No. _____

IN THE

Supreme Court of the United States

Tony Leon Henderson,
Petitioner

v.

State of Arkansas,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a discretionary, race-conscious selection process for the venire called in a particular criminal trial violate the 6th and 14th Amendments to the Constitution of the United States?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Arkansas Court of Appeals Division II were Petitioner Tony L. Henderson and Respondent State of Arkansas.

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PETITION FOR A WRIT OF CERTIORARI

Tony L. Henderson petitions for a writ of certiorari to review the judgment of the Arkansas Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals is reported at 575 S.W.3d 617. App.4. The order of the Arkansas Court of Appeals denying rehearing is unreported. App. 2. The order of the Supreme Court of Arkansas denying review is unreported. App.3. The judgment of the Garland County Circuit Court denying petitioner's motion for a new trial is unreported.

JURISDICTION

Mr. Henderson's timely petition for review by the Supreme Court of Arkansas was denied on September 19, 2019. App. 2. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

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,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

For over 80 years, this Court has recognized "that 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. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). *Taylor* struck down a Louisiana statute that required women to opt in to the jury pool. *Duren v. Missouri*, 439 U.S. 357 (1979), held that an opt out provision extended solely to women violated the Sixth Amendment.

This case asks whether a criminal defendant's Sixth and Fourteenth Amendment rights to a representative jury are violated when the state admits discretionary power over venire panels and knowingly calls panels that exclude all African-Americans.

I. The Trial Court

An all-white jury convicted the Petitioner, Tony L. Henderson, an African-American in the Garland County, Arkansas circuit court. At *voir dire*, Petitioner's counsel objected to the composition of the venire. The venire comprised forty-three persons: all white. Arkansas knew of the racial makeup of the three panels composing the venire. Because of this makeup, Petitioner moved to strike the venire.

The trial court heard argument in chambers before denying the motion and empaneling the jury. App. 7 (R. 227–230). In a colloquy, Mr. Henderson's counsel objected to the venire panels' composition, stating, "[w]e believe that this panel is

not a reflection of Mr. Henderson's peers and we would ask for it to be stricken as a panel a whole. *Id.* at 7 (R. 228). Again at the close of the prosecution's case in chief, Mr. Henderson's counsel renewed the objection to the jury, asserting that the venire denied the Petitioner's Sixth Amendment right to a jury of his peers. *Id.* at 10 (R. 539). At this time, Ms. Winton, the Garland County Jury Manager and Deputy Clerk, testified as to her practices in forming the venire. *Id.* at 10–16 (R. 539–543). Ms. Winton explained that the jury pool of Garland County comprises twelve venire panels per term. *Id.* at 13 (R. 541). She also testified that the discrete panels she called for Mr. Henderson's trial had previously been called twice. *Id.* at 11 (R. 540). In both instances, not one African-American was present. *Henderson v. Arkansas*, 575 S.W.3d 617, 619 (2019).

The clerk went on to admit that she considered race when deciding how to call the panels. *Id.* at 13–14 (R. 542). She also stated that she intentionally tried to call panels with more African-Americans for trials involving African-American defendants. *Id.* at 14 (R. 542). The trial court denied the renewed motion to strike.

Mr. Henderson went to trial and the jury convicted him of aggravated burglary and second-degree attempted murder. The trial court sentenced Mr. Henderson to 68 years and 40 years respectively.

II. Direct Appeal

Mr. Henderson renewed his argument on direct appeal that the make-up of the venire violated his Sixth and Fourteenth Amendment rights. In a published opinion, the Arkansas Court of Appeals Division II rejected Mr. Henderson's

contention. *Henderson*, 575 S.W.3d at 617. That court applied Arkansas decisions based on this Court's holding in *Duren v. Missouri*, *infra*. *See Henderson*, 575 S.W.3d at 620 (citing *Thomas v. State*, 257 S.W.3d 92 (2007), which adopted the *Duren* factors). The court acknowledged that Henderson proved that African-Americans were a distinctive group. *Id.*; *see also Duren*, 439 U.S. at 364 (requiring as part of a prima facie showing of a fair-cross-section violation "that the group alleged to be excluded is a 'distinctive' group in the community").

The court held, however, that Mr. Henderson failed to offer proof of the remaining *Duren* factors – "namely that representation of this group was not fair and reasonable in relation" to the population or "that this underrepresentation was due to a systematic exclusion of the group in the jury-selection process." *Henderson*, 575 S.W.3d at 620. Thus, the court affirmed the trial court's denial of the motion to strike the venire panels. *Id.*

Mr. Henderson then obtained other counsel who filed a petition for rehearing. Mr. Henderson disagreed with the appeals court's conclusion that he failed to provide population evidence to bolster his claim that the venire panels underrepresented African-Americans. Mr. Henderson noted that Ms. Winton's testimony revealed that the relevant jury pool "had quite a few" African-Americans. Mr. Henderson also provided census data showing that African-Americans comprised 8.7% of the Garland County, Arkansas population. Further data revealed that the non-white population of Garland county was 17.9%.

Mr. Henderson also directed the court's attention to evidence indicating systematic exclusion. He pointed to Ms. Winton's unbridled discretion. Henderson argued that such discretion necessarily removed any notion of randomness. Mr. Henderson added to his argument with Ms. Winton's testimony that she knew that the venire she selected for this trial did not have any African-Americans. The Court of Appeals Division II denied Mr. Henderson's petition for rehearing. App. 2.

Finally, Mr. Henderson petitioned The Supreme Court of Arkansas for review. The Supreme Court of Arkansas denied the petition on June 5, 2019. The mandate issued on September 19, 2019. App. 3.

REASONS FOR GRANTING THE PETITION

This case presents a question of constitutional magnitude: Can a criminal defendant invoke constitutional protections to challenge a venire that bears no racial relation to the criminal defendant. The short answer is yes, but the court below found otherwise. *Duren v. Missouri*, 439 U.S. 357 (1979), and *Taylor v. Louisiana*, 419 U.S. 522 (1975), guarantee to a criminal defendant a jury that fairly represents the community. In Mr. Henderson's case, the state defaulted on this guarantee. This Court has previously held that a criminal defendant is entitled to a jury drawn from a fair-cross-section of the community under the Sixth Amendment, and to a jury from which members of his own racial or ethnic group have not been systematically excluded under the Fourteenth Amendment.

This Court has recognized two primary circumstances in which these rights may be vindicated. In *Duren*, this Court affirmed the principle that a state's jury selection methods, including exemptions and disqualifications, must be calculated

to produce a fair cross section of the community. 439 U.S. at 363-64. A defendant may make out a prima facie case of a fair-cross-section violation under *Duren* by showing "(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." *Id.* at 364 (internal quotation marks altered). Because *Duren* claims involve the selection of prospective jurors from the community, defendants generally must show that the underrepresentation is present throughout the jury pool.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that a criminal defendant may also challenge the composition of the petit jury itself when racially motivated peremptory strikes are used to strike jurors of a distinctive group to which the defendant belongs. In *Batson*, the trial court had held that the right to fair representation on a jury applied only to selection of the venire, not the petit jury itself. *Id.* at 83. The Court rejected that argument. *Id.* at 84. The Court went on to say that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case.*" *Id* at 95 (emphasis original).

The Court of Appeals misinterpreted *Duren* as applying only to the selection of the jury pool. Accordingly, the Court of Appeals required Mr. Henderson to show underrepresentation of African-Americans across multiple venires. However, while

the facts in *Duren* happened to relate to the jury pool selection, both precedent and common sense dictate that the fair cross section requirement is applicable throughout the process of selecting a jury.

While this Court has never confronted a case alleging discrimination in between the jury pool formation of *Duren* and the *voir dire* considered in *Batson*, it has frequently indicated that such discrimination would be prohibited by the Constitution. The Court stated in *Batson* that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*." 476 U.S. at 95. Furthermore, the Court has said that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975). Finally, no logical distinction exists to support a regime that allows a criminal defendant to challenge an unrepresentative jury that results from systematic exclusion during the jury pool selection process (under *Duren*), and during actual jury selection (under *Batson*), but not during selection of panels for the venire.

Analyzing a claim of discriminatory venire panel selection presents no great challenge. The three-part *Duren* test may be applied with only minor modifications to account for the difference in context. A criminal defendant should thus be permitted to show that (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in the panels

selected for his trial 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 panel selection process.

This case easily passes that test. The State has never contended at any proceeding below that African-Americans are not a distinctive group in the community, and in any event this Court has recognized that they are. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879). African-Americans were also substantially underrepresented in the venire at Mr. Henderson's trial. The U.S. Census Bureau estimated that population of Garland County was 8.7% African-American in 2018. Under the standard deviation analysis approved by the Court in *Casteneda v. Partida*, 430 U.S. 482 (1977), the actual number of African-Americans in the venire was about 3.4 standard deviations from what would be expected. *See id.* at 496 n.17 ("if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect.").

Furthermore, African-Americans were systematically excluded from Mr. Henderson's venire. Systematic exclusion means that the disparity in representation is "inherent in the particular jury-selection process utilized.' *Duren* 439 U.S. at 366. "A selection procedure that is susceptible of abuse or is not racially neutral," when combined with statistical disparity, shows systematic exclusion. *Casteneda*, 430 U.S. at 494.

In this case, the Ms. Winton was granted discretion in forming specific venires. Ms. Winton had seen the panels in question before and knew their racial makeup. Ms. Winton testified that she first called each panel in order, but after that she "mixed them up," calling them according to her discretion.

Ms. Winton admitted that she used race-conscious criteria in selecting jury panels. Ms. Winton stated that when she knew the defendant was African-American she would intentionally use panels with more African-American jurors. She stated that she did not do so in this case because she did not know that Mr. Henderson was African-American.

Ms. Winton's practice of ensuring that heavily African-American panels were sent to certain trials systematically excluded African-Americans from other venires. Because Ms. Winton ensured that each panel was called an equal number of times, panels with more African-Americans were essentially taken out of the pool every time she intentionally selected them. If Ms. Winton had used a random, or otherwise race-neutral, method to select panels then Mr. Henderson's venire would have been drawn from a fair cross section of the community. Because Ms. Winton did not, Mr. Henderson was denied his right to an impartial jury

This case presents the Court with the opportunity to clarify how the Constitution's fair cross-section requirement applies after the initial selection of the jury pool. Rigid application of the *Duren* test to exclude such claims has left criminal defendants like Mr. Henderson without recourse when systematic

discrimination occurs at unexpected times in the jury selection process. The Court should intervene to ensure that all stages of the process are fair.

CONCLUSION

For the Foregoing reasons, Mr. Henderson respectfully requests that this Court issue a writ of certiorari to review the judgment of the Arkansas Court of Appeals.

Respectfully submitted,
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