working to increase incidents of racial discrimination. The lack of remedy in MCR 2.511(F) is not only troubling by itself, but it also replaces Michigan's otherwise more clearly articulated approach to appellate review of *Batson* challenges.

Batson and its progeny provide a road map for navigating *voir dire* in a manner designed to reach a fair and representative jury untinged by the scourge of discrimination. This judicially reasoned case by case analysis should not be replaced with a "do not enter sign."

The Michigan Civil Rights Commission and Department of Civil Rights urge this Court repeal MCR 2.511(F) and either rule on the merits of this case based upon case law alone, or remand to the Court of Appeals with instructions that they do so.

Respectfully submitted,

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Defendant-Appellant.

Supreme Court Docket No 137111

PROOF OF SERVICE

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