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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 44184-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CITY OF CAMAS

Respondent

vs.

VLADIMIR V. GRUNTKOVSKIY

Petitioner

---

OPENING BRIEF OF PETITIONER

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**I. INTRODUCTION**

Vladimir V. Gruntkovskiy (Petitioner) seeks reversal of his

conviction by jury verdict in Clark County District Court, for the crime of Driving While Under the Influence of Intoxicating Liquor. He claims that he was denied his right to trial before an impartial local jury drawn from a fair cross section of the community served by the court. Petitioner raised the issues herein for the first time on RALJ appellate review.

## **II. ASSIGNMENT OF ERROR AND ISSUES**

### **Assignment of Error**

Number 1: The trial court judge, Judge Darvin J. Zimmerman, erred by allowing the case to be tried before a jury which was not impartial, because it was selected from a panel which violated Petitioner's statutory and constitutional rights to a local jury representing a fair cross section of the community of Camas, Washington.

### **Issues Relating to Assignments of Error**

Number 1: In a criminal case filed in Municipal Court, may the court seat a jury selected from a panel of jurors summoned entirely from communities other than the area served by the Municipal Court?

Number 2: Does a Municipal Court's failure to provide a jury panel drawn from the area served by the Municipal Court deny a criminal defendant the right to a jury drawn from a fair cross section of the community?

Number 3: Is the denial of the right to a jury drawn from a fair cross section of the community the violation of constitutional right, which may be raised for the first time on appeal?

### **III. STATEMENT OF THE CASE**

A detailed recitation of the facts of the case is unnecessary for purposes of this discretionary review. Discretionary review has not been granted on issues relating to evidentiary issues, nor sufficiency of the evidence.

On October 13, 2011, Petitioner was charged by a citation issued by a police officer, CP 3, P. 1 of 67, alleging "Driving Under the Influence" a violation of a Camas municipal ordinance defined by the Camas Municipal Code, section 10.04.010. Rather than setting out each crime or traffic infraction in full, the Camas Municipal Code adopts by reference the language of the

Washington Model Traffic Ordinance, as set out in WAC 308-330. The Model Traffic Ordinance, in turn, adopts the language of RCW 46.61.502, Driving While under the Influence.

Defendant was also charged with and convicted of Hit and Run, property damage only, RCW 46.52.010, however that conviction was overturned by the Superior Court, and is not a subject of this appeal. The Respondent, City of Camas, has not cross-appealed that decision.

The charging document bears an illegible signature, but was presumably issued by a Camas Police Department officer. It correctly lists the "Town/City of Camas" as Plaintiff, and properly invokes the jurisdiction of the "Municipal Court of Camas." The Defendant pled not guilty to the charges, and was brought to jury trial in Clark County District Court, at the Clark County Courthouse, presided over by Clark District Court Judge Darvin J. Zimmerman on March 12, 2012. Judge Zimmerman at all times identified himself as sitting in the capacity of "Department 3" of the Clark County District Court.

The jury panel summoned by the Superior Court Administrator consisted entirely of residents of cities and unincorporated areas other than the City of Camas. Declaration of Silvia Reyes, CP 401, Exhibit 11.

Guilty verdicts were returned by the jury. CP 3, p. 60, 61 and 62 of 67.

At trial, and at the subsequent sentencing, Judge Zimmerman acted in the capacity of District Court judge, and not as a Municipal Court judge. All the pleadings in the case, other than the correct initial citation, invoked the jurisdiction of the Clark County District Court, (waiver of speedy trial, CP 3, p. 35; cover sheet for instructions, CP 3, p. 37 of 67; verdict forms, CP 60, 61, and 62 of 67; memorandum of disposition, RP 3, p. 64 of 67; advice of right to appeal, CP 3, p. 63 of 67; judgment and sentence, CP 3, 65, 66, and 67 of 67.)

Although the Court of Appeals has denied discretionary review on the issue of the trial court's jurisdiction, the trial court's confusion as to the capacity in which it sat explains why the court

erred so egregiously in permitting a non-municipal jury panel and jury to adjudicate the case; the trial court did not realize it should have been sitting as a municipal, rather than district court.

A jury panel was summoned to hear the case, drawn by the Clark County Superior Court Administrator. No jurors who sat in the jury panel, nor in the jury itself resided in the City of Camas, or even the broader postal zip code area designated as Camas. None of the summoned jurors had Camas addresses. Declaration of Silvia Reyes, CP 401, Exhibit 11.

The jury composition issue was submitted to the Superior Court in the RALJ appeal. The Superior Court affirmed the DUI conviction. The Superior Court held that a total failure to impanel any jurors from the “area served by the court,” RCW 2.36.050, and a total failure to make any effort to do so, is not a material departure from the statute so requiring, so long as the jury panel actually summoned was chosen at random from the rest of the county.

On Petitioner’s motion for discretionary review, the Honorable

Aurora R. Bearnse, Commissioner of the Washington Court of Appeals, Division II, granted discretionary review on two issues as follows:

“This court grants discretionary review of Gruntkovskiy’s claim that the trial court erred in selecting his jury and the related issue whether he can challenge the jury’s composition for the first time on appeal.”

Petitioner filed a motion seeking modification of the Commissioner’s ruling, so as to grant review of the issue relating to the subject matter jurisdiction of a County District Court to adjudicate matters which are properly adjudicated only by a Municipal Court judge sitting as such. That motion was denied by a panel of the Court of Appeals on June 18, 2013.

#### **IV. ARGUMENT**

##### **1. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER ONE**

The Clark County District Court denied Petitioner his right to a jury drawn from a fair cross section of the community, and therefore, his right to an impartial jury. This denial consisted of the violation of a statutory right, and a constitutional right.

A. Issues number 1 and 2: Violation of the Statutory Right

In a Municipal Court prosecution for violation of a municipal ordinance, a Defendant is entitled to have a jury which represents a fair cross section of the community in which the offense was committed.

This right is embodied in the statutory mandate of the Washington legislature, as follows:

**“RCW 2.36.050 Juries in courts of limited jurisdiction.**

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court.” (Emphasis added.)

In a case brought properly under the jurisdiction of the county District Court (which this one was not), it is appropriate to select the jury from the entire county, as the court has county-wide jurisdiction. See RCW 3.66.060 and Const. Art. I, Section 22, *infra*.

As seen in the statute set forth above, however, in Municipal

Court criminal matters the legislature has recognized a different formulation of the concept of “jury of one’s peers.” In City of Tukwila v. Garrett, 165 Wn. 2d 152, 196 P.3d 681 (2008), the jury administrator attempted to select a jury panel from the confines of the City of Tukwila, by summoning jurors residing in three specific zip code areas, which the United States Postal Service mailing address designation identified as “Tukwila.” In fact, the zip code designations and postal mailing designations of “Tukwila” exceeded the geographical boundaries of the city. They were, however, “roughly coextensive” with the city limits. The Court held, in accordance with State v. Tingdale 117 Wn.2d 595, 817 P.2d 850 (1991), that even if no jurors are residents of the municipality (the “area served by the court”) but the selection process is in substantial compliance with the statute, despite the error, the defendant must show prejudice. The court stated however, that if there has been a material departure from the statutes, prejudice will be presumed. See also State v. Marsh, 106 Wn. App. 801, 809, 24 P.3d 112 (2001).

A material departure from the statutory directive occurs when there is no approximation of the area served by the court. See State v. Twyman, 143 Wn.2d 115, 17 P.3d 1184 (2001). That is exactly the problem which occurred here. The jury panel from which the trial jury was selected was not representative of the area served by the court at all, nor even a rough approximation thereof, but rather from the entire county, and bizarrely, excluded the municipality and even the zip code designation of Camas. CP 401, Exhibit 11. There was no substantial compliance, as in Garrett, but rather a wholesale disregard, or material departure from the requirements of the statute. All of Clark County is not served by the Municipal Court and ordinances of the City of Camas, and unlike in Garrett, *supra*, none of the members of the twenty-one person jury panel and the six person jury itself had any residential connection to Camas (either in true geographical terms, or even in postal designation terms), or to the Camas zip code, 98607.

While the statute in question uses the terminology “may be selected” as opposed to “shall be selected,” none of the cases interpreting the statute indicate that the process is discretionary,

or that the statute is merely advisory. The requirement of random selection under the statute is also couched in terms of “may” instead of “shall”, and the express holding of Garrett, *supra*, is that a material departure from the statutory dictate will be presumptively prejudicial.

It is abundantly clear that the Clark County District Court (and the Superior Court Administrator’s office) treated this matter as a Clark County District Court case, rather than a Camas Municipal Court case, see RCW 3.50.020, and therefore ignored the Municipal Court local jury requirement of RCW 2.36.050.

In the case at bar, there was a material departure from the statutory requirement of local jurors. Unlike in City of Tukwila v. Garrett, *supra*, in this case there was no effort whatsoever to impanel jurors from the correct vicinage, and therefore, the decision of the Superior Court is in direct conflict with the Washington Supreme Court’s rule stated in Garrett, which presumes prejudice to the a defendant if there is a material departure from the required statutory procedure.

B. Issue number 3: Violation of the Constitutional Right

The right to a local jury of one's peers is a constitutional right, the denial of which may be raised for the first time on appeal. The violation of a constitutional right which is presumptively prejudicial mandates reversal.

[A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed. But it will only be presumed when there has been a material departure from the statute. Roche Fruit Co. v. Northern Pac. Ry., 18 Wn.2d 484, at 487, 139 P. (2d) 714.

The violation of Petitioner's right to be judged by a jury of his peers is tantamount to having no jury trial at all. Violation of the right to a jury trial is error of constitutional magnitude:

"The State suggests that Hochhalter lost his Sixth Amendment right to jury trial because he did not raise it before the trial court. The issue is of constitutional magnitude, however, so it may be raised for the first time on appeal. State v. Hochhalter 131 Wn. App. 506, at 522, 128 P.3d 104 (2006).

In a criminal case, the right to a jury trial is found in the United States Constitution, Article 3, Section 2:

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

And in the Sixth Amendment to the United States Constitution:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...”

The analogous right is found in the Washington State Constitution, in Article I, section 21:

**TRIAL BY JURY.** The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto...”

And in Article I, section 22:

**“RIGHTS OF THE ACCUSED.** In criminal prosecutions the accused shall have the right to ... have a speedy

public trial by an impartial jury of the county in which the offense is charged to have been committed...”

The Sixth Amendment “vicinage clause” of the federal constitution, cited above, has not been made applicable to state prosecutions under the doctrine of selective incorporation under the Fourteenth Amendment Due Process Clause. However, the concept of an impartial jury carries with it the requirement that a defendant’s jury be a “jury of one’s peers,” and that the jury “be a body truly representative of the community.” Smith v. Texas, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed 84, 86 (1940), Glasser v. United States, 315 U.S. 60, 85, 62 S.Ct. 457, 471, 86 L.Ed. 680, 707 (1942).

For this reason, it is a violation of a criminal defendant’s constitutional right to trial by an impartial jury, to allow a jury selection process which excludes a fair cross section of the community in which the trial is held.

It is apparent from this record that the Clark County Superior Court Administrator, who also administers the jury summons process for District court and the Municipal court cases, grossly deviated from the required procedure under RCW 2.36.050, and

thereby violated the Petitioner's constitutional right to a local jury panel. The exclusion of Camas jurors in this case may have been intentional, or it may have simply been *de facto*, but there is no difference in the result, and should be no difference in the analysis, because the Administrator had full and complete control over the vicinage for jury selection. See Clerk's Paper 401, exhibit 11, the Declaration of Silvia Reyes. She declares that in summoning jurors for Municipal Court cases for the nearby City of Battle Ground, Washington:

"The Superior Court Administrator's office provides jury panels for cases heard in Clark County Superior Court and District Court, including those cases filed in Camas Municipal court. We also administer the selection of jury panels for jury trials held by the Municipal Court of Battle Ground. Jury panels for cases involving the City of Camas are summoned from a list of eligible jurors covering the entire county. There is a mechanism in place for selecting the panel to be summoned for Battle Ground cases, from the City of Battle Ground, however we employ no such procedure on City of Camas cases so as to limit the jury panel to residents of the City of Camas."

By failing to employ the readily available mechanism for the summoning of local jurors, as is done for Battle Ground cases, the result in this trial was the systematic exclusion of all Camas

residents from the jury panel, and the jury in this case. No claim can be made that the exclusion of Camas jurors was a mere statistical anomaly, or inadvertent, when the Court Administrator has complete control over selection of the jurors from the master list to whom jury summons are sent (as evidenced by the Battle Ground procedure set out above) and knows of the process, and failed to follow it. If the Administrator can limit the jury panel to Battle Ground residents in Battle Ground cases, then certainly the Administrator can do the same for Camas cases, and simply chose not to. This choice, by the public officer entrusted with the duty to summons a fair cross section jury panel amounted to an unconstitutional systematic exclusion of Camas residents from this Camas Municipal Court case. Note the different process in Garrett, supra, wherein the Court Administrator summoned only jurors with an address and zip code of "Tukwila." The administrator in Garrett had a local jury summons process, and followed it. Here, the administrator had a local jury summons process and failed to follow it. Exclusion of local jurors from a jury panel, even if such practice may be justified by convenience and cost-savings, violates the

constitutional right to an impartial jury, encompassing the right to a fair cross section of the community. Alvarado v. State of Alaska, 486 P.2d 891 (1971.)

In the Alvarado case, the State of Alaska, in order to save money, implemented a procedure whereby criminal trials for a certain district were held in Anchorage, and jurors were selected from within a fifteen mile radius of the Anchorage vicinity, regardless of where the crime occurred. Following conviction on a charge of Rape, defendant Alvarado appealed on the basis that his state Constitutional right to an impartial jury from the community in which the crime was committed, was violated.

The Alaska Supreme Court agreed, interpreting Article I, Section 11 of the Alaska State Constitution (which is quite similar to the like provision in the Washington State Constitution quoted above):

“In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve...”

While noting that the urban Anchorage area and the more remote village-oriented areas of the state of Alaska differ in religious, financial, cultural, political, educational and even racial composition, the Alaska Supreme focused instead on the vicinage issue:

“...(T)he traditional starting point for determining the community from which jurors are to be selected is the scene of the alleged offense. Hence, we feel that in determining whether the source from which a given jury is selected represents a fair cross section of the community, we must adhere to a notion of community which at least encompasses the location of the alleged offense. It is the community within which the crime was committed that the jury must represent.

Because the focus of the concept of the community is on the place where the offense has allegedly been committed, any narrowing of the area from which the prospective jurors are drawn will have no effect on the impartiality of panels, so long as the narrow area of selection continues to include the scene of the crime, and so long as it remains sufficiently broad to allow for the empanelment of a jury which is not prejudiced by knowledge of the events of the specific crime charged....

The necessity for selection of juries from a source which truly represents a fair cross section of the community cannot be overemphasized. The jury is an essential institution in our democracy, and serves multifaceted purposes...As a protection or barrier against the exercise of arbitrary power, the people of this state, in adopting our constitution guaranteed to petitioners the right to be tried by an impartial

jury...As an institution, the jury offers our citizens the opportunity to participate in the workings of our government, and serves to legitimize our system of justice in the eyes of both the public and the accused...When the impartiality of jurors is neglected, "(t)he injury is not limited to the defendant.---there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." 486 P.2d 902-904.

It is axiomatic that a jury cannot represent a fair cross section of the community, when the entire community is excluded from the process. As pointed out above by the Alaska court, the exclusion of jurors from the community where the crime is committed violates not only the defendant's Constitutional right to an impartial jury, but also that community's right to participate in, and to monitor an extremely important governmental function.

On a related issue, it is undeniable that the arbitrary exclusion of certain segments of the community from participation in jury duty is a violation of the defendant's Constitutional rights, and also the jurors' constitutional rights, and can be raised for the first time on appeal, even if the defendant is not a member of the excluded class. State v. Beliz, 104Wn.App. 206, 15 P.3d 683 (2001), (exclusion of women from the jury.)

The exact definition of "impartial" jury may be subjective and elusive, however, it is not uncommon for the express parameters of constitutional rights to be vague, yet given enforceable definition by the legislature and the courts. Violation of the constitutional right to an impartial jury has been found in several Montana cases, wherein the right to demand compliance with statutory jury selection provisions is seen as a "legislative amplification" or clarification of the constitutional right. These cases were listed in State v. LaMere, 2000 MT 45, 2 P.3d 204 (2000). In that case, jurors had been called on the telephone to report for jury duty, instead of receiving written summonses in the mail or by personal service from the Sheriff, as required by statute. The Court stated:

"The State concedes at the outset that our recent decision in State v. Robbins, 292 Mont. 23, 971 P.2d 359, (1998) "is controlling" with regard to whether the telephone-dependent method of summoning prospective jurors substantially complies with Montana law.

LaMere, like the defendant in Robbins, relies on a long line of Montana cases holding that a failure to substantially comply with the statutory procedures governing jury selection amounts to a denial of a defendant's fundamental constitutional right to trial by a fair and impartial jury, and is therefore *per se* reversible without any proof of individual prejudice. See generally Solberg v. County of Yellowstone, 203 Mont. 79, 659 P.2d

290 (1983); Dvorak v. Huntley Project Irrigation Dist. 196 Mont. 167, 639 P.2d 62; (1981), State v. Deeds 130 Mont. 503, 305 P.2d 321 (1957); State v. Porter 125 Mont. 503, 242 P.2d 984 (1952); State v. Hay 120 Mont. 573, 194 P.2d 232 (1948); State v. Diedtman, 58 Mont. 13, 190 P. 117(1920); State v. Miller, 49 Mont. 360, 141 P. 860 (1914); State v. Groom, 49 Mont. 354, 141 P. 858 (1914); State v. Landry, 29 Mont. 218, 74 P. 418 (1903); State v. Tighe 27 Mont. 327, 71 P. 3(1903); Kermon v. Gilmer, 4 Mont. 433, 2 P. 21 (1882).”

State v. LaMere 2 P.3d at 209.

## V. CONCLUSION

The Honorable Court of Appeals should hold that Petitioner in this case was denied his right to a fair jury trial, or any trial at all, because the Clark County District Court and the Clark County Superior Court Administrator in charge of summoning jurors for Camas Municipal court cases failed to comply with the local jury requirement of RCW 2.36.050.

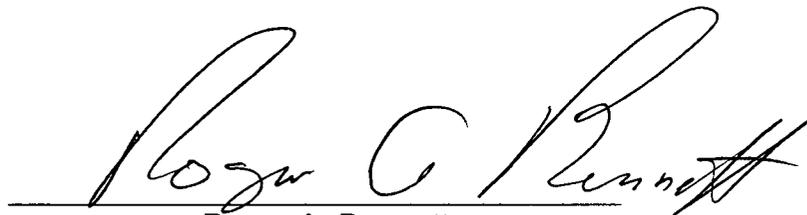
Further the Court should hold that the failure to do so, in a case where no Camas jurors were in the group of potential jurors present to hear the case, deprived Petitioner of his constitutional right to be tried by a jury drawn from a fair cross section of the community in which the crime occurred.

The Court of Appeals should reverse the Superior Court’s

decision on RALJ appeal, and remand to the Clark County Superior Court for entry of a cost bill, with subsequent remand to the Camas Municipal Court for a new trial.

Dated the 19 day of June, 2013

Respectfully submitted

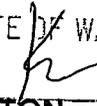
A handwritten signature in black ink, reading "Roger A. Bennett". The signature is written in a cursive style with a horizontal line underneath it.

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PROOF OF SERVICE OF  
OPENING BRIEF OF PETITIONER

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on the date set out below, I caused a true and accurate copy of the OPENING BRIEF OF PETITIONER to be served on opposing counsel listed below, by United States mail directed to his place of business.

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DATED the 19 day of June, 2013

  
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