STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 7, 1999
v	No. 172558 Kent Circuit Court
DIAPOLIS SMITH, Defendant-Appellant.	LC No. 92-060735-FC AFTER REMAND

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b: MSA 28.424(2), but it acquitted him of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and a second count of felony-firearm. The court sentenced defendant to life imprisonment on the murder conviction and to two years' imprisonment on the felony-firearm conviction to be served consecutively to a sentence defendant was then-serving due to his status as a parolee. The life sentence would then be served consecutively to the felony-firearm sentence.[1] Defendant appeals by right. We reverse and remand.

FACTS

Defendant's conviction arises out of a shooting death at So-So's Lounge in Grand Rapids. Shortly before 1 a.m., the decedent quarreled with another male bar patron identified by some witnesses as defendant and by other witnesses as someone else. This quarrel soon escalated into a physical confrontation with both parties participating. The decedent was struck with a glass or beer bottle, hit on the head with a pistol butt, and kicked. As many as five other males joined in the fight and struck the decedent; several witnesses identified defendant as one of the men who joined the fight. Although several witnesses testified that defendant displayed a handgun during this confrontation, struck the decedent with the butt of the gun and fired between two and six shots, other witnesses testified that

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

someone else fired the fatal shot. The fatal bullet pierced the decedent's chest, heart, pancreas and large intestine before exiting his back, causing him to bleed to death in three minutes. The bullet also pierced the thigh of So-So's bouncer who was attempting to break up the fight.

Although plaintiff voluntarily dismissed the charges following the preliminary examination, a one-person grand jury indicted defendant on open murder, assault with intent to do great bodily harm less than murder, and two counts of felony-firearm.

Defendant raises twenty-one issues on appeal. Our resolution of several issues renders moot the balance.

Here, in contrast to *People v Hubbard*, 217 Mich App 459, 463; 552 NW2d 493 (1996), defendant did not create an evidentiary record in the trial court regarding the workings of the Kent County jury selection process.[2] This Court, on its own motion, remanded the case to the Kent County Circuit Court for an evidentiary hearing to determine how jury venires were selected at the time of defendant's trial.

Defendant's jury selection began September 13, 1993. At the evidentiary hearings, the Kent County Circuit Court Administrator testified that the juror list for defendant's jury would have been compiled in May and June 1992 for jury trials conducted from October 1, 1992 through October 1, 1993. From October 1, 1993 through October 1, 1994, the year after defendant's jury was selected, the Circuit Court Administrator's Office made several changes in the jury selection process, including requesting from the Secretary of State the entire driver's license list and identification card list for Kent County. Previously, it had merely requested a certain number of names. Before October 1, 1993, jurors were first selected from the master juror list for 61st District Court, the City of Grand Rapids, and the other Kent County District Courts, 59, 62A, 62B, and 63, Divisions 1 and 2. Districts 61, 62A and 62B contained the largest concentration of minority residents. The remaining city and county residents on the master list were available for the circuit court jury pools.

After October 1, 1993, jurors were selected first for the Kent County Circuit Court's jury pools.[3] According to the Court Administrator, this change was made because

> [t]he belief was that the respective districts essentially swallowed up most of the minority jurors, and Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just—it represented certain portions of the county.

Furthermore, once citizens were called to serve on district court juries, they would be ineligible to serve as circuit court jurors for the following twelve months.

Notably, because there was no way of identifying a potential juror's race, the Court Administrator's Office took no steps to compensate for minority jurors who were statutorily excluded

from jury duty because they were under sentence for a felony conviction[4] or for those who, once they were summoned to jury duty for a given month, were excused. Neither the information that the Secretary of State provided nor the juror questionnaires asked for any information concerning race. Moreover, minorities often failed to return the juror questionnaires or sought and received an excuse from service for lack of transportation, child care, or some other hardship, thereby excluding themselves from the pool of potential jurors. After a City High School government class study of the Kent County juror selection process, the Court Administrator's Office took affirmative steps to mandate and improve the return of juror questionnaires and to compel attendance for jury duty. Again all of these changes were instituted for the jury year after defendant's jury was selected, i.e., October 1993 to October 1994.

Richard Hillary, the director of the Kent County Public Defender's Office, who has practiced for eighteen years exclusively in Kent County Circuit Court and who serves as co-chair of the Jury Minority Representation Committee of the Grand Rapids Bar Association, testified that he had conducted over 130 felony jury trials in circuit court. He stated that minority representation on juries in Kent County has been a "consistent problem" and that "98 percent of the time we had all-white juries:"

> Back prior to 1993, or even halfway through '93 and up to '94, I recall there being very few, if any, minorities, specifically black potential jurors at all. Traditionally, they would bring down approximately 150 jurors to serve for that month, sometimes as high as 175. During that time period, my recollection was that if you saw two or three blacks out of the 150 or 175, that would be about the maximum.[5]

Hillary also testified that after some months of study, the Jury Minority Representation Committee was concerned about qualified jurors being selected first for district court jury duty before changes were made effective October 1, 1993. According to Hillary:

> [I]n the city areas which the District Courts encompass, are your highest percentage of minorities, and the concern was that we were pulling out numbers for the District Court, the District Court would select first, and then not even return the unused ones to the Circuit Court panel. And we made a determination that we were losing minorities by choosing the District Court jurors first and not returning the unused ones to the . . . pool that the Circuit Court was taken from. [Emphasis added]

One statistician also testified regarding the underrepresentation of minorities on Kent County jury venires and provided several reasons that could explain this problem. Dr. Michael Stoline, a professor of mathematics and statistics at Western Michigan University, testified that according to statistical estimates and models for the time period April 1993 through October 1993, minorities were underrepresented in jury pools by 34.8 percent. Dr. Stoline believed that the underrepresentation of blacks in Kent County jury lists was a result of the tendency for more jurors to be selected from those Kent County census tracts that contained proportionately more white adults, and fewer jurors were selected from those census tracts that contain relatively more black adults.[6]

Kurt Metzger, program director for the Michigan Metropolitan Information Center (MIMIC) and a fifteen-year employee with the United States Census Bureau, testified that African-Americans were undercounted in the 1990 census at a rate of six to one in comparison with white Americans. Also undercounted are renters, unmarried household members, and people living in poverty, categories of which contain a greater ratio of blacks.[7]

The evidence presented on remand also revealed that pursuant to the 1990 census, black adults in Kent County ages 18 through 69 (i.e., those adults eligible to sit on juries) comprised 7.28% of the county's population. The percentage of black, non-hispanic adults in the City of Grand Rapids per the census equaled 18.1%, however.

I

First, defendant argues that the jury selection was unconstitutional because blacks were underrepresented in the jury venire, thereby violating his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community, and the court improperly refused his request for twelve additional peremptory challenges, per MCR 6.412, in order to attempt to seat blacks on the jury. Defendant properly preserved his Sixth Amendment claim for appeal by raising it in an oral motion before the jury was impaneled and sworn. *Hubbard, supra* at 464-465.

We review de novo questions regarding the alleged systematic exclusion of minorities from jury venires. *Id.* at 472. As this Court observed in *Hubbard, supra* at 473:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show "(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 automatically satisfies the first prong of the *Duren* test because blacks are considered a constitutionally cognizable group for a Sixth Amendment fair-cross-section analysis. *Hubbard, supra* at 473. For the second prong, defendant must show that a distinctive group is substantially underrepresented in the jury pool. *Id.* at 473-474. To satisfy the third prong, defendant must show that the underrepresentation of this distinctive group was due to systematic exclusion, i.e., "an exclusion resulting from some circumstance inherent in the particular jury selection process used." *Id.* at 481.

Based upon the record before us, we also find under the second prong of the *Duren* standard that the representation of blacks in venires from which juries were selected for Kent County Circuit Courts was at the time, i.e., before October 1, 1993, not fair and reasonable in relation to the number of such persons in the community. As in *Hubbard, supra* at 480-481, the evidence produced on

remand revealed that the juror allocation process used in Kent County before October 1, 1993, not random selection, caused the underrepresentation. One master list was compiled for all the courts in Kent County, both district and circuit. When defendant's jury was selected under the "old system," the Court Administrator's Office employed a system of first allocating the residents of the City of Grand Rapids to the juries needed for the 61st District Court.[8] There are six judges in the 61st District Court, and only City of Grand Rapids residents are permitted to sit on juries before each of these judges. The cities of Wyoming and Kentwood, where the next highest percentage of minorities reside, have two and one district court judges, respectively. Their residents are the only ones permitted to sit on their district court juries, also.

Under the "old system," once the jury list for the 61st District Court was filled, those City of Grand Rapids residents not allocated to district court juries remained on the master juror list and, consequently, were available for allocation to the circuit court juries. The same process applied to the other district courts. There are seven judges in Kent County's 17th Circuit Court. Moreover, merely by giving the 61st District Court priority over the 17th Circuit Court, the juror allocation process guaranteed that the number of city residents available for allocation to circuit court juries was significantly less than the city's representation in the county's general population. Accord *Hubbard, supra* at 480.

> Moreover, the largest population of African-Americans residing in the county reside in the City . . . . Consequently, by guaranteeing that the residents of the City . . . would be substantially underrepresented in the circuit court venires, the allocation system guaranteed that African-Americans residing in the City . . . likewise would be underrepresented. [*Hubbard, supra* at 480-481.]

Accordingly, the underrepresentation of minorities in the jury array available to defendant did not result from "benign" random selection but instead resulted from a defect inherent in the juror allocation process that Kent County used under the pre-October 1993 system. *Hubbard, supra* at 481. Thus, the undisputed anecdotal evidence regarding the 98% all-white juries during this time period and the statistical evidence that census tracts containing the greatest number of black adults were consistently first culled for 61st District Court and the other urban district courts substantiates the allegation that blacks were underrepresented in Kent County Circuit Court jury venires. Consequently, we conclude that defendant has satisfied the second prong of the *Duren* test.

With respect to the third prong of the *Duren* test, defendant has also established that the underrepresentation of the distinctive group was due in part to systematic exclusion, i.e., an exclusion resulting from some circumstance inherent in the particular jury selection process. *Hubbard, supra* at 481. As already noted, the evidentiary record establishes that the juror allocation system in place before October 1993 drained the largest concentration of African-Americans from the master jury list by selecting 61st District Court jury venires first. Although Dr. Stoline did not present a statistical analysis for juries seated before October 1993, we are constrained to conclude that African-Americans were significantly underrepresented on circuit court jury venires during the applicable time period.[9]

In conclusion, we find that the trial court abused its discretion in determining that defendant had not been deprived of his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. Defendant is therefore entitled to a new trial with a jury selected from a venire as now generated: properly comprised of all Kent County residents, including City of Grand Rapids residents, who are first allocated to the circuit court juries, not the district court juries within the county. *Hubbard, supra* at 482.

In addition, we adopt the same rule regarding the limited precedent that this case may establish as set forth in *Hubbard, supra* at 482-483:[10]

> Having concluded that the Kalamazoo County jury array procedure was systemically flawed between the mid-1980's and 1992, we further conclude that this decision shall have retrospective application only to the extent of direct appeals currently pending, or filed after the issuance date of this decision, where the jury array issue was specifically and seasonably raised in the trial court and properly preserved for appellate review. We further caution the bench and bar, however, that this decision should not be interpreted as warranting reversal per se of an otherwise valid conviction obtained in the Kalamazoo Circuit Court during the time when the flawed jury array procedure was in use. Each case must be decided on its own merits.

II

"Because of the dispositive nature of our resolution of the Sixth Amendment challenge, we limit our remaining discussion to those claims properly preserved and presented to this Court for resolution and necessary to guide the trial court and the parties on retrial." *Hubbard, supra* at 483.

Defendant further argues that the police improperly secured information from defendant's confidential medical records maintained at the prison where defendant had been incarcerated in the past. Because the police violated the physician-patient privilege, defendant's identification was tainted and should have been suppressed. We find defendant's arguments unpersuasive.

First, any attempt by defendant to employ a "fruits of the poisonous tree" analysis to the case at bar must fail. As our Supreme Court observed in *People v Kusowski*, 403 Mich 653, 671 n 9; 272 NW2d 503 (1978), the "fruit-of-the-poisonous-tree" exclusionary rule requires exclusion of the tainted "fruits" of police conduct that abridges constitutional rights, pursuant to *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963). Defendant points to no case law supporting the proposition that the alleged physician-patient privilege he asserts in this case is a "constitutional right." Rather, this privilege has its basis in common law and has been codified in MCL 600.2157; MSA 27A.2157.[11] Absent the violation of a constitutional right, however, the "fruit-of-the-poisonous-tree" exclusionary rule does not apply. Accord *People v Melotik*, 221 Mich App 190, 199; 561 NW2d 453 (1997) ("a *Miranda* violation does not necessarily involve the violation of the constitution, and, thus, the fruit of the poisonous tree doctrine enunciated in *Wong Sun* is not controlling where a *Miranda* violation is involved"). Therefore, we find no taint sufficiently pervasive to suppress defendant's identification and/or serve as a basis for reversing his conviction.

We also find that any alleged patient-physician privilege that defendant may have had with the doctors who treated him while incarcerated at the Chippewa Correctional Facility is not implicated in this case. As stated in MCL 600.2157; MSA 27A.2157 protects from disclosure any information that the physician has "acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician." The purpose of this privilege is to protect the doctor-patient relationship, to enable persons to secure medical aid without betrayal of confidences, and to encourage free discussion between doctors and their patients, including a full disclosure of symptoms and conditions. *Swickard v Wayne Medical Examiner*, 438 Mich 536, 560; 475 NW2d 304 (1991); *Domako v Rowe*, 438 Mich 347, 354; 475 NW2d 30 (1991). As a general proposition, to determine whether the physician-patient privilege applies, this Court looks, in part, to the reasons an individual has presented himself to the medical provider for examination or consultation and assesses whether those reasons demonstrate that the individual was there to receive medical advice or care under circumstances giving rise to a reasonable expectation that the examination or consultation is cloaked in a veil of confidentiality. *VanSickle v McHugh*, 171 Mich App 622, 626-627; 430 NW2d 799 (1988). Because the privilege belongs to the patient, neither the doctor nor a hospital can release a patient's medical records or information enclosed within the records without a patient's consent. *People v Wood*, 447 Mich 80, 89; 523 NW2d 477 (1994); *Popp v Crittenton Hospital*, 181 Mich App 662, 665; 449 NW2d 678 (1989); *Osborn v Fabatz*, 105 Mich App 450, 456; 306 NW2d 319 (1981).

In the case at bar, we find that the alleged privilege was not implicated because Chippewa Correctional Facility's prison hospital did not release to the detective information acquired in attending to defendant as a patient or information necessary to treat defendant, as the physician-patient statutory privilege requires.

Here, Grand Rapids Police Detective Thomas Lyzenga testified that he received a tip from a parolee that the person responsible for shooting the victim was known as "Baby D" and had been hospitalized at the Chippewa Correctional Facility for a broken hand in the spring of 1991 during the same time that the parolee was hospitalized for a dislocated ankle. Lyzenga testified that he called the prison hospital at Chippewa and asked the staff person to check the hospital's records to determine when the parolee had been treated for his dislocated ankle. The hospital confirmed the parolee's date of hospitalization, checked for another prisoner being treated at the same time for a broken hand, and informed Detective Lyzenga of defendant's name and date of birth. The parolee then selected defendant's mug shot from a group of photos. The next day, Detective Lyzenga secured an arrest warrant for defendant.

Detective Lyzenga testified that his sole purpose for contacting the prison hospital was to learn defendant's identity. Lyzenga received no details regarding defendant's treatment or medical condition because it "wasn't germane to my investigation." Lyzenga conceded that he secured defendant's name and date of birth from the hospital without a search warrant, court order, or defendant's authorization.[12]

Although we find no cases directly on point and defendant provides none for us, we believe that the detective neither sought nor received *medical* information regarding defendant *from* the prison hospital. Indeed, the parolee told Detective Lyzenga that "Baby D" broke his hand and was treated at

the prison on the same day the parolee was treated. Defendant's name did not constitute medical information necessary for defendant's treatment at the hospital. Accord *Porter v Michigan Osteopathic Hospital Ass'n, Inc*, 170 Mich App 619, 621-623; 428 NW2d 719 (1988) (the names and addresses of suspected patient-assailants who raped another patient of defendant hospital did not result in the disclosure of information necessary for patient treatment or diagnosis; thus, no violation of the physician-patient or psychiatrist-patient privilege was found).[13] Therefore, we find that even if a physician-patient privilege existed, which we do not decide on appeal, the information that Chippewa Correctional Facility gave to Detective Lyzenga did not implicate or violate any privilege because it was not necessary to enable the prison hospital or physician to prescribe treatment for defendant. MCL 600.2157; MSA 27A.2157; *Porter, supra*.

Accordingly, we find that the trial court did not clearly err in denying defendant's motion to suppress defendant's identification as we are not left with a definite and firm conviction that a mistake has been made. See *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

III

Finally, defendant argues that the one person grand jury exceeded its statutory authority when it subpoenaed defendant to appear in a lineup, and this unlawful seizure requires suppression of the fruits of the lineup. We disagree.

While we review a trial court's ruling on a motion to suppress evidence on legal grounds for clear error, *McElhaney, supra*, we review de novo defendant's claim that a grand juror exceeded the juror's statutory authority. See, e.g., *People v Weathersby*, 204 Mich App 98, 104-107; 514 NW2d 493 (1994).

In the case at bar, Kent Circuit Judge H. David Soet was appointed to act as a one person grand jury pursuant to MCL 767.3 *et seq.*; MSA 28.943 *et seq.* to investigate a series of criminal activities, including the shooting death of the victim at So-So's Lounge in Grand Rapids. During the course of his investigation, Grand Juror Soet issued a "Grand Jury Subpoena" to defendant stating in pertinent part:

> YOU ARE HEREBY COMMANDED AND SUMMONED TO APPEAR before the GRAND JURY FOR THE COUNTY OF KENT, at the Detective Bureau of the Grand Rapids Police Department, 333 Monroe NW, in the City of Grand Rapids, County of Kent, State of Michigan, to participate in a lineup at the Kent County Sheriff's Department, on Wednesday, the 9th day of December, 1992, at 12:30 O'clock/P.M. of that day in a certain Grand Jury proceeding now pending; if this subpoena is disobeyed, you will be deemed guilty of Contempt of Court.

The trial court denied defendant's motion to suppress the identifications that occurred at this lineup upon finding that the one man grand jury had the "inherent power to order a line-up." The court found that "[a] line-up can be of benefit to a person being investigated by a grand jury and could be used to

exonerate the person being investigated. Line-ups are a necessary part of the investigatory process of the grand juror."

The one person grand jury is a creation of statute and draws its extraordinary powers from statute.[14] MCL 767.3-MCL 767.6; MSA 28.943-MSA 28.946; *GTE North, Inc, v Public Service Comm'n*, 215 Mich App 137, 154; 544 NW2d 678 (1996). Thus, we look to the authority that the statute confers on the one person grand jury to determine whether Grand Juror Soet overstepped his boundaries. *Id.*

MCL 767.3; MSA 28.943 grants the one person grand juror certain extraordinary powers, including subpoena power to

> require such persons [able to give any material evidence respecting the crime or offense under investigation] to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order. . . . The proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony.

Any witness that neglects or refuses to appear in response to a summons or to answer any questions posed by the one person grand jury may be found in contempt of court. MCL 767.5; MSA 28.945.

Upon reviewing the lengthy statutory provisions found at MCL 767.3-MCL 767.6; MSA 28.943-MSA 28.946, it appears that the Legislature only made express reference to the one person grand jury's power to gather evidence in a testimonial form.[15] For example, MCL 767.3; MSA 28.943 and MCL 767.4-.4a; MSA 28.944-.944a also repeatedly employ the terms "testify" and "testimony" as they detail the grand juror's general responsibilities and authority. Although the statute does not define these terms, Black's Law Dictionary (6th ed), p 1478 defines "testify" as "[t]o bear witness; to give evidence as a witness; to make a solemn declaration, under oath or affirmation, in a judicial inquiry, for the purpose of establishing or proving some fact," and defines "testimony" as "[e]vidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources." According to the plain and ordinary meaning of these words, we believe that the one person grand jury statutes manifest the Legislature's intent to bestow upon the one person grand jury the power to gather oral evidence under oath or affirmation from individuals under subpoena to appear before the grand juror. This intent is similarly manifested in the statutory provisions that contain repeated references to answering questions posed in the grand juror's presence.

We must still determine, however, whether the Legislature intended to confer upon the grand juror the power to compel the production of physical evidence. Although the express mention of one thing in a statute implies the exclusion of other similar things, *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 6; 489 NW2d 115 (1992), we will not apply this rule of statutory construction if its application would defeat legislative intent, *Terzano v Wayne County*, 216 Mich App 522, 526-527; 549 NW2d 606 (1996).

The statutory language at issue neither empowers nor prohibits the one person grand jury to demand physical evidence from witnesses. We believe, nevertheless, that MCL 767.3, MCL 767.4 and MCL 767.4a contain language evidencing a Legislative intent that the powers conferred upon the one-person grand jury were meant to *augment* broad investigatory powers that the Legislature presumed to attend the office of the grand juror, the full extent and limitations upon which the Legislature left to the courts to determine. These statutory provisions contain terms and phraseology broad enough to constitute references to physical evidence.

For example, MCL 767.3; MSA 28.943 requires that the judge appointing the grand juror must have probable cause to suspect that "any persons may be able to give *any material evidence*" (emphasis added). MCL 767.4; MSA 28.944 uses the term "evidence" four times, and "evidence" is defined as "[t]estimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Black's Law Dictionary (6th ed), p 555. These statements acknowledge the fact that the grand juror has traditionally possessed investigatory powers to compel the production of testimonial as well as nontestimonial evidence. This acknowledgment is consistent with the long-recognized principle that a judge conducting a one-person grand jury proceeding is acting in a judicial capacity as an arm of the court, *In re Colacasides*, 379 Mich 69, 93; 150 NW2d 1 (1967); *In re Slattery*, 310 Mich 458, 466-467; 17 NW2d 251 (1945), and is invested with various powers of the court that impaneled the grand jury to compel production of physical evidence, LaFave & Israel, Criminal Procedure, Ch. 8, § 8.3, pp 353-354. It is also consistent with the broad and historically-grounded principle that, although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the public has the right to every man's evidence except for those persons protected by constitutional, common-law or statutory privilege. *United States v Dionisio*, 410 US 1, 9-10; 93 S Ct 764; 35 L Ed 2d 67 (1973); *Branzburg v Hayes*, 408 US 665, 688; 92 S Ct 2646; 33 L Ed 2d 626 (1972).

In *Dionisio, supra* at 2-5, the United States Supreme Court was asked to determine whether a grand jury could use its subpoena power to compel individuals to provide voice exemplars without violating the protections of the Fourth Amendment. The Court first observed that "[c]itizens generally are not constitutionally immune from grand jury subpoenas." *Id.* at 9, citing *Branzburg, supra* at 682. In addressing the claimed constitutional violation, the US Supreme Court began by observing that it had to conduct a two-part inquiry:

> [T]he obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels -- the "seizure" of the "person" necessary to bring him into contact with government agents, see *Davis v Mississippi*, 394 US 721; 89 S Ct 1394; 22 L Ed 2d 676 [1969], and the subsequent search for and seizure of the evidence. [*Id.* at 8.]

First, the Court determined that the inconvenience and burden of being forced to appear before a session of the grand jury or elsewhere for the purpose of providing a voice exemplar did not transform compliance with a grand jury subpoena into a "seizure" under the Fourth Amendment so long as the grand jury's investigative powers were not abused or used as an "instrument of oppression." *Id.* at 9-10. See also *United States v Mara*, 410 US 19, 21; 93 S Ct 774; 35 L Ed 2d 99 (1973).

"[A]lthough the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common law, or statutory privilege, is particularly applicable to grand jury proceedings." *Dionisio, supra* at 9, quoting *Branzburg, supra* at 688.

Regarding the second level of analysis, the Court concluded that a claim of unconstitutional seizure could not rest on the defendant's being forced to disclose physical characteristics such as the tone and manner of a person's voice.[16] *Dionisio, supra* at 6, 14-15. In *Mara, supra* at 21-22, the Supreme Court also held that the Fourth Amendment is not violated by a grand jury directive compelling the production of physical characteristics that are constantly exposed to the public, including handwriting. According to the Supreme Court in *Dionisio, supra* at 14:

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, *any more than he can reasonably expect that his face will be a mystery to the world.* [Emphasis added.]

"Thus whatever the differences between a lineup and the production of voice exemplars, it seems clear that one has no more reasonable expectation of privacy in one's face than in one's voice, and that being forced to stand in a lineup does not result in an unconstitutional 'seizure.'" *In re Melvin*, 550 F2d 674, 676 (CA 1, 1977).

In the case at bar, defendant was compelled, in accordance with the one person grand jury's subpoena, to participate in a lineup. In *In re Melvin, supra* at 676-677, the United States Court of Appeals for the First Circuit rejected the argument that a grand jury subpoena compelling appearance at a lineup was not sufficiently burdensome to constitute a seizure of the person, and any unconstitutional "seizure" could not rest on defendant's being required to disclose physical characteristics, including his face:

> The [*Dionisio*] Court's rationale in finding that the "seizure" of a "person" necessary to bring him before the grand jury for the purpose of furnishing a voice exemplar does not implicate the fourth amendment seems controlling in the present context. Appearance at a lineup could take longer and be more distasteful, but it is difficult to see that the procedure is so much more burdensome as to be distinguishable for that reason from the ordered identification procedures accepted in *Dionisio* and *Mara*.
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> * * *
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> The power to compel appearance at a lineup is, it is true, subject to possible oppressive misuse. A fingerprint or handwriting or voice exemplar need only be obtained once. There is no occasion, as with a lineup, to require the witness to return and give his evidence in other investigations. One can imagine the temptation to call certain

> individuals with known criminal proclivities to appear repeatedly in lineups, and the absence of a standard of probable cause or reasonable suspicion adds to the potential for abuse. But many investigatory powers of the grand jury are subject to abuse, and the remedy for this problem, if it should occur, is pointed out in *Dionisio*, where the Court states:
>
> "[T]he Constitution could not tolerate the transformation of the grand jury into an instrument of oppression[.] . . . 'Grand juries are subject to judicial control and subpoenas to motions to quash.'"
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> 410 US at 12 . . . quoting *Branzburg v Hayes*, 408 US [665, 708; 92 S Ct 2646; 33 L Ed 2d 626 (1972)]. The oppressive use of orders to appear in lineups can and should be dealt with by refusal of a court to enforce the order. Here there is no suggestion of oppressive use and no need to interfere with the grand jury's power to issue the order. We conclude, therefore, that subject to the district court's continuing power and duty to prevent misuse, the grand jury is empowered to require a suspect to appear at a lineup. [*In re Melvin, supra* at 676-677; citations omitted.]

In the case before us, we find that defendant's compelled participation in the lineup did not constitute a seizure of his person for purposes of the Fourth Amendment. In light of the fact that defendant had previously appeared in a lineup in this case before he was compelled to do so again by the grand jury subpoena, we believe that defendant's participation in the lineup was not so much more burdensome as to be distinguishable from the ordered identification procedures accepted in *Dionisio, supra*, and *Mara, supra*. Defendant's previous participation in a lineup significantly minimizes any stigma and humiliation that defendant may have experienced as a result of his compelled participation in the grand jury lineup. We also agree with *In re Melvin, supra*, that an individual has no more expectation of privacy in his face than in his voice because both are exposed to the public on a daily basis.

Thus, we hold that while the statutory provisions pertaining to the one person grand jury do not expressly confer the power to compel production of nontestimonial evidence, these statutes demonstrate an acknowledgment by the Legislature that the grand jury possesses traditional powers of investigation. The power to compel participation in a corporeal lineup falls within the grand jury's broad investigatory powers. And, consistent with United States Supreme Court and First Circuit precedent, we find that the one person grand jury's subpoena compelling defendant to participate in the lineup did not violate defendant's Fourth Amendment rights.

CONCLUSION

Accordingly, we reverse defendant's convictions and remand for a new trial with a jury that satisfies the Sixth Amendment guarantee of a representative cross-section of the community. We also affirm that neither the detective's discovery of defendant's identity from the Chippewa

Correctional Facility nor the one person grand jury's subpoena compelling defendant to appear in a lineup violated the Fourth Amendment. Thus, the evidence gathered as a result of these two events was properly admitted at the first trial.

We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ James C. Kingsley

[1] The trial court dismissed the supplemental information charging defendant with fourth habitual offender status, MCL 769.12; MSA 28.1084, after finding that plaintiff failed to give notice to defense counsel of the filing of a supplemental information against defendant.

[2] Although defendant requested that this Court remand the case to the trial court for evidentiary hearings on this issue, this Court denied the request.

[3] The Court Administrator admitted that none of the changes implemented in October 1993 would have affected defendant's jury selection.

[4] Counsel asked Mr. Metzger about the fact that the black population in Michigan is approximately 13% but that the number of blacks sentenced as felons is 55%. No one challenged these figures, and Metzger said that these numbers would likely exclude more potential black jurors.

[5] Mr. Hillary also stated that since many new changes were undertaken in 1994, "there has been a noticeable increase in the number of minorities that show up" for jury duty.

[6] Dr. Stoline reached his conclusions after studying the numbers of jurors selected from each census tract, the racial composition of each census tract based upon the 1990 census figures, and the term in which those jurors were selected to serve.

[7] Metzger testified that within the Kent County black community, 64% of families with children are single parent families, whereas only 19% of the white community is comprised of single parent families. Also, 59% of blacks are renters in Kent County compared with 27% of whites. The poverty rate among blacks in the county was 31.5% versus 6.7% among whites.

[8] The greater Kent County area contains the district courts for Districts 59, 61, 62A, 62B, and 63 Divisions 1 and 2. Apparently, jury pools for these courts were also taken first from the master list before the circuit court juries were filled, but the district courts for other than 61st District Court did not take residents from the City of Grand Rapids. Rather, residents within each particular district area were chosen to serve on these jury venires, i.e., Kentwood residents for 62B District Court and Wyoming residents for 62A District Court.

[9] While this Court is cognizant of the problems that local courts face with respect to recruiting qualified minority jurors, we also recognize that the problem of minority underrepresentation is not one easily

solved. Where more drastic measures are taken to ensure that the minority population in the community and on jury venires mirror each other, courts have struck down those efforts. For example, in *United States of America v Ovalle*, 136 F3d 1092, 1095-1098 (CA 6, 1998), the Sixth Circuit Court of Appeals struck down the jury selection program for the Eastern District of Michigan as violative of the Jury Selection and Service Act, 28 USC 1861 *et seq.* where one in five non-blacks was randomly selected to be removed from the jury wheel simply because of that person's race. Apparently, the random reduction of non-African-Americans was intended to ensure that the percentage of blacks on the qualified jury wheel closely approximated the percentage of blacks in the population. *Id.* The Hispanic defendants in *Ovalle* successfully argued, however, that qualified Hispanic jurors were being randomly removed from the jury pool because the jury selection process only recognized African Americans as a "cognizable group" within the community. *Id.* 1097, 1100. Thus, at least one defendant's conviction was reversed, and his case remanded for retrial with a properly selected jury. *Id.* at 1100.

[10] We recently faced a similar challenge to Kent County Circuit Court jury venires selected after October 1993 and decided, based on the merits of the case, that no Sixth Amendment violations occurred. See *People v Palmer (After Remand),* unpublished opinion per curiam of the Court of Appeals, issued January 29, 1999 (Docket No. 174649).

[11] MCL 600.2157; MSA 27A.2157 provides in relevant part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

[12] Although defendant argues that by releasing defendant's name, the prison hospital personnel in fact confirmed a diagnosis of a broken hand, we believe that the confirmation of such information that Detective Lyzenga already possessed from the parolee could not reasonably justify suppressing defendant's identity as a violation of any physician-patient privilege.

[13] See also *Miller Oral Surgery, Inc, v Dinello*, 611 A2d 232, 236 (Pa Super, 1992) (disclosure of names and addresses of patients being treated did not violate the physician-patient privilege); *Martinez v Pfizer Laboratories Div*, 216 Ill App 3d 360; 159 Ill Dec 642; 576 NW2d 311, 317 (Ill App 1 Dist, 1991) (disclosure of names would not violate physician-patient privilege unless the names sought were those of individuals who had particular injuries).

[14] The one person grand jury is not, however, a grand jury in the common law sense. See Bransdorfer, Power of Michigan One-Man Grand Jury to Punish Contempt, 54 Mich L R 414 (1956).

[15] MCL 767.3; MSA 28.943 provides that "such judge shall require persons to attend before him as witnesses and answer such questions . . . ." MCL 767.5; MSA 28.945 indicates that a witness neglecting or refusing "to answer questions" is guilty of contempt. MCL 767.6; MSA 28.946 provides

that no witness shall be required to "answer any questions . . . when the answers might tend to incriminate him," and that any grant of immunity for a witness shall be placed in a written order and supplied to the witness before he or she "shall answer such questions."

[16] No Fifth Amendment violation of the privilege against compulsory incrimination is found where the subpoena required the defendant to give a handwriting exemplar because it, like the voice or body itself, is an identifying physical characteristic outside the Fifth Amendment's protections. *Dionisio, supra* at 6-7.