No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH HOWELL,

Petitioner,

v.

SUPERINTENDENT ROCKVIEW SCI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a court deny a fair cross-section challenge to the jury pool simply because the "absolute disparity" is less than 10%, thereby sanctioning the complete exclusion from jury service of minorities that comprise less than 10% of the population?

2. Was the court of appeals' decision that Petitioner failed to show "systematic exclusion" because his six-month study of the venire was too short contrary to *Duren v. Missouri*, 439 U.S. 357 (1979), in which this Court found an eight-month study to be sufficient? And was it improper for the court of appeals to accord a "presumption of legitimacy" to the challenged jury selection system because the government had undertaken efforts at venire reform?

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS – (continued)

PAGE

APPENDIX

TABLE OF CONTENTS – (continued)

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

TABLE OF AUTHORITIES – (continued)

PAGE(S)

TABLE OF AUTHORITIES – (continued)

PAGE(S)

FEDERAL STATUTES

STATE CASES

STATE STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Howell respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Third Circuit's affirmance of the denial of Mr. Howell's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The opinion of the divided court of appeals affirming the denial of habeas corpus relief (App.[1] 1-21) is reported at *Howell v. Superintendent Rockview SCI*, 939 F.3d 260 (3d Cir. 2019). The denial of Mr. Howell's petition for rehearing en banc (App. 22-23) is unreported. The order of the district court (App. 24) adopting the Report and Recommendation (R&R) of the magistrate judge (App. 25-37) are both unreported and are available at 2017 WL 782879 and 2016 WL 8377536, respectively. The state court determination denying the fair cross-section claim (App. 38-55) is unreported and was decided without published opinion. *See Commonwealth v. Howell*, 881 A.2d 884 (Pa. Super. Ct. June 29, 2005).

JURISDICTION

The court of appeals issued its order denying Mr. Howell's petition for panel rehearing and/or rehearing en banc on November 26, 2019. On February 21, 2020, Justice Alito granted Petitioner's application to extend the time to file a petition for a writ of certiorari to April 24, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] "App." refers to Petitioner's Appendix that is filed concurrently herewith.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> 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 . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

A. Introduction

Petitioner Joseph Howell is black.[2] He was arrested and charged in Allegheny County with the 2002 murder of Michael Balint, who was white. In the two years preceding Mr. Howell's trial, multiple media outlets reported that Allegheny County juries were not diverse and that black people in particular were not adequately represented in the jury pool. App. 56-65. An empirical study conducted by a defense expert revealed that, although Blacks comprised 10.7% of the population of Allegheny County, they only comprised 4.87% of the jury pool. App. 74, 80. Although the pool of jurors was apparently neutrally drawn – from voter registration lists and motor vehicle records, App. 105 – Blacks were consistently underrepresented. The absolute frequency of Blacks in the jury pools of all races was 5.83% lower than was statistically expected (the "absolute disparity").[3] And relative to the Black jury-age population, Black potential jurors were underrepresented by 54.49% (the "comparative disparity").[4]

Mr. Howell filed a pretrial Motion to Ensure Representative Venire, relying on this Court's precedents in *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Duren v.*

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[2] The terms "Black" and "African American" are used interchangeably in this petition.

[3] "Absolute disparity" is determined by subtracting the percentage of a distinctive group in the jury pool from the percentage of the group in the local, jury-eligible population. *Berghuis v. Smith*, 559 U.S. 314, 323 (2010) ("*Smith*").

[4] "Comparative disparity" is determined by dividing the absolute disparity by the distinctive group's representation in the jury-age population. *Id.*

Missouri, 439 U.S. 357 (1979). App. 162. Under *Duren*, to prove a fair cross-section violation, a movant 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.

439 U.S. at 364. The trial court held a hearing at which it received unrebutted evidence of underrepresentation. App. 66-160. The trial court denied the motion[5] and Mr. Howell was tried and convicted by a jury that was 100% white.

Following state court review, Mr. Howell sought federal habeas corpus relief under 28 U.S.C. § 2254. The district court denied relief. On appeal, reviewing the denial of Mr. Howell's fair cross-section claim *de novo*,[6] a fractured panel of the court of appeals affirmed. The panel majority held that "an absolute disparity below 10% generally will not reflect unfair and unreasonable representation," App. 8, and the concurrence marked "this threshold a smidge higher" at 11.5%, App. 10. That position, if allowed to stand, sanctions the exclusion of distinctive groups at rates of up to 10% (or, for the concurrence, up to 11.5%), *even if that were to result in the complete exclusion of a minority group*. As the dissenting Circuit Judge remarked, "It approaches absurdity to argue that the entire black population of Allegheny

[5] The Pittsburgh Tribune-Review reported on the denial of the motion. *See* App. 56 ("*Plea to add blacks to jury pool rejected*"); *see also* App. 57-58 (reporting on underrepresentation of Blacks on Pittsburgh juries in other cases during the same time period).

[6] The Pennsylvania courts denied Mr. Howell's fair cross-section claim in the first instance. The court of appeals unanimously held that the state court applied a rule that was contrary to and an unreasonable application of this Court's precedents. App. 5.

County could be excluded from serving on venires without violating the Constitution simply because a single metric—absolute disparity—is not high enough, without reference to any other factors." App. 16.[7]

This issue was previously before the Court ten years ago in *Berghuis v. Smith*, 559 U.S. 314 (2010). In that case, the State asked the Court to adopt the absolute disparity standard as the exclusive measure of jury venire underrepresentation, and to require that a 10% threshold be met to make out a prima facie showing of a fair cross-section violation. *Id.* at 330 n.4. In its brief, the State did not deny the implications of the rule it advocated: "'the Sixth Amendment offers no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold.'" *Id.* (quoting Brief for Respondent 35). The Court found that it "need not reach that issue." *Id.*

The time has come for the Court to clarify whether the Sixth Amendment permits the categorical exclusion of minority groups that constitute up to 10% of the population. The courts of appeals are split as to whether an absolute disparity "threshold" is constitutionally permissible. Like the Third Circuit below, the First, Fifth, Ninth, and Eleventh Circuits have approved such a rule. The Second, Sixth, Seventh, and Eighth Circuits reject it. It is especially important for the Court to grant certiorari to resolve this question because it is likely to repeat itself, it

[7] Mr. Howell refers to the opinion of Circuit Judge Felipe Restrepo concurring in part and dissenting in part as a dissent.

involves the fundamental constitutional right to trial by jury, and it implicates public confidence in the jury-trial system. The Court should grant certiorari.

The court of appeals also found that Mr. Howell failed to satisfy prong three of *Duren* – that the underrepresentation must be due to the group's systematic exclusion in the jury-selection process. Although Mr. Howell offered unrebutted statistical evidence showing six months of underrepresentation, which is akin to the eight-month study offered by the defendant in *Duren*, the court of appeals found that Mr. Howell was required to present evidence of at least two years of underrepresentation, contrary to *Duren*. The court of appeals also created a novel "presumption of legitimacy" for underrepresentative jury venires where a government has undertaken some effort to correct the problem, and found that that presumption negated Mr. Howell's showing of systematic exclusion. The presumption has no basis in this Court's precedents and belies common sense. The Court should either grant certiorari to address these errors that imperil the fundamental jury trial right, or grant, vacate, and remand for reconsidering of Mr. Howell's appeal in light of *Duren.*

B. The Trial Court Proceedings

The trial court held a pretrial hearing on Mr. Howell's Motion to Ensure Representative Venire on January 20, 2004. App. 167-76. Counsel for Mr. Howell challenged "the manner in which the juries are selected in Allegheny County" and the "particular jury panel" that had been pulled for Mr. Howell's trial. App. 171. At the hearing, the Court adopted the record from the cases of *Commonwealth v. Sean Bush* and *Commonwealth v. Laurence Bush*, two other cases where the same trial

judge had taken expert testimony in support of a fair cross-section challenge to the Allegheny County jury pool. App. 170, App. 199-201.[8]

In the incorporated evidence from the *Bush* cases, Dr. John F. Karns, a Ph.D. sociologist, testified as an expert in statistics and demography. App. 71-72. Dr. Karns testified about the collection of data of the daily venire from May 12, 2001, through October 11, 2001, regarding the "individuals who appeared for the venire. . . . [T]hey were asked questions on their age, their gender and their race." App. 72. In that process, about 4,500 jurors were counted. App. 73. Additional data was collected over a ten-day period in December 2002, and the Allegheny County Court Administration's office conducted its own study. *Id.* Based on the data, Dr. Karns determined that Blacks constituted 4.87% of the jury pool. App. 80. Based on data from the year 2000 census, Dr. Karns testified that Blacks constituted 10.7% of the adult population of Allegheny County. App. 74.[9]

Dr. Karns concluded that "whites are overrepresented in the county." App. 79. Asked whether this is a situation of the exclusion of "a significant number of people for a significant amount of time," Dr. Karns replied, "It is." App. 94. In a

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[8] The incorporated evidence from the case of *Commonwealth v. Sean Bush*, CP-02-CR-0013175-2002 (Allegheny Cty. Ct. C.P.), and *Commonwealth v. Laurence Harlem Bush*, CP-02-CR-0014185-2002 (Allegheny Cty. Ct. C.P.), comprised a transcript of testimony and the Allegheny County Juror Questionnaire. App. 66-160 (transcript), App. 202-04 (questionnaire).

[9] Dr. Karns also testified to his methodology and ranges of error. *See, e.g.*, App. 75-78, 80-81. Dr. Karns did not attempt to attribute causation. App. 90. He acknowledged that his study focused on the actual venire pool that reported for jury duty, not the jurors who were summoned but did not respond. App. 89. He made clear that he was not concerned with "intentionality" in the underrepresentation of African Americans. App. 90.

passage of testimony about whether the underrepresentation was "systematic," the prosecutor asked Dr. Karns whether it was "something in the system [that] causes an underrepresentation, not that the people who operate the system cause that to happen . . . ?" App. 98. Dr. Karns responded, "The process as it exists produces the results that were described. The government is responsible for that process." App. 99. The prosecution did not call an expert or offer evidence to rebut Dr. Karns's conclusions.

The Commonwealth offered the testimony of Mr. Regan Nerone from court administration to address how jury pools were drawn and what efforts had been undertaken to address the underrepresentative number of minorities in the jury pools. App. 103-41. Because Mr. Howell's claim is a Sixth Amendment fair cross-section claim (where intentionality is not required), not an Equal Protection claim (where intentionality must be shown), *see Duren*, 439 U.S. at 368 n.26, Mr. Nerone's testimony is largely inapposite. His testimony establishes, however, that even the court recognized that Blacks were underrepresented in its jury pools.

Jury selection had begun before the trial court ruled on the motion. The first venire panel of thirty-five people had only two black potential jurors, both of whom were excused for hardship; eleven white jurors were empaneled from that panel. App. 168, 179. In support of the pending fair-cross section motion, counsel argued:

> I object to our panel.
>
> I think it's a disgrace that you have an African-American kid who's charged with killing a white person who sits with his all-white jury.
>
> I think he's at a disadvantage because he doesn't see any peers in the courtroom. He's got a white lawyer. He's got a white prosecutor. He's

> got a white judge. And he's got a parade of white people in to prosecute him for killing a white guy. He's got to feel like he's in Alabama in the 1930s.

App. 172. The second jury panel (from which the twelfth juror and two alternates were selected) of twenty-five people was entirely white. *Id.*

The trial court denied Mr. Howell's motion and he was tried by an all-white jury. App. 174, 181. Mr. Howell, who has always maintained his innocence, testified in his own defense. *See* App. 45. He was convicted of second-degree murder and sentenced to life in prison without the possibility of parole. App. 39, 41.

C. The Direct Appeal and PCRA Proceedings

Mr. Howell filed a timely appeal to the Pennsylvania Superior Court. Among the issues raised on direct appeal was the fair cross-section claim. A three-judge panel of the Pennsylvania Superior Court unanimously affirmed the convictions and sentences in an unpublished memorandum. App. 38-55. As to Mr. Howell's fair cross-section claim, the state court cited *Duren* as the proper legal standard for fair cross-section claims, but then added that, under state law, "[p]roof is required of an actual discriminatory practice in the jury selection process, not merely underrepresentation of one particular group." App. 49 (quoting *Commonwealth v. Estes*, 851 A.2d 933, 935 (Pa. Super. Ct. 2004)). The court stated that Mr. Howell "fails to demonstrate an actual discriminatory practice in the jury selection

process," specifically "discriminatory intent," and held that his "claim fails." App. 49-50 (internal citation omitted).[10]

Mr. Howell's petition for allowance of appeal to the Pennsylvania Supreme Court was denied. *Commonwealth v. Howell*, 889 A.2d 1214 (Pa. Dec. 5, 2005) (table). Mr. Howell then filed a timely petition under Pennsylvania's Post Conviction Relief Act ("PCRA") that is not relevant to this petition.

D. Federal District Court Decision

Following the completion of state court proceedings, Mr. Howell filed a timely *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The case was referred to a magistrate judge. After briefing, the magistrate judge issued an R&R assuming without deciding "that the Superior Court erred in requiring [Mr. Howell] to show discriminatory intent." App. 32. The magistrate judge nonetheless recommended denying relief under a *de novo* standard of review, finding that Mr. Howell could not establish a Sixth Amendment violation under the second prong of *Duren*, 439 U.S. 357.[11] App. 34.

The district court adopted the R&R, adding that "petitioner's argument and core statistical evidence fail to account for the difference between statistical underrepresentation that is troubling because it fails to reflect the county

[10] The Third Circuit unanimously held that the state court improperly "requir[ed] proof of this additional element" of "discriminatory purpose," which was "contrary to and an unreasonable application of" *Duren*. App. 5.

[11] Neither the magistrate judge nor the district court addressed prongs one or three of *Duren*.

population as a whole and statistical underrepresentation that runs afoul of the Sixth Amendment." App. 24.

E. The Court of Appeals Decision

The panel unanimously agreed that the state court determination was contrary to and an unreasonable application of *Duren*, and therefore reviewed Mr. Howell's Sixth Amendment claim *de novo*. App. 5, 10, 11-12. This Court should likewise review Petitioner's fair cross-section challenge *de novo*.

The majority concluded that Mr. Howell's claim failed on both the second and third prongs of the *Duren* test. The majority found that the evidence Mr. Howell presented – that Blacks constituted 10.7% of the population but only 4.87% of venires – did not establish constitutionally impermissible underrepresentation. App. 7-8. The majority first considered the absolute disparity in this case (5.83%) and concluded that it "is lower than or similar to absolute disparities in other cases where courts have found no constitutional violation, and in fact, numerous courts have noted that an absolute disparity below 10% generally will not reflect unfair and unreasonable representation." App. 8. It also noted the comparative disparity (54.49%) and compared it with two cases from other circuits where constitutional violations were not found. App. 8.

As to prong three – whether the underrepresentation was due to systematic exclusion – the majority noted that the jury selection system in Allegheny County was facially neutral. App. 8-9. The majority stated that, to satisfy prong three, Mr. Howell would have to "demonstrate ongoing discrimination over a sufficient period of time." App. 8. It noted that the Third Circuit had found a two-year study

insufficient in a prior equal protection and fair cross-section case, *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992), so Mr. Howell's must also be insufficient. App. 9 (citing *Ramseur*, 983 F.2d at 1235). Noting, however, that the Supreme Court had found an eight-month study sufficiently long in *Duren*, the panel distinguished Mr. Howell's case from *Duren* because in *Duren* the cause of the problem was "readily identifiable and undisputed," whereas here it was not. App. 9. The majority noted that Allegheny County had engaged in "laudable remedial actions" to remedy its underrepresentation problems and that those actions "warrant 'some presumption of [the jury system's] legitimacy.'" App. 9 (quoting *Ramseur*, 983 F.2d at 1235).

The concurrence expressed the view that any case where the absolute disparity fell beneath a "threshold" of 11.5% could not *ipso facto* violate the Sixth Amendment fair cross-section guarantee. App. 10. As to systematic exclusion, the concurrence emphasized that Allegheny County's jury selection system was neutral and remarked that it "could imperil juror-selection methods across many jurisdictions" if the Court were to find that such a facially-neutral system could ever violate the Sixth Amendment. App. 11.

The dissent would have held that Mr. Howell established a prima facie case of a violation of his Sixth Amendment fair cross-section right. Regarding prong two of *Duren*, the dissent opined that the majority approach:

> deprives the Sixth Amendment of any power to provide a remedy in cases where a distinctive group that constitutes less than 10% (or, for the concurrence, 11.5%) of the population is systematically excluded from serving on venires, even if the *entire* group is *completely* excluded from venire service. Such an interpretation simply cannot be an accurate statement of the law.

App. 12. The dissent remarked that the majority opinion "approaches absurdity" because, under its rationale, "the entire black population of Allegheny County could be excluded from serving on venires without violating the Constitution." App. 16.

The dissent would have held that Mr. Howell satisfied the third prong of *Duren*, systematic exclusion, because Mr. Howell produced evidence of the underrepresentation of Blacks in the venires over a sufficient period of time. App. 18-20. Regarding what the majority called "laudable remedial actions," the dissent countered, "contrary to the majority's assertion, the evidence in this case that Allegheny County took steps to increase racial diversity on venires tends to suggest that the underrepresentation of black persons *was* systematic, not the opposite." App. 19. The dissent would have found a prima facie case established and would have remanded to the district court to determine in the first instance whether the Commonwealth could justify the infringement by showing that the attainment of a fair cross section was incompatible with a significant state interest. App. 20 (citing *Duren*, 439 U.S. at 368).

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari to Resolve a Split Among the Circuits Regarding Whether a Court May Deny a Fair Cross-Section Challenge Simply Because the "Absolute Disparity" is Less than 10%.

"[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor*, 419 U.S. at 527. "To exclude racial groups from jury service was said to be 'at war with our basic concepts of a democratic society and representative government.'" *Id.* (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)). The systematic exclusion of a distinctive group "during

the jury-selection process, resulting in jury pools not 'reasonably representative' of the community, denies a criminal defendant his right, under the Sixth and Fourteenth Amendments, to a petit jury selected from a fair cross section of the community." *Duren*, 439 U.S. at 358-59.

The second prong of this Court's prima facie test for fair cross-section claims requires a defendant to show "that the representation of [a distinctive] group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." *Duren*, 439 U.S. at 364. To make that showing, defendants present statistical evidence that compares a distinctive group's percentage in the local jury-eligible population with that group's percentage in the jury pool over a period of time. When analyzing underrepresentation in the jury venire, this Court has "noted three methods employed or identified in lower federal court decisions: absolute disparity, comparative disparity, and standard deviation." *Smith*, 559 U.S. at 329.

"'Absolute disparity' is determined by subtracting the percentage of [the distinctive group] in the jury pool . . . from the percentage of [the group] in the local, jury-eligible population." *Id.* at 323. For example, in a population of 1,000 people, if there were 300 Blacks eligible for jury service, the group's population percentage would be 30%. If 100 people were summoned for jury duty and only ten of them were Black, Blacks would be present in the venire at a rate of 10%. To calculate the absolute disparity, one subtracts the venire percentage (10%) from the population percentage (30%) as follows: 30% – 10% = 20% absolute disparity. The absolute

disparity quantifies the degree of underrepresentation of a distinctive group *relative to the population as a whole*. Thus, if an absolute disparity is 20%, then in a jury pool of 100 people taken from the population as a whole, there would be twenty fewer Black people than statistically expected.

"'Comparative disparity' is determined by dividing the absolute disparity . . . by the group's representation in the jury-eligible population." *Id.* Using the preceding example, one divides the absolute disparity (20%) by the group's population percentage (30%) as follows: 20% ÷ 30% = 66.6% comparative disparity. The comparative disparity measures the degree of underrepresentation of a group *in relation to all of the members of that group*. Thus, if a comparative disparity is 66.6%, a Black person is 66.6% less likely to be in the jury pool than he or she would be if the venire mirrored the community.[12]

In *Smith*, discussing the various measures of underrepresentation on venires, this Court remarked that "[e]ach test is imperfect," particularly when "members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service." *Smith*, 559 U.S. at 329. The Court noted that "neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." *Id.* And as noted *supra*, the Court declined to reach the question presented today—whether the Sixth Amendment fair

[12] As this Court noted in *Smith*, "to our knowledge, '[n]o court . . . has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." *Id.* at 329 (quoting *United States v. Rioux*, 97 F.3d 648, 655 (2nd Cir. 1996)). Because standard deviation was only tangentially involved in Petitioner's case and because it is not central to the questions he presents in this petition, that analysis is not explored here.

cross-section requirement tolerates the partial or complete exclusion of distinctive groups so long as the absolute disparity measure of underrepresentation is less than 10%. Six courts of appeals would hold that the exclusion of a distinctive group up to 10% *ipso facto* does not violate the Sixth Amendment, while four courts of appeals would hold that exclusion as low as 1% may be sufficient, considering other factors.[13]

A. The First, Third, Fifth, Ninth, Tenth, and Eleventh Circuits Endorse the View that an Absolute Disparity Under 10% Indicates Fair and Reasonable Representation, Defeating Any Fair Cross-Section Challenge.

Six of the courts of appeals have either endorsed or explicitly adopted a rule that a fair cross-section claim fails if the absolute disparity is less than a 10%. The apparently arbitrary 10% threshold is a relic of *Swain v. Alabama*, 380 U.S. 202 (1965), which this Court overruled over thirty years ago in *Batson v. Kentucky*, 476 U.S. 79 (1986). As the dissenting circuit judge contended in Mr. Howell's case, the rule in these jurisdictions "deprives the Sixth Amendment of any power to provide a remedy . . . even if the *entire* group is *completely* excluded from venire service." App. 12.

First Circuit: In *United States v. Hafen*, 726 F.2d 21 (1st Cir. 1984), the defendant offered evidence that Blacks were underrepresented by an absolute disparity of 2.02% out of a population that was only 3.73%. *Id.* at 23. The court affirmed the denial of the fair cross-section challenge, holding that a "number of

[13] The Fourth Circuit and the District of Columbia Circuit do not appear to have joined either side of the circuit split.

circuits have found an absolute disparity of this size or even larger insufficient to show underrepresentation." *Id.* Hafen argued that the court should consider the comparative disparity (54.2%) because, if it did not, "the number of blacks in the Eastern Division is so small that the absolute disparity figure would be below 4 per cent even if every black in the region were excluded from jury service." *Id.* at 23-24. The First Circuit refused to consider the comparative disparity, noting its precedents had "not adopt[ed] the comparative disparity analysis." *Id.* at 24 n.3.

In *United States v. Pion*, 25 F.3d 18 (1st Cir. 1994), the First Circuit reiterated the same approach where Hispanic jurors were underrepresented at an absolute disparity of 3.4% out of a population of 4.2%. *Id.* at 23. Citing *Hafen* for the proposition that the comparative disparity analysis was inapplicable, the court characterized the absolute disparity of 3.4% as "relatively small Hispanic underrepresentation" even though the comparative disparity would have been nearly 81%. *Id.* at 24. The *Pion* court found that the defendant's absolute disparity failed to meet prong two of the *Duren* standard. *Id.*

Third Circuit (Petitioner's Case): Third Circuit precedent prior to Petitioner's case advocated consideration of both the absolute and comparative disparities because "figures from both methods inform the degree of underrepresentation." *United States v. Weaver*, 267 F.3d 231, 243 (3d Cir. 2001). But even in *Weaver* and an earlier precedent, *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992), the Third Circuit used language suggesting an absolute disparity "threshold." *Weaver*, 267 F.3d at 243 (describing the proffered absolute disparities as "well below those that

have previously been found insufficient to establish unfair and unreasonable representation"); *Ramseur*, 983 F.2d at 1232 (characterizing absolute disparity of 14.1% "to be of borderline significance" in comparison with other cases).

In Mr. Howell's case, the majority stated that the absolute disparity of 5.83% was "lower than or similar to absolute disparities in other cases where courts have found no constitutional violation, and in fact, numerous courts have noted that an absolute disparity below 10% generally will not reflect unfair and unreasonable representation." App. 8. By comparing absolute disparities across cases, the court of appeals oversimplified the analysis, shunted the comparative disparity to the side, and established an impermissible "threshold." *Id.* Indeed, the concurring circuit judge stated that the absolute disparity of 5.83% was "easily within the range typically found constitutionally permissible," noting that "[m]any courts have adopted a threshold of 10% absolute disparity," and arguing that the Third Circuit has adopted a "threshold" that is even higher, at 11.5%. App. 10.

Fifth Circuit: The Fifth Circuit has a long tradition of considering *only* the absolute disparity, and of rejecting any challenge if it is less than 10%. *See United States v. Butler*, 611 F.2d 1066, 1070 (5th Cir. 1980) ("None of the disparities urged by the appellants are as great as the 10% [d]isparity found not to present a case of purposeful discrimination in *Swain v. Alabama*, 380 U.S. 202 (1965)."); *United States v. Maskeny*, 609 F.2d 183 (5th Cir. 1980) (same, and rejecting request to consider comparative disparity); *United States v. Rodriguez*, 776 F.2d 1509, 1511 (5th Cir. 1985) ("[T]this circuit has consistently found that a prima facie case of

underrepresentation has not been made where the absolute disparity between these percentages does not exceed ten percent."); *United States v. Yanez*, 136 F.3d 1329 (5th Cir. 1998) (unpublished) (holding that "in cases where there is no other evidence other than statistics to show a violation of the fair-cross-section requirement, absolute disparity is an appropriate yardstick by which to measure the severity of minority's under representation," and rejecting challenge where absolute disparity was 9.62%); *see also Kennedy v. Cain*, 624 F. App'x 886, 891 (5th Cir. 2015) (reversing grant of fair cross-section claim under AEDPA where "the absolute disparities ranged from 13.4% to 17.41%").

Ninth Circuit: In *United States v. Kleifgen*, 557 F.2d 1293 (9th Cir. 1977), the Ninth Circuit rejected a statutory and constitutional fair cross-section claim to the composition of the grand jury. Though Kleifgen's evidence of underrepresentation of Blacks on the grand jury included comparative and absolute disparity,[14] the Ninth Circuit rejected comparative disparity and noted that it had "adopted a test for substantiality . . . [based] on the absolute numerical composition" of the grand jury. *Kleifgen*, 557 F.2d at 1297; *see also United States v. Suttiswad*, 696 F.2d 645, 648-49 (9th Cir. 1982) (rejecting application for expert funding in support of fair cross-section claim where absolute disparity "in absolute terms [wa]s 2.8% for Blacks,

[14] The Ninth Circuit noted that Kleifgen had "employ[ed] the same technique as did appellant in [*United States v.*] *Potter*," 552 F.2d 901, 906 (9th Cir. 1977). *Kleifgen*, 557 F.2d at 1296-97. The defendant in Potter had offered a comparative disparity of underrepresentation of Blacks in the grand jury venire of 31.9%, which the Ninth Circuit rejected in favor of an absolute approach. *Potter*, 552 F.2d at 906 (noting absolute disparity of 2.7% where Blacks constituted 8.5% of the population and rejecting comparative disparity stating, "While 2.7 is 32% of 8.5, it is still only 2.7% of 100.").

7.7% for Spanish, and 4.7% for Asians," holding that no "discrepancy exceeds allowable limits set out by this Circuit in *Kleifgen*" and that all "may be considered insubstantial"); *Thomas v. Borg*, 159 F.3d 1147, 1151 (9th Cir. 1998) (rejecting fair cross-section challenge where absolute disparity was 5%, noting that "[w]e have previously rejected claims of substantial underrepresentation where the absolute disparity was close to or even greater than this").

Tenth Circuit: The Tenth Circuit has considered both the absolute and comparative disparities, but in practice it has denied fair cross-section claims if the absolute disparity does not meet the 10% threshold. In *United States v. Shinault*, 147 F.3d 1266 (10th Cir. 1998), the Tenth Circuit noted an absolute disparity of 3% was "far less than the percentages that the Supreme Court has relied upon in its cases finding Sixth Amendment violations," and that "Courts generally are reluctant to find that the second element of a prima facie Sixth Amendment case has been satisfied when the absolute disparities are less than 10%." *Id.* at 1273; *see also United States v. Gault*, 141 F.3d 1399, 1403 (10th Cir. 1998) (considering absolute disparities ranging from 0.28% to 7% and finding that "[t]hese percentages are much lower than those upon which courts have relied to find constitutional violations"); *United States v. Yazzie*, 660 F.2d 422, 426-27 (10th Cir. 1981); *United States v. Test*, 550 F.2d 577, 587 (10th Cir. 1976) (finding absolute disparity of 4% insufficient for prima facie case because "this figure is well below the 10–16% range of disparity approved in *Swain*").

Eleventh Circuit: The Eleventh Circuit adopted the Fifth Circuit's approach to fair cross-section claims: it analyzes them using exclusively the absolute disparity and has refused to incorporate the comparative disparity into its analysis. In *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984), the court rejected a fair cross-section claim based on an absolute disparity of 7.6%. *Id.* at 649. The court noted that, "[t]o determine whether the representation was fair and reasonable, we are only concerned with the 'absolute disparity' produced by the selection process." *Id.* The court cited the *Maskeny* and *Butler* decisions from the Fifth Circuit to conclude that "the disparity [here] . . . was well within the absolute disparity limits set by this circuit." *Id.*; *see also United States v. Pritt*, 458 F. App'x 795, 798 (11th Cir. 2012) (rejecting defendant's argument that court should "reassess the requirement that a criminal defendant demonstrate an absolute disparity of more than 10 percent" for a prima facie showing of a fair cross-section violation).

Summary: The First, Third, Fifth, Ninth, Tenth, and Eleventh Circuits will thus reject any fair cross-section challenge unless a defendant can show an absolute disparity that exceeds a 10% threshold.[15] The courts use slightly different language: some say that an absolute disparity under 10% will never suffice (*Rodriguez* (5th Cir.), *Test* (10th Cir.), *Pepe* (11th Cir.)), some say an absolute disparity below 10% will "generally" not suffice (*Howell* (3d Cir.)), and others simply say that absolute disparities not above 10% are "insufficient" or fall within "allowable limits" (*Hafen* (1st Cir.), *Suttiswad* (9th Cir.)). But the result is always the same: the substantial

[15] These will be referred to as the "10% threshold circuits."

or even complete exclusion from the jury pool of a distinctive group that constitutes less than 10% of the population has no remedy in these jurisdictions.

B. The Second, Sixth, Seventh, and Eighth Circuits Find the Absolute Disparity Not Determinative of Fair and Reasonable Representation, Even If It Is Less than 10%.

Four courts of appeals have held that a fair cross-section violation may be established even when the absolute disparity is less than 10%. Those courts have recognized the same troubling implications discussed in the dissent in Mr. Howell's case: that requiring at least a 10% absolute disparity would mean that *any* distinctive group that measures less than 10% of the population could be entirely excluded from the jury pool without violating the Sixth Amendment's fair cross-section guarantee. Those courts have repudiated the intractable use of the absolute disparity and have instead relied on the comparative disparity and other measures to gain a more complete picture of the underrepresentation before deciding a fair cross-section claim. Their approach is at odds with the approach taken by the 10% threshold circuits.

Second Circuit: The Second Circuit historically followed an "absolute numbers" approach that focuses not on a percentage of underrepresentation, but instead on the actual number of potential jurors of a discrete group that would have been present in a jury panel (not a petit jury) had the jury panel mirrored the community. *See United States v. Jenkins*, 496 F.2d 57, 65-66 (2nd Cir. 1974). The Second Circuit questioned its traditional approach in *United States v. Biaggi*, 909 F.2d 662 (2nd Cir. 1990), noting:

> The risk of using th[e absolute numbers] approach is that it may too readily tolerate a selection system in which the seemingly innocuous absence of small numbers of a minority from an average array creates an unacceptable probability that the minority members of the jury ultimately selected will be markedly deficient in number and sometimes totally missing.

Id. at 678. The court noted that the underrepresentation in *Biaggi* "press[ed] the *Jenkins* 'absolute numbers' approach to its limit." *Id.*

In *United States v. Jackman*, 46 F.3d 1240 (2nd Cir. 1995), the Second Circuit abandoned the absolute numbers approach and granted relief on a fair cross-section claim. In *Jackman*, a flaw in the jury summons system caused potential jurors from two Connecticut cities that contained substantial minority populations to not be summoned for jury service over a lengthy period of time. *Jackman*, 46 F.3d at 1242. Although the resulting absolute disparity was only 2.5% for Blacks and 3.40% for Hispanics, *id.* at 1252 (dissent), the Second Circuit adopted a flexible approach and found that those discrete groups were substantially underrepresented in the jury pool and granted relief under the Sixth Amendment, *id.* at 1248. While the Second Circuit has taken a different approach than any other circuit, its decision in *Jackman* makes clear that it does not ascribe to the 10% absolute disparity rule.

Sixth Circuit: In *Garcia-Dorantes v. Warren*, 801 F.3d 584 (6th Cir. 2015), the Sixth Circuit considered both the absolute and comparative disparities and granted relief on a fair cross-section claim in which the distinctive group was underrepresented by an absolute disparity of 3.45% and a comparative disparity of 42%. *Id.* at 600-01. The court "emphasized that, '[w]here the distinctive group

alleged to have been underrepresented is small, . . . the comparative disparity test is the more appropriate measure of underrepresentation.'" *Id.* at 601 (quoting *Smith v. Berghuis*, 543 F.3d 326, 338 (6th Cir. 2008), *rev'd on other grounds,* 559 U.S. 314 (2010)). The *Garcia-Dorantes* court remarked that "absolute disparities understate the systematic representative deficiencies in cases where the groups at issue comprise small percentages of the general population." *Id.* (internal quotation and modifications omitted).

In *Smith v. Berghuis*, 543 F.3d 326, which this Court subsequently reversed on other grounds, the Sixth Circuit had found a fair cross-section violation where the absolute disparity was 1.28% and the comparative disparity was 34%. In *Smith*, the Sixth Circuit took issue with an absolute disparity approach because, "even if African Americans in Kent County were never called for jury service, the absolute disparity would still fall below the 10 percent figure that courts have found to be a threshold indicator of a constitutionally significant disparity." *Smith*, 543 F.3d at 338.

Seventh Circuit: In *Johnson v. McCaughtry*, 92 F.3d 585 (7th Cir. 1996), the Seventh Circuit affirmed the denial of a fair cross-section challenge that was based largely on age-based groups that it did not find were "distinctive" for Sixth Amendment purposes. *Id.* at 593. Although Johnson's claim failed on prong one of the *Duren* standard, the court made an alternative holding that the claim also would have failed on prong two. It calculated "an actual disparity of 9 percent and a comparative disparity of 33 percent," and it concluded that these numbers did not

satisfy *Duren*, *id.* at 594 (citing *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990), in which the court also considered an absolute disparity of 8 percent and a comparative disparity of 40 percent to reject a fair cross-section claim)). In considering the comparative disparity, the court did not adhere to a 10% absolute-disparity threshold.

Eighth Circuit: In *United States v. Rogers*, 73 F.3d 774 (8th Cir. 1996), the Eighth Circuit noted that, "[a]lthough utilizing the absolute disparity calculation may seem intuitive, its result understates the systematic representative deficiencies; the percentage disparity can never exceed the percentage of African Americans in the community." *Id.* at 776-77. The court remarked that, with an African American population of 1.87%, the exclusion of *all* African Americans would produce an absolute disparity of only 1.87%. *Id.* at 777. As such, "the comparative disparity calculation provides a more meaningful measure of systematic impact vis-a-vis the 'distinctive' group: it calculates the representation of African Americans in jury pools relative to the African-American community rather than relative to the entire population." *Id.*

Summary: The Second, Sixth, Seventh, and Eighth Circuits take a comparative approach to the statistical analysis of fair cross-section claims and do not deny them based on an absolute-disparity threshold. These circuits have tended to recognize that several different measures of underrepresentation give a clearer picture of whether a group's representation in the venire is fair and reasonable.

C. The Court Should Grant Certiorari to Resolve the Split.

This Court has repeatedly and forcefully held that the right to trial by jury enshrined in the Sixth Amendment is fundamental. *Taylor*, 419 U.S. at 530 ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace"); *see also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017) ("In the era of our Nation's founding, the . . . jury was considered a fundamental safeguard of individual liberty."); *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) ("[I]t is the jury that is a criminal defendant's fundamental protection of life and liberty against race or color prejudice"); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). The erosion of this fundamental jury trial right occurs when the jury pool is not truly and accurately a reflection of the community, as the Founders contemplated.

The implications of the doctrine adopted by the "10% threshold circuits" are made plain by simply examining Mr. Howell's case. Blacks constituted over 10% of the population of Allegheny County and have long been a vibrant and important part of the fabric of the City of Pittsburgh. Yet, because of the system that summoned jurors at the time of Mr. Howell's trial, they constituted less than 5% of the venire. Put differently, Blacks were more absent than they were present; they were present at a rate that was less than 50% of what was statistically expected. That is not fair and reasonable.

And it had real-world consequences. Mr. Howell's jury was selected from two panels, comprising sixty prospective jurors. Two prospective jurors (3.33%) were Black. Both Black prospective jurors were excused for hardship and he was convicted by an entirely white jury. As his lawyer explained when she made a post-trial motion for extraordinary relief based on the unrepresentative venire, "the effect of excluding any large and identifiable segment of the community is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." App. 194.

As the dissenting judge on the court of appeals explained, "it appears that *over half* of Allegheny County's black jury-service-eligible population—a significant population of nearly 110,000 people—was excluded from serving on venires." App. 12. But the rule advanced by the court of appeals and the "10% threshold circuits" would abide the exclusion of all of them. The dissenting judge continued, "It approaches absurdity to argue that the entire black population of Allegheny County could be excluded from serving on venires without violating the Constitution simply because a single metric—absolute disparity—is not high enough, without reference to any other factors." App. 16.

The Court should grant the petition to resolve this important question.

II. The Court Should Grant Certiorari to Determine Whether Courts May Impose Strict Duration Requirements for Venire Studies and Whether Efforts at Reform Merit a Presumption of Legitimacy.

A. The Imposition of a Strict Duration Requirement on the Venire Study to Show Systematic Exclusion is Contrary to *Duren*.

Prong three of the prima facie standard under *Duren* requires Mr. Howell to show that the "underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364. In *Duren*, women were underrepresented; at the time, state law in Missouri "provided an automatic exemption from jury service for any woman requesting not to serve." *Id.* at 359 (citing Mo. Rev. Stat. § 494.031(2) (Supp. 1978)). Duren demonstrated the underrepresentation by proffering studies of the makeup of the venire "for the periods June-October 1975 and January-March 1976," a period of eight months. *Id.* at 362. Duren's data reflected that 54% of the population was female but that jury venires were only "approximately 15%" female. *Id.* at 362-63, 365.

The *Duren* Court held that "Petitioner's proof met th[e systematic exclusion] requirement. His undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." *Id.* at 366. Regular and persistent underrepresentation over a period of time thus demonstrates systematic exclusion.

Some lower courts have adopted that standard. The presence of a statistical disparity that reflects underrepresentation of a discrete group may make it

"possible to infer that unconstitutional exclusion of cognizable groups exists." *Ramseur*, 983 F.2d at 1231; *see also Rogers*, 73 F.3d at 777 ("The extremely low probability that the underrepresentation would have occurred by chance alone provides further evidence that the system itself contributed to the lack of African-American participation in the venire pools.").

As set forth in detail above, Mr. Howell presented evidence analyzing Allegheny County's daily venire from May through October of 2001, and additional data from December of 2002, a period of six months. App. 72-73. That data revealed that Blacks were present in the venire at a rate of only 4.87% when they constituted 10.7% of the jury-age population. App. 74, 80. Blacks were less than half as likely to be present in the jury pool than statistically expected. Otherwise put, had the venire mirrored the community, there would have been more than *twice as many* Blacks present for jury service than were observed. Like *Duren*, Mr. Howell "demonstrate[ed] that a large discrepancy occurred not just occasionally but in every [daily] venire for a period of nearly a year[, which] manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." *Duren*, 439 U.S. at 366.

Despite this Court's holding in *Duren* that an eight-month study passed muster, the court of appeals below ruled that its precedent in *Ramseur v. Beyer*, 983 F.2d at 1235, required Mr. Howell to submit a venire study that was at least two years long. App. 9.[16] That sweeping new rule in the Third Circuit will have

[16] The Third Circuit did not hold that a two-year study was required for *fair cross-section claims* in *Ramseur*; it held that a study of such length would be required for *equal protection claims* where

serious consequences. Under *Howell*, defendants in the Third Circuit will have to clear a significantly higher hurdle to establish a fair cross-section violation than defendants in other circuits.[17] The duration requirement in *Howell* is contrary to *Duren*. *See* App. 19 (dissent) (remarking that the majority's read of *Ramseur* "is in direct conflict with Supreme Court precedent in *Duren* on this point, and *Ramseur* should not be considered good law in this regard").

The court of appeals also held that its conclusion that a six-month study was too short was not in conflict with this Court's approval of an eight-month study in *Duren* "because the problematic system there—a gender-based exemption statute—was readily identifiable and undisputed." App. 9. The court of appeals thus reasoned that, if the cause of the underrepresentation was apparently the product of discriminatory treatment of a distinctive group, a lesser statistical showing of underrepresentation was required. App. 9.

Not so. The court of appeals cited no authority for that proposition and counsel is aware of none. It is well established that discriminatory intent is not required for a Sixth Amendment fair cross-section claim. *See Duren*, 439 U.S. at 368 n.26 (discussing the discriminatory purpose required for equal protection

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discriminatory intent is an element. *See Ramseur*, 983 F.2d at 1233 (citing successful *equal protection* challenges that had venire studies of seven, eleven, and twenty-five years).

[17] Furthermore, it would be counterintuitive to require a two-year venire study to support a fair-cross section challenge. Few cases, if any, languish in pretrial proceedings for more than the two years that would be required to complete such a study before litigating the pretrial motion. If such a requirement existed, fair cross-section challenges would likely only be feasible for institutional defense counsel but not for private defense practitioners. The Sixth Amendment fair cross-section requirement was not intended to apply so narrowly.

claims, and stating, "In contrast, in Sixth Amendment fair-cross-section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross section"); App. 18 (dissent) ("[I]t appears that the majority is requiring Howell to produce evidence of racially discriminatory intent, which he is not required to produce under *Duren* to state a Sixth Amendment claim.").

Mr. Howell put forth a sufficient showing—akin to that made in *Duren*—that the underrepresentation of Blacks in the Allegheny County venire was due to their systematic exclusion in the jury selection process. This Court should grant certiorari to correct the lower court's adoption of standards that conflict with *Duren* or, in the alternative, should grant, vacate, and remand in light of *Duren*.

B. The Establishment of a "Presumption of Legitimacy" When the Government Had Undertaken Efforts at Reform Violates the Sixth Amendment.

In concluding that Mr. Howell had failed to meet *Duren*'s third prong—systematic exclusion—the court of appeals held that, "even if the statistical evidence demonstrates that the pool is 'not representative enough,'" it would accord a "presumption of legitimacy" to the jury system if "the government is engaged in on-going efforts to improve the representativeness of jury lists." App. 9. The court thus reasoned that "remedial actions . . . reflect that Allegheny County's processes were not systematically exclusive." App. 9.

This reasoning suffers from two fatal flaws. First, as a matter of common sense, the government's recognition that its venire is not representative of the

community is an admission that there *is* a systematic problem, not that there is not. As Circuit Judge Restrepo argued in dissent,

> [C]ontrary to the majority's assertion, the evidence in this case that Allegheny County took steps to increase racial diversity on venires tends to suggest that the underrepresentation of black persons *was* systematic, not the opposite. . . . This amounts to an admission by Allegheny County that it knew that certain racial groups were underrepresented on venires and that the cause of the underrepresentation was the system by which veniremembers were selected because Allegheny County attempted to address the problem—and, indeed, eventually ameliorated the problem—by altering the system. This is not, as the majority asserts, evidence that undermines Howell's case; this is evidence in Howell's favor.

App. 19.

Moreover, the majority did not consider the record evidence of the circumstances that gave rise to the efforts at reform. The witnesses testified that multiple government bodies had taken note of the systematic problem. Dr. Karns testified that the Allegheny County Court Administration's Office and Carnegie Mellon graduate students had studied the underrepresentation problem. App. 73. Mr. Nerone, from Court Administration, testified to his office's attempts to address the underrepresentation of Blacks in the jury pool, App. 121-22, and referenced "a study done by the State Senate and by the Commission of the Supreme Court," App. 128.

The news media had studied, documented, and reported on the problem for nearly two years before Mr. Howell's trial. A 2002 Pittsburgh Tribune-Review investigation entitled "*A jury of peers?*" showed that Blacks in Allegheny County

were less likely to be called for jury duty than Whites. App. 64.[18] Other articles noted that the State Senate and State Supreme Court had recently studied the problem and issued reports. App. 56, 57; *see also* App. 57-61 (contemporaneous newspaper articles about Mr. Howell's case and other cases, including that some trial judges had *granted* fair cross-section motions, remarking that "the typical criminal jury room was only 4 percent black," App. 56, that the pool of 105 jurors assembled for one capital trial had only three Black jurors (less than 3%), App. 57, and that a sampling of the venire in February 2004 showed that "2 percent of the pool was black," App. 58-59).

The history that preceded the efforts at reform reveals that the underrepresentation of Blacks on Pittsburgh juries was longstanding and profoundly "systematic," not the opposite. The establishment of a rule that efforts at reform give rise to a "presumption of [the jury system's] legitimacy," App. 9, is overly broad at best, backwards at worst.

Second, this novel proposition that a Sixth Amendment violation is vitiated by remedial actions undertaken to cure it has no support from the precedents of this Court or the Third Circuit. The court of appeals cited no precedent of this Court that supports the its novel presumption and undersigned counsel has found none. The court of appeals cited *Ramseur* as authority that efforts at reform create a

[18] The Tribune-Review study had such an impact that its author, Mark Houser, received multiple national journalism awards for it. *See Trib jury story nets another journalism award*, Tribune-Review, July 27, 2003, *available on Westlaw at* 2003 WLNR 13967008.

presumption of legitimacy that may prevent a defendant from demonstrating systematic exclusion. App. 9 (citing *Ramseur*, 983 F.2d at 1235).

The passage in *Ramseur* pertains to prong two ("fair and reasonable"), not prong three ("systematic exclusion"), of *Duren*. *See Ramseur*, 983 F.2d at 1235 ("Such efforts at reform . . . have some relevance to the question of whether a group's representation on those lists is 'fair and reasonable.'"). And even if *Ramseur* had been addressing prong three, it is far from clear that it created a legal "presumption of legitimacy" as the panel majority suggests. *Ramseur* stated, "If a system appears *ex ante* likely to create representative jury lists there should be some presumption of its legitimacy, even though evidence *ex post* may demonstrate that the lists are not representative enough." *Id.*

The panel majority went to great lengths to avoid the inexorable conclusion that is dictated by the unrebutted evidence—statistical and otherwise—in this case: "Howell has demonstrated that black persons were underrepresented on venires to a troubling degree and that the underrepresentation was caused by the system of selecting prospective jurors, in violation of the Sixth Amendment's fair-cross-section requirement." App. 20 (dissent). This Court should grant the petition.

CONCLUSION

For the foregoing reasons, Petitioner Joseph Howell respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit. In the alternative, he requests that the Court grant certiorari, vacate the Third Circuit's judgment, and remand with instructions for the Third Circuit to reconsider Mr. Howell's appeal in light of *Duren* and *Smith*.

Respectfully submitted,

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