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

APPENDIX

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April 24, 2020

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939 F.3d 260
United States Court of Appeals, Third Circuit.

Joseph HOWELL, Appellant
v.
SUPERINTENDENT ROCKVIEW SCI; Attorney General Pennsylvania; District Attorney Allegheny County

No. 17-1758
|
Argued May 1, 2019
|
(Filed: September 17, 2019)

Synopsis

Background: Following affirmance of his felony murder conviction, 881 A.2d 884, state inmate filed petition for writ of habeas corpus. The United States District Court for the Western District of Pennsylvania, No. 2-12-cv-00884, David Stewart Cercone, J., 2017 WL 782879, denied petition, and petitioner appealed.

[Holding:] The Court of Appeals, Fisher, Senior Circuit Judge, held that county's jury selection procedure did not violate Sixth Amendment's fair cross-section requirement.

Affirmed.

Porter, Circuit Judge, concurred and filed opinion.

Restrepo, Circuit Judge, concurred in part, dissented in part, and filed opinion.

Procedural Posture(s): Post-Conviction Review.

West Headnotes (12)

[1] **Jury** Representation of community, in general

Criminal defendants are deprived of their Sixth Amendment right to jury selected from broad representation of community when distinctive groups are systematically excluded from jury selection process. U.S. Const. Amend. 6.

[2] **Habeas Corpus** Scope and Standards of Review

In reviewing district court's denial of habeas relief where district court did not hold evidentiary hearing but relied exclusively on state court record, Court of Appeals undertakes plenary review of district court's order utilizing same standard that district court applied.

1 Cases that cite this headnote

[3] **Jury** Representation of community, in general

Jury Competence for Trial of Cause

Sixth Amendment promises all criminal defendants trial by jury drawn from pool broadly representative of community as assurance of diffused impartiality. U.S. Const. Amend. 6.

[4] **Jury** Representation of community, in general

Violation of Sixth Amendment's fair cross-section requirement occurs where jury wheels, pools of names, panels, or venires from which juries are drawn exclude distinctive groups in community. U.S. Const. Amend. 6.

[5] **Habeas Corpus** Federal Review of State or Territorial Cases

Habeas Corpus Federal or constitutional questions

State-court decision is "contrary to" or "unreasonable application of" federal law, thus warranting federal habeas relief, if it directly conflicts with Supreme Court precedent or reaches different result than Supreme Court when presented with materially indistinguishable facts. 28 U.S.C.A. § 2254(d)(1)-(2).

1 Cases that cite this headnote

[6] **Jury** Representation of community, in general

Proof of discriminatory intent is not required to establish violation of criminal defendant's Sixth Amendment right to trial by jury drawn from pool broadly representative of community. U.S. Const. Amend. 6.

[7] **Habeas Corpus** Federal Review of State or Territorial Cases

For purposes of federal habeas statute, "clearly established Federal law" includes only holdings, as opposed to dicta, of Supreme Court's decisions. 28 U.S.C.A. § 2254(d)(1).

1 Cases that cite this headnote

[8] **Courts** Construction of federal Constitution, statutes, and treaties

Though states may provide broader constitutional protections than required by federal law, they may not impose greater restrictions as matter of federal constitutional law when Supreme Court specifically refrains from imposing them.

[9] **Jury** Representation of community, in general

To establish violation of Sixth Amendment's fair cross-section requirement, defendant must prove that, at time of his trial: (1) group alleged to be excluded was distinctive group in community; (2) representation of this group in venires from which juries were selected was not fair and reasonable in relation to number of such persons in community; and (3) this underrepresentation was due to systematic exclusion of group in jury selection process. U.S. Const. Amend. 6.

[10] **Jury** Race

Representation of blacks in jury venires in county was proportionately fair and reasonable, and thus county's jury selection procedure did not violate Sixth Amendment's fair cross-section requirement, notwithstanding comparative disparity of 54.5%, where absolute disparity was 5.83%, master list consisted of names from county's list of registered voters and state Department of Transportation's driving records, data reflected amalgamation of racial makeup of jury pools over six-month period, and county was engaged in on-going efforts to improve representativeness of jury lists. U.S. Const. Amend. 6.

[11] **Jury** Representation of community, in general

To demonstrate systematic exclusion of group from jury pool, defendant asserting violation of Sixth Amendment's fair cross-section requirement must show large discrepancy over time such that system must be said to bring about underrepresentation. U.S. Const. Amend. 6.

[12] **Jury** Representation of community, in general

Court must consider nature of system, length of time studied, and efforts at reform to increase representativeness of jury lists in determining whether jury selection system caused under-representation of distinctive group, in violation of Sixth Amendment's fair cross-section requirement. U.S. Const. Amend. 6.

***262** On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 2-12-cv-00884), District Judge: Honorable David S. Cercone

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Before: RESTREPO, PORTER and FISHER, Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.

[1] Criminal defendants are deprived of their Sixth Amendment right to a jury selected from a broad representation of the community when distinctive groups are systematically excluded from the jury selection process. *See* *Duren v. Missouri*, 439 U.S. 357, 363-64, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). Because any underrepresentation in Joseph Howell's jury pool was not caused by a systematically discriminatory process, the District Court properly denied his habeas petition alleging a Sixth Amendment violation. We will affirm.

I.

Jury selection in Howell's 2004 prosecution consisted of two venire panels. The first included thirty-five individuals, two of whom were black but were both excused for hardship. The second panel included twenty-five potential jurors, all of whom were white. Ultimately, Howell, a black man, was convicted for the 2002 felony murder of a white man by an all-white jury.

Prior to jury selection, Howell filed a Motion to Ensure Representative Venire, arguing that he was entitled to a jury pool that represented a fair cross section of the community —Allegheny County—particularly with respect to race. The trial court held a hearing on Howell's allegations that black individuals were systemically under-represented in Allegheny County's jury pools, during which it adopted the record from two other cases where defendants also raised a fair-cross-section challenge. The incorporated record included expert testimony from Dr. John F. Karns, a sociologist, regarding the racial statistics and demography of Allegheny County.

Dr. Karns' testimony expounded on demographic data gathered over a six-month period in 2001, over a ten-day period in 2002, and from the 2000 census. The 2001 study was based on data gathered by the firm Gentile Meinert & Associates and interpreted by Dr. Karns. Gentile Meinert & Associates provided prospective jurors (individuals who appeared for jury selection pursuant to a summons) with a paper survey ***263** that asked questions about their race, age, and gender. From this study, which surveyed approximately 4500 potential jurors, Dr. Karns calculated that black individuals made up 4.87% of Allegheny County's jury pool. He also found that black individuals made up 10.7% of the population of Allegheny County eligible for jury service. Based on these numbers, Dr. Karns concluded that "whites [were] overrepresented" in jury pools, resulting in systematic exclusion of "a significant number of people for a significant time." App. at 112, 127. Despite this conclusion, the trial court denied Howell's motion.

An all-white jury was impaneled and found Howell guilty of felony murder. Howell moved for extraordinary relief, arguing that he should be retried by a representative jury, even if assembling the jury would require multiple venires. The trial court denied his motion; it then sentenced Howell to a mandatory sentence of life without parole.

Howell timely appealed to the Pennsylvania Superior Court, which held that Howell had not been denied a trial by a fair cross-section of the community. The Superior Court noted Dr. Karns' testimony,[1] and identified the proper test for determining whether a fair-cross-section violation occurred. The court then concluded that Howell "fail[ed] to demonstrate 'an actual discriminatory practice in the jury selection process,' " and, therefore, held that Howell did not demonstrate a constitutional violation. App. at 252-54 (quoting *Commonwealth v. Johnson*, 576 Pa. 23, 838 A.2d 663, 682 (2003)). The state court stated that, though the U.S. Supreme Court's test does not require a showing of discriminatory intent, it was bound to follow Pennsylvania Supreme Court precedent, which does require such a showing.

1 The Superior Court observed Howell's reliance on Dr. Karns' testimony without stating whether it was reliable or making a finding of fact about its accuracy and declined to reach the statistical analysis.

Howell filed a habeas petition based on six grounds, including his fair-cross-section claim. A magistrate judge issued a report and recommendation that assumed, without deciding, "that the Superior Court erred in requiring [Howell] to show discriminatory intent," but concluded that, under *de novo* review, Howell failed to establish a Sixth Amendment violation. App. at 14-16. The magistrate judge compared the level of racial disparity in Howell's case to those in other cases around the country. She concluded that, because other courts found no constitutional violation in cases with higher percentages of disparity than here, Howell could not establish his claim.

The District Court adopted the magistrate judge's report and recommendation and denied Howell's petition. Howell now appeals.

II.

The District Court exercised subject matter jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. We exercise appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

[2] The District Court did not hold an evidentiary hearing but relied exclusively on the state court record; we therefore undertake a plenary review of the District Court's order utilizing the same standard that the District Court applied. *Branch v. Sweeney*, 758 F.3d 226, 232 (3d Cir. 2014).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") dictates the parameters of our review and requires us to afford considerable deference to the state court's legal and factual determinations. ***264** *Lambert v. Blackwell*, 387 F.3d 210, 234 (3d Cir. 2004). We may overturn a state-court holding only where it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented." *Id.* (quoting 28 U.S.C. § 2254(d)(1)-(2)). The state court's factual conclusions " 'shall be presumed to be correct' unless the petitioner rebuts 'the presumption of correctness by clear and convincing evidence.' " *Id.* (quoting 28 U.S.C. § 2254(e)(1)).

If the state court erred, habeas relief should be granted only if, upon *de novo* review, the prisoner has established that he "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *see also* *Saranchak v. Beard*, 616 F.3d 292, 301 (3d Cir. 2010).

III.

[3] **[4]** The Sixth Amendment promises all criminal defendants a trial by a "jury drawn from a pool broadly representative of the community ... as assurance of a diffused impartiality." *Taylor v. Louisiana*, 419 U.S. 522, 530-31, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting)). A violation of this right occurs where "jury wheels, pools of names, panels, or venires from which juries are drawn ... exclude distinctive groups in the community." *Duren*, 439 U.S. at 363-64, 99 S.Ct. 664 (quoting *Taylor*, 419 U.S. at 538, 95 S.Ct. 692). Howell argues that his Sixth Amendment rights were violated by Allegheny County's systematic exclusion of black jurors at the time of his trial.

A.

[5] A state-court decision is "contrary to" or an "unreasonable application of" federal law if it directly conflicts with Supreme Court precedent or reaches a different result than the Supreme Court when presented with materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

In its analysis, the state court relied on its interpretation of Pennsylvania Supreme Court precedent to determine whether Howell established a prima facie violation of his right to a jury composed of a representative cross-section of his community. Quoting *Commonwealth v. Estes*, 851 A.2d 933 (Pa. Super. Ct. 2004) (citing *Johnson*, 576 Pa. 23, 838 A.2d 663), the court set forth the *Duren* standard for establishing such a violation—that (1) an allegedly excluded group is "distinctive" in the community; (2) the group's representation in jury-selection panels is not fair and reasonable in relation to the community's population; and (3) the group is under-represented due to its systematic exclusion from the jury-selection process—but then went on to state

that "[p]roof is required of an actual discriminatory practice in the jury selection process, not merely underrepresentation of one particular group." App. at 252-54. The state court acknowledged Howell's argument that he was "not required to prove discriminatory intent ... under *Duren*," but the court concluded that "the Pennsylvania Supreme Court has held otherwise" and that it was "bound by [that] prior decision[ ]." App. at 253-54.

Irrespective of how the Superior Court reached its conclusion, that conclusion must comport with "clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also* *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 ("As the statutory ***265** language makes clear ... § 2254(d)(1) restricts the source of clearly established Federal law to [the Supreme] Court's jurisprudence."). Therefore, the question before us is whether the Superior Court's decision is consistent with *Duren* and its progeny.

[6] *Duren* established a three-factor test for determining when a fair-cross-section violation has occurred. Significantly, that test does not include a requirement for proof of discriminatory intent. To the contrary, the Court—in a footnote—distinguished the Sixth Amendment claim before it from cases brought under the Equal Protection Clause by noting that, in the latter, a showing of discriminatory purpose is essential, but that, in the former, "systematic disproportion itself demonstrates an infringement." *Duren*, 439 U.S. at 368 n.26, 99 S.Ct. 664.

[7] **[8]** The Commonwealth correctly notes that the Court's statements in a footnote are not necessarily binding authority on habeas review because " 'clearly established Federal law' ... includes only the holdings, as opposed to the dicta, of [the] Court's decisions." *Woods v. Donald*, —— U.S. ——, 135 S. Ct. 1372, 1376, 191 L.Ed.2d 464 (2015) (citing *White v. Woodall*, 572 U.S. 415, 419, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014)). However, Footnote 26 is not the only place in *Duren* where the Court makes clear that a showing of discriminatory intent is not required. In the body of the opinion, the Court enumerated the three elements that a prisoner must establish to prove a constitutional violation, thereby setting the outer parameters of a fair-cross-section analysis, and it simply did not include discriminatory intent as one of those elements.[2] Therefore, requiring a prisoner to show discriminatory intent imposes a more stringent standard than the one articulated by the Supreme Court. Though states may provide broader constitutional protections than required by federal law, they "may not impose ... greater restrictions as a matter of federal constitutional law when [the Supreme] Court specifically refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) (emphasis omitted)).

2 Writing in dissent, Justice Rehnquist criticized the majority for imposing the very distinction between Equal Protection Clause cases and Sixth Amendment cases that the Superior Court ignores. *Duren*, 439 U.S. at 371, 99 S.Ct. 664 (Rehnquist, J., dissenting) (emphasizing that "[t]he difference [between equal protection and Sixth Amendment cases] apparently lies in the fact, among others, that under equal protection analysis prima facie challenges are rebuttable by proof of absence of intent to discriminate, while under Sixth Amendment analysis intent is irrelevant").

The state court did not address the three factors identified in the *Duren* test, but instead rested its decision exclusively on Howell's failure to identify a discriminatory purpose. By requiring proof of this additional element, the Superior Court imposed greater restrictions on Howell than those required by the Supreme Court, contrary to and in an unreasonable application of clearly established federal law.

B.

[9] Because the Superior Court's decision contradicts federal law, this Court must review Howell's claim *de novo*. To establish a fair-cross-section violation, Howell must prove that, at the time of his trial, (1) blacks were a " 'distinctive' group in the community"; (2) "representation of [blacks] in venires from which juries [were] selected [was] not fair and reasonable in relation to the number of such persons in the community"; and (3) "this underrepresentation [was] due to systematic ***266** exclusion of [blacks] in the jury selection process." *Duren*, 439 U.S. at 364, 99 S.Ct. 664.

1. Distinctive Group

Blacks are "unquestionably a constitutionally cognizable group." *Ramseur v. Beyer*, 983 F.2d 1215, 1230 (3d Cir. 1992) (en banc). *See also* *United States v. Weaver*, 267 F.3d 231, 239 (3d Cir. 2001) (finding that blacks are "sufficiently numerous and distinct from others in the population" to satisfy the first prong of the *Duren* test (citing *Castaneda v. Partida*, 430 U.S. 482, 495, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977))).

2. Unfair and Unreasonable Representation

Howell's claim that blacks were unfairly and unreasonably represented in jury venires "must be supported by statistical evidence," beginning with the percentage of blacks in the community at the time of his trial. *Weaver*, 267 F.3d at 240 (citing *Duren*, 439 U.S. at 364, 99 S.Ct. 664). Relying on the 2000 Census, Howell has demonstrated that 10.7% of the adult population in Allegheny County identified as black. *See* *Duren*, 439 U.S. at 365, 99 S.Ct. 664 (accepting census data as "prima facie evidence of population characteristics"). This population percentage must then be compared to the percentage of blacks included in the jury venire to determine whether representation was proportionately fair and reasonable. *Id.* at 364-67, 99 S.Ct. 664.

i. *Reliability of the Data*

Howell relies on the 2001 study conducted by Gentile Meinert & Associates for his claim that blacks made up 4.87% of jury pools. However, there is no evidence regarding how many people received jury summonses, how many people appeared for jury selection (versus the number of individuals who received surveys), or how many people failed to fill out the survey. Without this information, Howell's statistical data is not sufficiently reliable to support a finding of unfair and unreasonable representation. [3] *See* *Weaver*, 267 F.3d at 243-44.

3 Under AEDPA, the state court's implicit and explicit factual findings are presumed correct "if supported by the record." *Taylor v. Horn*, 504 F.3d 416, 433 (3d Cir. 2007); *see also* 28 U.S.C. § 2254(e)(1). Even if the Superior Court had implicitly made a credibility determination regarding Dr. Karns' testimony—which it did not, *compare Campbell v. Vaughn*, 209 F.3d 280, 285 (3d Cir. 2000) (finding implicit credibility determination where Superior Court relied on the contested testimony to conclude that defendant did not demonstrate ineffective assistance of counsel), *with* App. at 252 (noting that Howell "relies on the testimony of John F. Karns, Ph.D.," but then reaching its legal determination without any reference to or reliance upon Dr. Karns' testimony) —that determination would be undermined by the record for the reasons we explain.

In *Weaver*, this Court found that a prisoner's figures were too weak to support his claims where the statistician based his conclusions only on completed and returned questionnaires without accounting for unanswered questionnaires. *Id.* The Court highlighted that, to support an allegation of under-representation, the statistician was required to perform one of three analyses: (1) analyze the race of every person in the jury pool; (2) perform a sampling of the jury pool and then calculate the standard deviation [4]; or (3) account for the ***267** statistical impact of the unreturned questionnaires. *Id.* at 244. Because he did not provide any of these analyses, this Court concluded that the statistical evidence was "too weak to support a finding of representation that is unfair and unreasonable." [5] *Id.*

4 "Standard deviation" is often confused with the similar, but distinct, calculation of "standard error." *See* Douglas G. Altman & J. Martin Bland, Statistics Note, *Standard Deviation and Standard Errors*, 331 Brit. Med. J. 903 (2005). As called for in *Weaver*, reliable data requires a standard deviation calculation if the entire population is not accounted for, which "indicates how accurately the mean represents sample data." Dong Kyu Lee et al., *Standard Deviation and Standard Error of the Mean*, 68 Korean J. Anesthesiology 220 (2015); *see also* *Weaver*, 267 F.3d at 238 n.6 (requiring

calculation of the standard deviation "because it establishes the probability that a sample taken from the jury wheel accurately reflects the composition of the entire wheel").

5 The Court also noted that discrepancies in the statistician's testimony, wherein he consistently claimed to have examined the entire master wheel even though he did not account for unreturned surveys, "further undermine[d] the strength of the evidence." *Weaver*, 267 F.3d at 243-44.

Howell's statistical data suffers from the same weaknesses we identified in *Weaver*. As in *Weaver*, Dr. Karns did not analyze the racial makeup of the entire jury venire.[6] Though approximately 4500 individuals were given surveys over a six-month period, Dr. Karns' analysis did not take the unanswered surveys into consideration, which significantly weakens the reliability and influence of the statistical data. *Id.* at 244. As Dr. Karns acknowledged, if a higher percentage of blacks failed to answer the survey than whites, the results of the survey would be "skewed." App. at 131. However, Dr. Karns does not know how many surveys omitted responses to certain questions or went unanswered entirely, let alone the race of the individuals who chose not to answer them. Because of this missing data, it is not possible to now calculate the standard deviation or account for the significance of unanswered surveys, as we require.

6 In addition to acknowledging that he had "no idea" whether every potential juror filled out the survey, App. at 117—and it would be illogical to believe that each person did—Dr. Karns also testified that jurors who were originally assembled in civil court assignment rooms but were later brought to criminal court were not surveyed. Therefore, we can conclude without speculation that Dr. Karns' analysis failed to account for every member of the venire.

Howell claims that Dr. Karns' data does satisfy *Weaver* because he conducted a validity analysis known as the "Z-statistic," which Howell claims is "akin to standard deviation," and concluded that the chances of his conclusion that blacks were under-represented being incorrect "are about four in 10,000." Reply Br. at 13 (quoting App. at 112). However, the purpose of the "Z-statistic" is simply to determine the "risk of being wrong" about a hypothesis. App. at 112. Here, Dr. Karns' starting hypothesis was "that there are too few African-Americans" in jury pools. *Id.* However, Dr. Karns did not provide any analysis to explain how a low likelihood of this hypothesis being incorrect sufficiently demonstrates that his statistical representations are reliable, particularly in light of the unaccounted for, unanswered surveys. For instance, it could certainly be true that blacks appear on jury pools less often than we would statistically expect, but that the degree of under-representation does not rise to the level of a constitutional violation. Dr. Karns' Z-statistic analysis regarding the accuracy of his general hypothesis cannot substitute a standard deviation calculation, which is an inquiry into the reliability of the statistics he presented and is required by our precedent.

Because Howell's statistical data fails to account for the entire jury venire using one of the statistical methodologies approved by this Court, it is "too weak to support a finding of representation that is ***268** unfair and unreasonable." *Weaver*, 267 F.3d at 244.

ii. *Significance of the Data*

[10] Even if Howell had provided reliable data, courts around the nation, including our own, have found that representation was not unfair or unreasonable with disparity levels greater than or similar to those presented here.

To determine the significance of the statistical evidence, we must compare the population percentage (10.7%) with the jury venire percentage (4.87%). This Court has relied on two methods of statistical analysis to determine the significance of the disparity between the percentages: absolute disparity[7] and comparative disparity.[8] *Weaver*, 267 F.3d at 241; *Ramseur*, 983 F.2d at 1233-35.

7 Absolute disparity reflects the difference in the percentage of, in this case, blacks in the general voting-age population and in the jury venire: 10.7% (population percentage) - 4.87% (venire percentage) = 5.83% (absolute disparity). This absolute disparity reflects that, in a jury pool of one hundred people, approximately six fewer black people would be in the pool than statistically expected.

8 Comparative disparity "measures the *decreased likelihood* that members of an underrepresented group will be called for jury service" relative to what would be expected given the percentage of the general population that group comprises. *United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998) (emphasis in original) (cited by *Weaver*, 267 F.3d at 241-42). This is calculated by dividing the absolute disparity by the population percentage: 5.83% (absolute disparity) ÷ 10.7% (population percentage) = 54.49% (comparative disparity). This comparative disparity reflects that, at the time of Howell's trial, blacks were 54.49% less likely to be on venires than if the representation was directly proportional to their population in the County.

The absolute disparity in this case, 5.83%, 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. *See United States v. Shinault*, 147 F.3d 1266, 1273 (10th Cir. 1998) (noting that courts of appeals "generally are reluctant to find [unfair and unreasonable representation] when the absolute disparities are less than 10%"); *see also, e.g.*, *Thomas v. Borg*, 159 F.3d 1147, 1151 (9th Cir. 1998) (5% absolute disparity insufficient even though no blacks were on jury panel); *United States v. Gault*, 141 F.3d 1399, 1402-03 (10th Cir. 1998) (3.19%, 5.74%, and 7.0% absolute disparities insufficient); *United States v. Pion*, 25 F.3d 18, 23 (1st Cir. 1994) (3.4% absolute disparity insufficient); *Ramseur*, 983 F.2d at 1232 (absolute disparity of 14.1% "borderline"); *United States v. Suttiswad*, 696 F.2d 645, 649 (9th Cir. 1982) (2.8%, 4.7%, and 7.7.% absolute disparities insufficient).

Likewise, courts have found that comparative disparities similar to the comparative disparity in this case, 54.49%, were insufficient to demonstrate unfair and unreasonable representation. *See, e.g.*, *United States v. Chanthadara*, 230 F.3d 1237, 1257 (10th Cir. 2000) (finding comparative disparity of 40.89% insufficient where the distinctive group represented 7.9% of the population); *United States v. Clifford*, 640 F.2d 150, 155-56 (8th Cir. 1981) (finding comparative disparity of 46% insufficient where the group represented 15.6% of the population). *But see LaRoche v. Perrin*, 718 F.2d 500, 502-03 (1st Cir. 1983) (holding that a prima facie challenge was established where the comparative disparity was 68.22% and the group comprised 38.4% of the population), *overruled on other grounds by Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985).

***269** When compared to factually similar cases, the absolute and comparative disparities reflected in this case do not make a prima facie showing of unconstitutional underrepresentation.

3. Systematic Exclusion

[11] **[12]** If Howell's claims were supported by reliable statistical evidence, to prove a cross-section violation, Howell would need to show that the under-representation of blacks in jury pools is "due to systematic exclusion in the jury selection process." *Weaver*, 267 F.3d at 244 (citing *Duren*, 439 U.S. at 366, 99 S.Ct. 664). In *Duren*, the Supreme Court found systematic exclusion where a state law permitted women to exclude themselves from jury selection simply because of their gender. 439 U.S. at 367, 99 S.Ct. 664. Unlike in *Duren*, where the system that caused the underrepresentation—a state statute—was readily apparent, there is no identifiable cause for the under-representation of blacks in jury venires in Allegheny County. Therefore, to demonstrate "systematic exclusion," Howell must show "a large discrepancy over time such that the system must be said to bring about the underrepresentation." *Weaver*, 267 F.3d at 244. We consider the nature of the system, length of time studied, and "efforts at reform to increase the representativeness of jury lists" in determining whether the jury selection system caused the under-representation. *Ramseur*, 983 F.2d at 1234-35.

i. *Nature of the System*

A selection process that is facially neutral is unlikely to demonstrate systematic exclusion. *See Ramseur*, 983 F.2d at 1235. In *Ramseur*, we concluded that the selection process was facially neutral because the pool of jurors (the "Master List") was composed of names from both the voter

registration and Department of Motor Vehicles lists, and, therefore, did not preference any particular age, gender, or race. *Id.* Likewise, at the time of Howell's trial, the Master List consisted of names from Allegheny County's list of registered voters and the Pennsylvania Department of Transportation's driving records. Howell does not contest the propriety of Allegheny County's method for compiling its Master List, and these parallels demonstrate that the nature of the system was facially neutral.

ii. *Length of Time Studied*

Even assuming that Howell's data was based on a reliable study, that study must have demonstrated ongoing discrimination over a sufficient period of time. In *Ramseur*, this Court held that a study conducted over the course of two years was not sufficient to show a history of abuse that would reflect a systematic exclusion. 983 F.2d at 1235. Howell seeks to distinguish the six-month study in this case from *Ramseur* by noting that, in *Duren,* the underlying study lasted for only eight months. [9]

9 On appeal, Howell also points to media reports and studies regarding racial under-representation that began in 2002; however, these studies were not part of the record before the state court, and we cannot consider them. *See S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 267 n.27 (3d Cir. 2013) (refusing to consider evidence offered for the first time on appeal).

Howell cannot distinguish his case from *Ramseur* by relying on the eight-month study in *Duren* because the problematic system there—a gender-based exemption statute—was readily identifiable and undisputed. *Duren*, 439 U.S. at 367, 99 S.Ct. 664. Additionally, unlike here, where the data reflects an amalgamation of the racial makeup of jury pools over the six-month period, Duren undisputedly demonstrated ***270** "that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year." *Id.* at 366, 99 S.Ct. 664. The Supreme Court emphasized that this repeated, perpetual underrepresentation "manifestly indicate[d] that the cause of the under-representation was systematic." *Id.* Howell's evidence is not similarly specific and does not support a conclusion that the under-representation was occurring in every, or even nearly every venire for a substantial period of time.

iii. *Efforts to Reform*

Where the government is engaged in on-going efforts to improve the representativeness of jury lists, it is less likely that the data reflects that under-representation is due to a systematic exclusion in the jury process. *Ramseur*, 983 F.2d at 1235. We presume that the process is legitimate where the government's efforts seem likely to create a representative jury, even if the statistical evidence demonstrates that the pool is "not representative enough." *Id.*

At the time of Howell's trial, Allegheny County was unable to say whether there was a representation problem with its Master List because its records did not reflect the races of potential jurors. Around 2002, to remedy the risk of underrepresentation, the Court Administration Office revised its eligibility questionnaire to include questions regarding race, age, and gender so that it could better understand whether a particular group was over-represented or under-represented. Allegheny County additionally implemented procedures to follow up on unreturned questionnaires, ensure that the Master List reflects up-to-date addresses, and encourage individuals to respond to jury summonses. According to the Court Administration Office, each of these actions was implemented to better ensure proportionate representation. These laudable remedial actions warrant "some presumption of [the jury system's] legitimacy," *Ramseur*, 983 F.2d at 1235, and reflect that Allegheny County's processes were not systematically exclusive.

IV.

Though the Pennsylvania Superior Court misapplied the Supreme Court's precedent in denying Howell's Sixth Amendment claim, on *de novo* review, we find that Howell failed to show that Allegheny County's jury selection processes systematically excluded black jurors. We will therefore affirm the District Court's denial of habeas relief.

PORTER, Circuit Judge, concurring.

I join the majority in holding that Joseph Howell failed to satisfy the second and third requirements of *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). But I reach that conclusion slightly differently. On *Duren*'s second prong, I would avoid the soundness-of-the-statistics debate for a simple reason: even assuming arguendo that Howell's statistics are methodologically sound, the disparity figures are within the range that we have held constitutionally permissible. So I would hold that Howell fails *Duren*'s second requirement on that basis. On *Duren*'s third requirement, I agree with the majority's analysis. But I supplement it to underscore that Allegheny County's jury-selection system goes above and beyond what is constitutionally required, so there cannot be systematic exclusion.

To satisfy *Duren*'s second requirement, a defendant must show that "the representation of [an underrepresented distinctive] group in jury venires is not 'fair and reasonable' in relation to the number of such persons in the community." *United States v. Weaver*, 267 F.3d 231, 237 (3d Cir. 2001) ***271** (citing *Duren*, 439 U.S. at 364, 99 S.Ct. 664). As the majority observes, two statistical measurements drive this analysis: absolute disparity and comparative disparity. We consider both of these disparity measures, which makes us something of an outlier. *See* Nancy Gertner, et al., *The Law of Juries* § 2.11 (10th ed. 2018) (noting that while "[t]he Supreme Court has not mandated the use of one approach over another," in practice, "[m]ost [courts] have rejected comparative disparity analysis").

Howell's statistics show an absolute disparity of 5.83%, which is easily within the range typically found constitutionally permissible. As the leading treatise summarizes, "[m]any courts have adopted a threshold of 10% absolute disparity." Gertner, § 2.12. We have followed this trend, marking the threshold a smidge higher. *See* *Ramseur v. Beyer*, 983 F.2d 1215, 1232 & n.18 (3d Cir. 1992) ("Courts addressing the question of whether a given absolute disparity constitutes 'substantial underrepresentation' have held that absolute disparities between 2.0% and 11.5% do not constitute substantial underrepresentation." (quoting *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977))). So the absolute disparity of 5.8% in this case is constitutionally permissible under authorities from this and other courts.

This means that Howell must rely on comparative disparity to satisfy *Duren*'s second prong. This is a much closer question. Under our precedents, the comparative disparity of 54.5% shown here is troubling. *Ramseur*, 983 F.2d at 1232 (describing "a comparative disparity of about 40%" as "borderline" but ultimately rejecting prima facie case); *see also* *Weaver*, 267 F.3d at 243 (describing comparative disparity figures of 40.01% for blacks and 72.98% for Hispanics as "quite high," but qualified that the figures were of limited value because both groups formed "a small percentage of the population"). But we have never held that a high comparative disparity is itself sufficient to satisfy *Duren*'s second prong. And indeed, other courts have rejected fair-cross-section challenges involving comparative disparities higher than (or similar to) the one here. [1] So the comparative-disparity figure in this case—while high—is not enough to satisfy *Duren*'s second prong.

1 *See, e.g.*, *United States v. Shinault*, 147 F.3d 1266, 1273 (10th Cir. 1998) (permitting comparative disparities of "48%, 50%, and almost 60%"); *United States v. Chanthadara*, 230 F.3d 1237, 1257 (10th Cir. 2000) (permitting "a comparative disparity of 58.39%"); *United States v. Sanchez*, 156 F.3d 875, 879 & n.4 (8th Cir. 1998) (acknowledging a comparative disparity of 58.3%, but declining to address statistics at all to "simply hold that when jury pools are selected from voter registration lists, statistics alone cannot prove a Sixth Amendment violation"); *Hafen*, 726 F.2d at 23–24 (permitting comparative disparity of 54.2%); *United States v. Sanchez-Lopez*, 879 F.2d 541, 548–49 (9th Cir. 1989) (permitting comparative disparity of 52.9%); *United States v. Orange*, 447 F.3d 792, 798–99 (10th Cir. 2006) (permitting comparative disparity of 51.22%).

Turning to *Duren*'s third requirement, Howell must show "the underrepresentation is caused by the 'systematic exclusion of the group in the jury selection process.' " *Weaver*, 267 F.3d at 237 (quoting *Duren*, 439

U.S. at 364, 99 S.Ct. 664). On this point, I am puzzled by the dissent's insistence that the County's system is constitutionally deficient.

The County's two-track method of selecting jurors is structurally sound. It first draws names from voter-registration lists. It then supplements this by pulling additional names from motor-vehicle records. If anything, the County's system goes above and beyond what is required, as courts have consistently held that using ***272** voter-registration lists alone is sufficient.[2] "Not only has the use of the voter registration lists been uniformly approved by the Court[s] of Appeals as the basic source for the jury selection process ... Congress specifically approved the use of such lists even though it was recognized that persons who chose not to register would be excluded from the jury selection process." *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir. 1988) (citing 28 U.S.C. § 1863(b)(2)). In fact, the County's two-track system here is strikingly similar to the one we upheld in *Ramseur*. 983 F.2d at 1233 (noting that the "mechanism used to create the source lists was facially neutral with respect to race," as the New Jersey county in question "utilized voter registration and Department of Motor Vehicle lists to create its jury venire").

2 *United States v. Guzman*, 468 F.2d 1245, 1247–49 (2d Cir. 1972) (approving the use of voter-registration lists as the sole source of names for jury selection); *United States v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008) (approving jury administrator's use of voter-registration lists, noting these "are the presumptive statutory source for potential jurors") (citing 28 U.S.C. § 1863(b)); *United States v. Greatwalker*, 356 F.3d 908, 911 (8th Cir. 2004) (finding no systematic exclusion from jury selection plan that draws its pools of prospective jurors randomly from lists of persons who voted in the last presidential election).

Unsurprisingly, then, the dissent cites no case in which a hybrid system like this one—i.e., voter-registration lists supplemented with motor-vehicle records—has been held to systematically exclude a distinctive group. In dicta, we have speculated "that if the use of voter registration lists over time did have the effect of sizeably underrepresenting a particular class or group on the jury venire, then under some circumstances, this could constitute a violation of a defendant's fair cross-section rights under" the Sixth Amendment. *Weaver*, 267 F.3d at 244–45 (internal quotation marks and citation omitted). But that theoretical possibility was not the reality in *Weaver*, as "nothing in the record" showed persistent systematic exclusion of minority jurors. *Id.* at 245. And whatever the merits of that theoretical possibility, we have never invoked it to hold that a hybrid system like this one systematically excluded a distinctive group. Given that Congress has made voter-registration lists the presumptive source for selecting jurors, such a holding could imperil juror-selection methods across many jurisdictions.

In support of systematic exclusion, Howell argues that the County's problems with "non-representative jury venires were widely known well before" Howell's trial, largely because the County and some academics studied it. Appellant's Br. 36–39. This is weak tea. The fact that the County studied this issue does not show that the County knew its selection system was constitutionally unsound; rather, it may simply show that the County was responsibly trying to determine the system's soundness or seeking to improve (already constitutionally sufficient) representation. In *Ramseur*, we viewed a New Jersey county's efforts to diversify jury venires just this way, approvingly noting the county's "efforts at reform to increase the representativeness of jury lists." 983 F.2d at 1235. Howell's inferences, by contrast, would perversely punish the County for its salutary reform efforts.

In sum, if the County used only voter-registration lists to assemble the jury venire, it would be employing a method widely upheld as constitutional by the courts of appeals and statutorily prescribed by the Jury Selection and Service Act. 28 U.S.C. §§ 1861–78. By supplementing this method with motor-vehicle records, the County ***273** goes beyond this widely approved method to mirror the system upheld in *Ramseur*. Howell has not suggested how the County could improve upon this system and I see no constitutional requirement for it to do so.

RESTREPO, Circuit Judge, concurring in part and dissenting in part.

I join the majority opinion only with respect to Part III.A, in which the majority holds that we are not required to accord deference under the Antiterrorism and Effective Death

Penalty Act of 1996 ("AEDPA") to the legal conclusions of the Pennsylvania Superior Court because that court's decision was contrary to, or involved an unreasonable application of, clearly established federal law. I respectfully dissent from the remainder of the majority opinion because, in my view, Howell has established a prima facie violation of his Sixth Amendment right to have his petit jury drawn from a fair cross-section of the community, and I would reach the merits of his fair-cross-section claim because the Commonwealth has presented *no* evidence to rebut Howell's statistical analysis or the qualifications of his expert witness. The majority, however, lends undue credence to the Commonwealth's speculative attack on the reliability of Howell's statistics and, in the process, sets forth a new standard of statistical purity that will foreclose nearly all fair-cross-section claims. And with respect to the merits of Howell's fair-cross-section claim, the majority and concurring opinions interpret the case law in a way that 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.

I.

Howell presented evidence that black persons constituted 10.7% of the jury-service-eligible population of Allegheny County in the early 2000s but merely 4.87% of persons serving on venires during the same period. Thus, according to Howell's evidence, black persons in Allegheny County were underrepresented on venires by approximately 54.49%. Put another way, 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.

Rather than discussing these troubling statistics at length, the majority simply attacks their reliability. In so doing, the majority misapplies our precedent in *United States v. Weaver*, 267 F.3d 231 (3d Cir. 2001), and, as a result, sets a new bar for statistical reliability that almost no litigant in a fair-cross-section case will be able to satisfy. [1]

1 Independently, the Court also may lack authority under AEDPA to probe into the reliability of Howell's statistics in the first place. Pursuant to AEDPA, in a section 2254 proceeding such as this one, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Both implicit and explicit factual findings are presumed to be correct under section 2254(e)(1). *Taylor v. Horn*, 504 F.3d 416, 433 (3d Cir. 2007). Two of the three judges on the panel of the Superior Court appear to have reached their decisions by taking Howell's statistical evidence at face value, which, in my opinion, may constitute an implicit factual finding that is entitled to the "presumption of correctness" under section 2254(e)(1). *See* App. 258.

The majority reads *Weaver* as requiring *all* litigants asserting fair-cross-section ***274** claims to either (1) produce documentary evidence that they conducted a complete census of the races of *every single* individual in the relevant jury pool (e.g., every person on the "master wheel" or venire), or (2) perform sampling of the jury pool "and then calculate the standard deviation," or (3) "account for the statistical impact" of persons in the jury pool who were not surveyed or studied. 267 F.3d at 244. This reading of *Weaver* disregards the specific context of that case. In *Weaver*, the demographer who provided expert testimony regarding the racial makeup of the "master wheel" in the Erie Division of the Western District of Pennsylvania purported to have studied *all* persons on the "master wheel," on which 5,877 persons were listed. *See id.* at 243. Our Court determined, however, that the demographer "based his testimony on the returned questionnaires," of which there were only 4,753. *Id.* Thus, in *Weaver*, concrete evidence—figures that demonstrated with specificity that 1,124 persons, or over 19%, of the relevant jury pool were not included in the study—effectively impeached the demographer's testimony that he had studied *all* persons in the jury pool. Consequently, because the demographer did not—either quantitatively or qualitatively—account for the glaring discrepancy in his testimony, our confidence in the reliability of his statistics was undermined.

Placed in context, *Weaver* stands for the proposition that "the strength of [a litigant's statistical] evidence" is "undermined" when (1) the state produces concrete evidence that the petitioner's expert did not study all persons in the relevant jury pool and (2) the expert neither (A) "perform[ed] sampling" of the jury pool "and then calculate[d] the standard deviation" nor (B) "account[ed] for the statistical impact of" unstudied or uncounted persons in the jury pool. *Id.* at 244.

Here, there is no such concrete evidence that Howell's expert failed to study all persons on the venires during the six-month study period—there is only speculation. Despite its failure to substantively challenge the reliability of Howell's statistics or the qualifications of Howell's expert in any of the state-court proceedings below, the Commonwealth, in its brief, now argues that the Court should disregard Howell's statistical evidence solely because his expert, Dr. John F. Karns, Ph.D., "did not know if every individual [in the studied venires] complied with the request to fill out the questionnaire[s]." Appellee's Br. 15. The Commonwealth presents *no* evidence regarding the number of veniremembers who allegedly did not return the questionnaires; it merely speculates that there *could have been* veniremembers who did not return the questionnaires.

For the majority, mere speculation of this nature is sufficient to defeat Howell's Sixth Amendment fair-cross-section claim. This holding—that the state can defeat a fair-cross-section claim simply by speculating, with no evidentiary support, that a habeas petitioner's statistics *may* be flawed—transforms the modest holding in *Weaver* regarding statistical reliability into a holding that dramatically heightens the burden of proof in fair-cross-section cases. In effect, the majority holds that, to state a Sixth Amendment fair-cross-section claim, a litigant must produce *unassailable* proof that she conducted a complete census of every single member of the relevant jury pool; if the state simply speculates that certain members of the jury pool *may have been* excluded from the study, and even if the state provides *zero* evidence to that effect, the litigant's fair-cross-section claim fails unless certain limited conditions are met.

The majority also takes a severely constrained view with respect to what evidence ***275** can satisfy such limited conditions and requires Howell to produce evidence that is wholly irrelevant to its inquiry into the reliability of his statistics. Relying on its reading of *Weaver*, the majority holds that because Howell's statistical analysis is fundamentally undermined by the Commonwealth's speculation regarding the *potential* existence of unstudied veniremembers,[2] Howell's claim may only survive if he either (1) "calculate[s] the standard deviation" or (2) "account[s] for the statistical impact of ... unreturned questionnaires." Howell has produced evidence that satisfies both of these conditions, even assuming that both conditions are relevant. Regarding the "significance of unanswered surveys," the *only* concrete evidence in the record that indicates that certain veniremembers were omitted from the study is that "a very small number" of "surveys contain[ed] incomplete information." App. 118. Dr. Karns explicitly testified as to the statistical impact of these incomplete surveys on his results: the number of such surveys was "so small that it [did] not change [his] opinion." *Id.* at 128. Thus, Howell has accounted for the only concrete evidence in the record that his statistical analysis may be based on less than complete information, and, therefore, Howell has satisfied one of the majority's requirements.

2 As an ancillary matter, the majority also holds that Howell's statistical evidence is undermined by the fact that "there is no evidence regarding how many people received jury summonses." It is unclear how information with respect to "how many people received jury summonses" is relevant to Howell's claim because his claim is based on the composition of the *venires*—the persons who actually *appeared* for jury service—in Allegheny County, a type of claim that has long been recognized as cognizable by the Supreme Court. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975) ("[T]he 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." (emphasis added)).

Regarding the majority's requirement that Howell calculate the standard deviation, it is not clear to me how calculation of the standard deviation relates to the question that the majority seeks to answer: How do (potentially) unaccounted-for veniremembers affect the reliability of Howell's statistical analysis? "[S]tandard deviation is a measure of [the] *variability* ... of the population from which [a] sample was drawn."[3] In other words, standard deviation is an expression of "how widely scattered some measurements [of

a population] are." [4] For example, students who score a 141 on the LSAT have scores that are one standard deviation from the mean score of 151. [5] But the fact that one standard deviation is equivalent to approximately 10 points in the context of the distribution of LSAT scores tells us nothing about the statistical *reliability* of the analysis conducted by the Law School Admission Council—it only tells us how the scores are distributed on a curve. It appears to me that the majority actually desires a calculation of the "standard error," which "indicates the uncertainty around the estimate of the mean" due to, ***276** among other things, sampling errors. [6] "The terms 'standard error' and 'standard deviation' are often confused." [7] The former concept, standard error, concerns the reliability of Howell's statistics, which statistics indicate that over the course of the study period, a mean of 4.87 black persons served on every venire of 100 persons; standard error would tell us how confident we should be that the mean of 4.87 is an accurate figure. In requiring that Howell instead calculate the standard deviation, the majority perpetuates an error of terminology first committed by our Court in *Weaver*. *See* 267 F.3d at 244 ("In order to support Weaver's allegation of underrepresentation on the master wheel, [his expert] would have had to ... calculate the standard deviation ...."). Thus, the majority requires Howell to produce evidence that is not at all relevant to probing the reliability of his statistics. [8]

3 Douglas G. Altman & J. Martin Bland, Statistics Note, *Standard Deviations and Standard Errors*, 331 Brit. Med. J. 903 (2005), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1255808/pdf/bmj33100903.pdf (emphasis added).

4 *Id.*

5 *See* Memorandum from Lisa Anthony, Senior Research Assoc., Law Sch. Admission Council, to LSAT Score Recipients 2 (June 20, 2017), https://www.lsac.org/sites/default/files/legacy/docs/default-source/data-%28*l*sac-resources%29-docs/lsat-score-distribution.pdf.

6 Altman & Bland, *supra* note 3.

7 *Id.*

8 If, however, the majority truly desires a calculation of the standard deviation—which is irrelevant for the reasons stated above—Howell has produced equivalent statistical evidence. Dr. Karns used a "difference-of-proportion test" by calculating a "Z-statistic," App. 112, and then calculating what social scientists refer to as a "*P* value," which is a "statistical summary of the compatibility between the observed data and what we would predict or expect to see if we knew the entire statistical model." Sander Greenland et al., *Statistics Tests,* P *Values, Confidence Intervals, and Power: A Guide to Misinterpretations*, 31 Eur. J. Epidemiology 337, 339 (2016). Put differently, a *P* value "can be viewed as a continuous measure of the compatibility between the data and the entire model used to compute it, ranging from 0 for complete incompatibility to 1 for perfect compatibility." *Id.* Similar to the way that standard deviation indicates the variance within a population, a *P* value indicates the variance between observed data and the data that we would expect to observe. Here, for instance, we would expect that the percentage of black persons serving on venires in Allegheny County would mirror the black jury-service-eligible population of Allegheny County as a whole (10.7%). As Dr. Karns observed, however, black persons constituted merely 4.87% of persons serving on venires. That observed data (4.87%) varies widely from the expected data (10.7%), resulting in a *P* value of .0004 according to Dr. Karns, which closely nears complete incompatibility. *See* App. 112 (characterizing the "chances of being wrong in stating that there are too few African[ ]Americans" as "about four in 10,000"). Statisticians often characterize *P* values in terms of "the probability that chance alone produced the observed association." Greenland et al., *supra*, at 340. Thus, if the majority desires statistical evidence regarding variance—which is what standard deviation expresses—Howell has provided such evidence to the Court in the form of a *P* value.

Further, standing alone, the sample size of the study upon which Howell relies indicates that Howell's statistics are reliable. Approximately 4,500 persons were surveyed in connection with the study. Unrebutted expert testimony in this case establishes that a "sample of 4[,]500 is relatively large." App. 119. Because the sample in this case was so large, the standard error necessarily is small because "[t]he standard error falls as the sample size increases,

as the extent of variation is reduced."[9] By questioning the reliability of the statistics resulting from such a large sample size and by emphasizing the alleged importance of surveying every single member of venires without exception, the majority undermines the very concept of sampling in Sixth Amendment challenges.

9 Altman & Bland, *supra* note 3.

In sum, the majority opinion sets forth a new standard of statistical purity that appears to be unattainable for nearly all litigants—and particularly for habeas petitioners—in fair-cross-section cases. Litigants are required to present statistical evidence to support fair-cross-section ***277** claims. *See* *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). If the state can fundamentally undermine a litigant's statistical analysis with mere speculation that her statistics are unreliable, nearly all force has been drained from the Sixth Amendment's fair-cross-section requirement.

II.

Accepting the reliability of his statistical evidence, Howell, in my view, has satisfied both the second and third prongs of the test espoused by the Supreme Court in *Duren v. Missouri*, 439 U.S. at 364, 99 S.Ct. 664;[10] namely, he has demonstrated that (A) "the representation" of black persons "in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community" and (B) "this underrepresentation is due to the systematic exclusion of this group in the jury-selection process."

10 As the majority recognizes, Howell undoubtedly has satisfied *Duren*'s first prong, which requires him to demonstrate that black persons are "a 'distinctive' group in the community." *Duren*, 439 U.S. at 364, 99 S.Ct. 664; *see also* *Ramseur v. Beyer*, 983 F.2d 1215, 1230 (3d Cir. 1992) (en banc) (holding that black persons are "unquestionably a constitutionally cognizable group").

A.

Howell has demonstrated that black persons in Allegheny County were underrepresented on venires by approximately 54.49% in the early 2000s. This rate of underrepresentation simply cannot be "fair and reasonable" under *Duren*.

"[N]either *Duren* nor any other decision of th[e Supreme] Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." *Berghuis v. Smith*, 559 U.S. 314, 329, 130 S.Ct. 1382, 176 L.Ed.2d 249 (2010). Our Court previously has utilized "absolute disparity" and "comparative disparity" to analyze the merits of fair-cross-section claims. *Weaver*, 267 F.3d at 241 & n.11. "Absolute disparity" is the "difference between [(x)] the percentage of a certain population group eligible for jury duty and [(y)] the percentage of that group who actually appear in the venire." *Ramseur v. Beyer*, 983 F.2d 1215, 1231 (3d Cir. 1992) (en banc). "Comparative disparity is calculated by dividing [(x)] the absolute disparity by [(y)] the population figure for a population group." *Id.* Although "both methods have been criticized," *Weaver*, 267 F.3d at 242, we have held that "figures from both methods inform the degree of underrepresentation," and we "examine and consider the results of both in order to obtain the most accurate picture possible," *id.* at 243.

The comparative disparity in this case is 54.49%, while the absolute disparity in this case is 5.83%. The Commonwealth argues that analysis of the absolute disparity is the "starting place" when considering a fair-cross-section challenge and that, given the absolute-disparity figure in this case, it also should be the *ending* place for Howell's fair-cross-section claim. Appellee's Br. 19. Relying on dicta in our decision in *Ramseur v. Beyer*, 983 F.2d 1215, the Commonwealth argues that "[a]bsolute disparities between 2.0% and 11.5% have not constituted substantial underrepresentation" and that, "[t]herefore, under applicable precedent, an [a]bsolute [d]isparity of 5.83% is statistically insufficient to demonstrate a prima facie showing of a Sixth Amendment violation." Appellee's Br. 20 (emphasis omitted). This argument not only disregards our Court's observation that "[o]ur precedent does not dictate that one method of statistical analysis should be used rather than another," ***278** *Weaver*, 267 F.3d at 241, but also misapprehends what the absolute-disparity figure captures. Viewed in isolation, an absolute-disparity figure lacks any meaning because the same absolute-disparity figure

can imply drastically different levels of underrepresentation in two distinct populations.

For example, if, as the Commonwealth seems to suggest, an absolute disparity of over 11.5% is required for a litigant to state a Sixth Amendment fair-cross-section claim, Howell would *never* be able to state a fair-cross-section claim; the black jury-service-eligible population of Allegheny County is 10.7%, and thus the *maximum* absolute disparity in Howell's case is 10.7%, which assumes the *complete* exclusion of black persons from service on venires (i.e., a comparative disparity of 100%). By contrast, in Philadelphia County, for example, which has a black population of approximately 43.4%, an absolute disparity of 11.5% would equate to underrepresentation of black persons on venires at a rate (and a comparative disparity) of 26.5%, raising much fewer constitutional concerns. 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.

But the majority and concurring opinions adopt precisely that argument. The majority holds that "an absolute disparity below 10% generally will not reflect unfair and unreasonable representation." The concurrence takes this line of argument even further, framing an absolute disparity of 10% as a "threshold" matter and implying that this Court has set the "threshold" at the even higher figure of 11.5%. By definition, the absolute disparity in a given case can only be as high as the percentage of the population that a distinctive group constitutes. If a litigant must present evidence of an absolute disparity of 10% (or, for the concurrence, 11.5%) as a "threshold" matter to state a fair-cross-section claim, then litigants, as a matter of law, cannot state fair-cross-section claims if the distinctive group that they allege was systematically excluded from serving on venires constitutes less than 10% (or 11.5%) of the population because, in such a case, even *complete exclusion* of such a group would not result in an absolute disparity of 10% (or 11.5%). In essence, the majority and concurring opinions hold that the Sixth Amendment provides no remedy for complete, systematic exclusion of distinctive groups in the community if those groups constitute less than 10% (or 11.5%) of the population.

Both the majority and concurring opinions also misunderstand the interaction between absolute disparity and comparative disparity. Analyzing the absolute disparity and comparative disparity in a case is not an either-or proposition: "figures from *both* methods inform the degree of underrepresentation." *Id.* at 243 (emphasis added). We look at *both* figures because comparative disparity is a *dependent* variable—in fact, absolute disparity is the numerator in the formula used to calculate comparative disparity. In other words, we cannot even calculate the comparative disparity in a case without knowing the absolute disparity. Thus, the comparative disparity in a case, by necessity, implies a precise absolute disparity—every comparative disparity has a corresponding absolute disparity, and vice versa.

If, as the majority and concurring opinions hold, a litigant must present evidence of an absolute disparity of 10% (or 11.5%) as a "threshold" matter to state a fair-cross-section claim, the opinions' analyses of the comparative disparity in Howell's case are merely perfunctory. As illustrated ***279** in the Appendix to this opinion, Howell would have to produce evidence of a comparative disparity of 93.46% or higher to satisfy a 10% absolute-disparity "threshold," and Howell could *never* satisfy a 11.5% absolute disparity "threshold" because he would have to produce evidence of a comparative disparity in excess of 100%, which is impossible. If—as the majority and concurring opinions, by necessity, hold—the comparative disparity in Howell's case must exceed these figures because absolute disparity is a "threshold" matter, any analysis in the majority and concurring opinions with respect to the sufficiency of Howell's comparative disparity figure of 54.49% necessarily must be composed of empty words.

In my view, Howell's statistics are sufficient to state a fair-cross-section claim. When analyzing this case, my reading of the case law compels me to start with the comparative disparity of 54.49%. This figure—which implies that *over half* of Allegheny County's black jury-service-eligible population was excluded from serving on venires—should trouble everyone. Although this figure is well above the 40% figure that we called "borderline" in *Ramseur*, 983 F.2d at 1232, our analysis cannot stop there because we have recognized that comparative disparity may overstate the degree of underrepresentation in cases "where a small population is subjected to scrutiny," *Weaver*, 267 F.3d at 242.

We must, then, look at the size of the population at issue—and, consequently, at the absolute disparity—to place the troubling 54.49% comparative disparity into context and determine whether it rises to the level of a Sixth Amendment

violation. *See* *id.* ("[T]he significance of the [comparative-disparity] figure is directly proportional to the size of the group relative to the general population ...."). For example, in *Weaver*, we noted that comparative disparities of 40.01% with respect to black persons and 72.98% with respect to Latino persons were "quite high," but because the black and Latino jury-service-eligible populations constituted merely 3.07% and 0.97% of the total jury-service-eligible population, respectively, we held that these figures did not rise to an unconstitutional level of underrepresentation. *Id.* at 238, 243. In essence, because the populations at issue in *Weaver* were so small—resulting in absolute disparities of 1.23% for black persons and 0.71% for Latino persons—the net impact of the underrepresentation of these racial groups on venires was minimal, and therefore their degree of representation on venires was "fair and reasonable" under the Sixth Amendment. *See* *id.* at 243.

Here, we are not confronted with a small population group as in *Weaver*; rather, we are confronted with a group that constitutes over one-tenth—10.7%—of the relevant jury-service-eligible population. Given the significant size of that group—black persons—as a proportion of the total jury-service-eligible population, underrepresentation of black persons at a rate of 54.49% cannot be "fair and reasonable" under *Duren*; the black jury-service-eligible population of Allegheny County is large enough such that the troubling comparative disparity of 54.49% is probative of a Sixth Amendment violation. *See* *id.* at 242 ("[C]omparative disparity ... is most useful when dealing with a group that comprises a large percentage of the population."). The black jury-service-eligible population, however, is nonetheless small enough such that the absolute disparity of 5.83% in this case "understates the systematic representative deficiencies." *Id.* (quoting *United States v. Shinault*, 147 F.3d 1266, 1273 (10th Cir. 1998)). As discussed above, the absolute disparity in this case has an absolute maximum limit of 10.7%, which assumes complete exclusion ***280** of black persons from service on venires and a comparative disparity of 100%; thus, as illustrated by the Appendix, demanding a higher absolute disparity in this case would require a comparative disparity that would quickly approach 100% and complete exclusion. Therefore, underrepresentation of black persons on juries at a rate of 54.49% under these particular circumstances is sufficient to establish that such underrepresentation violates the Sixth Amendment's fair-cross-section requirement. [11] *Cf.* *Garcia-Dorantes v. Warren*, 801 F.3d 584, 600 (6th Cir. 2015) ("[T]he absolute disparity for African-Americans of 3.45% and corresponding 42% comparative disparity are sufficient to satisfy the *Duren* second prong.").

11 The unconstitutional nature of the underrepresentation of black persons on venires in Allegheny County comes into stark relief when one considers it in the broader context of the ultimate goal of the Supreme Court's jurisprudence regarding racial discrimination in jury selection. As a result of *Taylor v. Louisiana*, 419 U.S. at 538, 95 S.Ct. 692, and its progeny (including *Duren*), the Supreme Court prohibits the state from discriminating on the basis of, among other things, race when compiling jury pools and assembling venires from which petit juries are drawn. *See* *id.* ("[J]ury wheels, pools of names, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."). As a result of *Strauder v. West Virginia*, 100 U.S. 303, 305, 25 L.Ed. 664 (1880), and its progeny (including *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)), the Supreme Court prohibits the state from discriminating on the basis of race when selecting petit juries from those venires. *See* *Batson*, 476 U.S. at 86, 106 S.Ct. 1712 ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." (citing *Strauder*, 100 U.S. at 305)). Although "a defendant has no *right* to a 'petit jury composed in whole or in part of persons of his own race,' " *id.* at 85, 106 S.Ct. 1712 (emphasis added) (quoting *Strauder*, 100 U.S. at 305), the upshot of *Taylor* and *Strauder* and their progeny is that a defendant's petit jury *should* be reasonably representative of the racial demographics of her community because the empanelment of the petit jury should be the result

> of a process free from racial discrimination: venires cannot be assembled in a racially discriminatory way, and the state cannot select petit juries in a racially discriminatory way, and thus the resulting petit juries *should* be reasonably representative of the racial demographics of the community.
>
> If black persons were represented on venires in Allegheny County in the early 2000s in equal proportion to their representation in the jury-service-eligible population as a whole (10.7%), assuming that petit juries were empaneled properly in a race-neutral manner, we would expect *every single* criminal petit jury in Allegheny County to have had *at least* one black juror. Specifically, we would expect each criminal petit jury of twelve to have, on average, 1.3 black jurors (10.7% of 12). In reality, utilizing Howell's statistics and assuming again that petit juries were empaneled properly in a race-neutral manner, we expect that approximately 42% of criminal petit juries in Allegheny County had *zero* black jurors—like the jury that convicted Howell. Specifically, we expect that each criminal petit jury of twelve had, on average, 0.58 black jurors (4.87% of 12). The Constitution simply cannot tolerate such a wide disparity that results solely from the unrepresentativeness of venires.

B.

Finally, Howell has satisfied the third prong of the test in *Duren*: he has produced sufficient evidence to demonstrate that the underrepresentation of black persons on venires "is due to the *systematic* exclusion of this group in the jury-selection process." 439 U.S. at 364, 99 S.Ct. 664 (emphasis added).

Under *Duren*, Howell need only demonstrate that the underrepresentation of black persons is " 'systematic'—that is, inherent in the particular jury-selection process utilized." *Id.* at 366, 99 S.Ct. 664. In other words, Howell simply must prove that the underrepresentation of black persons ***281** was "due to the *system* by which juries were selected." *Id.* at 367, 99 S.Ct. 664. The term "systematic exclusion," however, does not connote "intentional discrimination": "intentional discrimination need not ... be shown to prove a Sixth Amendment fair cross section claim." *Weaver*, 267 F.3d at 244 (citing *Duren*, 439 U.S. at 368 n.26, 99 S.Ct. 664 (contrasting equal-protection challenges, which require evidence of discriminatory intent, with Sixth Amendment fair-cross-section challenges, which require proof of only "systematic disproportion itself")). "Under *Duren*, 'systematic exclusion' can be shown by a large discrepancy repeated over time such that the system must be said to bring about the underrepresentation." *Id.* For example, the Supreme Court held in *Duren* that the petitioner's statistical evidence, which "demonstrate[ed] that a large discrepancy occurred not just occasionally, but in every weekly venire" during an eight-month study period, "manifestly indicate[d] that the cause of the underrepresentation was systematic." 439 U.S. at 367, 99 S.Ct. 664.

The majority holds that Howell cannot demonstrate that the underrepresentation of black persons was "systematic" for three reasons: (1) the process by which venires were assembled was "facially neutral," insofar as veniremembers were drawn from voter-registration lists and motor-vehicle records; (2) the six-month study of venires upon which Howell relies is not of a sufficient duration to support a finding of "systematic exclusion"; and (3) Allegheny County was engaged in "on-going efforts to improve the representativeness of jury lists," which, according the majority, makes "it less likely that the data reflects that underrepresentation is due to a systematic exclusion in the jury process."

I disagree with the premises of each of these points. First, by giving weight to the fact that venires are assembled from "facially neutral" sources, it 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. *See id.* at 368, 99 S.Ct. 664 n.26; *accord Weaver*, 267 F.3d at 244. According to the concurring opinion, because Allegheny County assembled its venires from two facially neutral sources—voter-registration lists and motor-vehicle records—Allegheny County's "system [went] above and beyond what is constitutionally required." What the concurring opinion fails to grasp is that the use of race-neutral sources in assembling venires is only what the *Fourteenth* Amendment requires: the Fourteenth Amendment forbids the government from intentionally discriminating on

the basis of race in assembling venires or petit juries. *See* *Strauder*, 100 U.S. at 305. The *Sixth* Amendment, by contrast, requires that "representation of [a distinctive] group in venires from which juries are selected [must be] fair and reasonable in relation to the number of such persons in the community." *Duren*, 439 U.S. at 364, 99 S.Ct. 664 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)). "[I]ntentional discrimination need not be shown to prove a Sixth Amendment fair[-]cross[-]section claim," and thus the fact that Allegheny County assembled its venires from race-neutral sources is immaterial to Howell's Sixth Amendment claim. *Weaver*, 267 F.3d at 244. The majority and concurring opinions thus disregard our observation in *Weaver* that "if the use of voter registration lists"—a facially neutral source—"over time did have the effect of sizeably underrepresenting a particular class or group of the jury venire, then under some circumstances, 'this could constitute a violation of a defendant's fair-cross-section ***282** rights under the [S]ixth [A]mendment.' " *Id.* at 244–45 (alteration in original) (quoting *Bryant v. Wainwright*, 686 F.2d 1373, 1378 n.4 (11th Cir. 1982)). This is not, as the concurring opinion phrases it, a "theoretical possibility": Howell's very statistics establish that the use of voter-registration lists and motor-vehicle records resulted in the underrepresentation of black persons on venires in Allegheny County at a rate of 54.49%, even though Allegheny County used race-neutral sources to assemble its venires.

Second, taken together with other evidence, the six-month duration of the study upon which Howell relies is sufficient to demonstrate that the underrepresentation of black persons was "systematic." The six-month duration of the study in this case is sufficiently similar to the eight-month duration of the study in *Duren*, which, standing alone, "manifestly indicate[d] that the cause of the underrepresentation was systematic." 439 U.S. at 367, 99 S.Ct. 664. Admittedly, *Duren* presented a stronger set of facts, from which the Supreme Court could even "establish[ ] when in the selection process the systematic exclusion took place," but nowhere in *Duren* does the Supreme Court hold that a litigant needs such a strong set of facts to prevail on a fair-cross-section claim; rather, the core holding of *Duren* in this regard is that a litigant must prove merely that the "cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized"—and that a study with an eight-month duration "manifestly indicates" such a "systematic" cause. *Id.* Further, by relying on *Ramseur* for the proposition that a study with a duration of two years was not sufficient to demonstrate systematic underrepresentation, the majority disregards the fact that *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. Indeed, our Court previously has noted that we undertook a flawed analytical approach in *Ramseur* with respect to the second and third prongs of *Duren*. *See* *Weaver*, 267 F.3d at 241 ("In our brief discussion of Ramseur's Sixth Amendment claim, we appear to have combined the second and the third prongs of *Duren* ....").

Third, 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. The Jury Coordinator of the Allegheny County Court Administrator's Office testified that "one of the parts of [his] mission ha[d] been to address concerns about the numbers of discrete races and colors ... of people that [we]re represent[ed o]n our jury panels." App. 137. The Jury Coordinator testified that "the most important" of his efforts to "address those concerns" was to "completely revise the questionnaire" that is mailed to prospective jurors as part of the process of selecting veniremembers. *Id.* 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*.

Therefore, Howell has satisfied the third prong of the test espoused in *Duren*. The six-month study upon which he relies is sufficiently similar in duration to the eight-month study in *Duren* such that the duration of the study indicates that the system of selecting potential jurors caused the ***283** underrepresentation, and the evidence with respect to Allegheny County's attempts to alter the system to increase

racial diversity suggest that Allegheny County itself believed the problem of underrepresentation was systematic.

III.

While I find that Howell's statistics are reliable and help establish a prima facie violation of his Sixth Amendment fair-cross-section rights, the focus on and discussion of statistics and statistical concepts in this case—statistical reliability, the difference between standard deviation and standard error, the import of absolute disparity versus comparative disparity—obscures what is a relatively straightforward question: Did the process of selecting potential jurors result in the underrepresentation of black persons on venires in Allegheny County to a degree that is constitutionally unacceptable? In my view, the answer to that question must be "yes": 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.

There is evidence in the record to suggest that the court administrators in Allegheny County eventually implemented policies that remedied the underrepresentation of black persons on venires. The underrepresentation of black persons on venires, however, had not been remedied at the time of Howell's trial, and, because Howell established that black persons were underrepresented on venires at an alarming rate, his Sixth Amendment right to have his petit jury drawn from a fair cross-section of the community was violated.

For the reasons stated above, I respectfully dissent. Because Howell has established a prima facie fair-cross-section violation, I would remand to the District Court to determine whether the Commonwealth can "justify[ ] this infringement by showing [that] attainment of a fair cross[-] section [was] incompatible with a significant state interest." *Duren*, 439 U.S. at 368, 99 S.Ct. 664.

Appendix

Illustrative Absolute and Comparative Disparity Figures for Black Persons Serving on Venires in Allegheny County in the Early 2000s

(with Increases/Decreases in Venire Representation of 0.2%)

(with Howell's Statistical Evidence Shaded in Grey)

***284**

Percentage of Population	Percentage of Venires	Absolute Disparity	Comparative Disparity
10.7%	10.7%	0.0%	0.00%
10.7%	10.5%	0.2%	1.87%
10.7%	10.3%	0.4%	3.74%
10.7%	10.1%	0.6%	5.61%
10.7%	9.9%	0.8%	7.48%
10.7%	9.7%	1.0%	9.35%
10.7%	9.5%	1.2%	11.21%
10.7%	9.3%	1.4%	13.08%
10.7%	9.1%	1.6%	14.95%
10.7%	8.9%	1.8%	16.82%
10.7%	8.7%	2.0%	18.69%
10.7%	8.5%	2.2%	20.56%
10.7%	8.3%	2.4%	22.43%
10.7%	8.1%	2.6%	24.30%
10.7%	7.9%	2.8%	26.17%
10.7%	7.7%	3.0%	28.04%

***285**

Percentage of Population	Percentage of Venires	Absolute Disparity	Comparative Disparity
10.7%	7.5%	3.2%	29.91%
10.7%	7.3%	3.4%	31.78%
10.7%	7.1%	3.6%	33.64%
10.7%	6.9%	3.8%	35.51%
10.7%	6.7%	4.0%	37.38%
10.7%	6.5%	4.2%	39.25%
10.7%	6.3%	4.4%	41.12%
10.7%	6.1%	4.6%	42.99%
10.7%	5.9%	4.8%	44.86%
10.7%	5.7%	5.0%	46.73%
10.7%	5.5%	5.2%	48.60%
10.7%	5.3%	5.4%	50.47%
10.7%	5.1%	5.6%	52.34%
10.7%	4.9%	5.8%	54.21%
10.7%	4.87%	5.83%	54.49%
10.7%	4.7%	6.0%	56.07%
10.7%	4.5%	6.2%	57.94%
10.7%	4.3%	6.4%	59.81%
10.7%	4.1%	6.6%	61.68%
10.7%	3.9%	6.8%	63.55%
10.7%	3.7%	7.0%	65.42%
10.7%	3.5%	7.2%	67.29%
10.7%	3.3%	7.4%	69.16%
10.7%	3.1%	7.6%	71.03%

***286**

Percentage of Population	Percentage of Venires	Absolute Disparity	Comparative Disparity
10.7%	2.9%	7.8%	72.90%
10.7%	2.7%	8.0%	74.77%
10.7%	2.5%	8.2%	76.64%
10.7%	2.3%	8.4%	78.50%
10.7%	2.1%	8.6%	80.37%
10.7%	1.9%	8.8%	82.24%
10.7%	1.7%	9.0%	84.11%
10.7%	1.5%	9.2%	85.98%
10.7%	1.3%	9.4%	87.85%
10.7%	1.1%	9.6%	89.72%
10.7%	0.9%	9.8%	91.59%
10.7%	0.7%	10.0%	93.46%
10.7%	0.5%	10.2%	95.33%
10.7%	0.3%	10.4%	97.20%
10.7%	0.1%	10.6%	99.07%
10.7%	0.0%	10.7%	100.00%

All Citations

939 F.3d 260

End of Document

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

No. 17-1758

_____

JOSEPH HOWELL,
Appellant

v.

SUPERINTENDENT ROCKVIEW SCI;
ATTORNEY GENERAL PENNSYLVANIA;
DISTRICT ATTORNEY ALLEGHENY COUNTY

_____

(W.D. Pa. No. 2-12-cv-00884)

_____

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and FISHER[1], *Circuit Judges.*

_____

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

_____

The petition for rehearing filed by Appellant, Joseph Howell in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for

[1] Judge Fisher's vote is limited to panel rehearing only.

rehearing by the panel and the Court en banc, is denied. Judge Restrepo voted for rehearing.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: November 26, 2019
CJG/cc: Arianna J. Freeman, Esq.
Loren D. Stewart, Esq.
Rusheen R. Pettit, Esq.

2017 WL 782879
Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

Joseph HOWELL, Petitioner,
v.
Marirosa LAMAS Superintendant at S.C. I. Rockview, the Attorney General of the Commonwealth of Pennsylvania, the District Attorney of the County of Allegheny, Respondents.

2:12cv884
|
Filed 03/01/2017

Attorneys and Law Firms

Joseph Howell, Huntingdon, PA, pro se.

Rusheen R. Pettit, Office of the District Attorney, Pittsburgh, PA, for Respondents.

MEMORANDUM ORDER

David Stewart Cercone, United States District Judge

***1** AND NOW, this 1st day of March, 2017, after *de novo* review of the record and upon due consideration of [34] the magistrate judge's report and recommendation filed on January 25, 2016, and [39] petitioner's objections thereto, IT IS ORDERED that petitioner's objections are overruled, the Petition for Writ of Habeas Corpus is dismissed and the concomitant request for a certificate of appealability is denied. The report and recommendation as augmented below is adopted as the opinion of the court.

Petitioner's objections are without merit. Petitioner's contention—that the underrepresentation of the African-American population in the Allegheny County jury pools at the time of his trial is statistically sufficient to warrant an evidentiary hearing to further develop his Sixth Amendment fair-cross-section claim—is unavailing. As Judge Klein aptly opined, 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 population as a whole and statistical underrepresentation that runs afoul of the Sixth Amendment. This core statistical evidence presents the foundation for petitioner's fair-cross-section claim. But even if it is augmented by other anecdotal evidence, it is insufficient to render the county jury-pool system utilized at the time of petitioner's trial constitutionally deficient. In other words, petitioner has failed to present a sound reason for further development of the record. Consequently, the writ of habeas corpus and the concomitant request for a certificate of appealability have been denied

All Citations

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Report and Recommendation Adopted as Modified by Howell v. Lamas, W.D.Pa., March 1, 2017

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United States District Court, W.D. Pennsylvania.

Joseph HOWELL, Petitioner,
v.
Marirosa LAMAS, Superintendant at S.C.I. Rockview; the Attorney General of the Commonwealth of Pennsylvania; the District Attorney of the County of Allegheny, Respondents.

Civil Action No. 12-884
|
Signed 01/25/2016

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

MAUREEN P. KELLY, CHIEF UNITED STATES MAGISTRATE JUDGE

I. RECOMMENDATION

***1** It is respectfully recommended that the Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition") filed pursuant to 28 U.S.C. § 2254 be dismissed and that a Certificate of Appealability be denied.

II. REPORT

Joseph Howell ("Petitioner") was convicted of, inter alia, second degree murder in connection with his shooting of the victim in the course of a robbery. He has now filed the Petition to challenge his state court convictions. This case has been the subject of a previous Report and Recommendation (the "First Report") that recommended the Respondents' Motion to Dismiss based upon the statute of limitations be denied without prejudice, to being raised in the Answer and addressing some additional issues such as tolling. ECF No. 25. The First Report was adopted by District Judge David Stewart Cercone. ECF No. 27. Familiarity with the First Report is presumed.

Petitioner raises six issues in the instant Petition. Because none of the issues merit the grant of federal habeas relief, the Petition should be denied. Because jurists of reason would not find denial of the Petition debatable, a Certificate of Appealability should also be denied.

A. Facts Underlying Petitioner's Convictions.

The Pennsylvania Superior Court summarized the facts of this case in its June 29, 2005 Opinion and Memorandum:

> The following facts are relevant. James Balint testified that at 12:30 p.m. on July 13, 2002, he met his younger brother, Michael, at Michael's apartment on Jones Street in Verona, Pennsylvania. James noticed that two other individuals were present: Michael's roommate, a male identified as "J.R.," and Appellant [i.e., Petitioner], who James had never seen before. Appellant, who had been talking on a cellular telephone when James arrived, promptly ended his telephone conversation, "said something about girls," and left the apartment. James asked Michael who Appellant was, and Michael responded, "Don't worry about it." James visited with Michael until 2:30 p.m., at which time he returned home.
>
> At approximately 6:00 p.m., James decided to attend a street fair in Pittsburgh and drove back to Michael's apartment unannounced to see if Michael wanted to go with him. When James arrived, he rang the security buzzer at the front of the apartment building, but Michael did not answer. James then checked a side door and discovered that it was unlocked. He entered the building, walked to his brother's door, and knocked on it, expecting to find Michael cleaning the apartment. When James knocked on the door, however, it opened slightly, and he immediately observed Appellant "standing there with a [9mm] gun pointed at [Michael], and [Michael] had duct tape on his mouth." A moment later, an African-American male named Donald Burnham reached through the door, grabbed James by the wrist, and said, "[G]et in here." James reacted by throwing his shoulder into the door, knocking Burnham to the ground.
>
> Once inside the apartment, James lunged at Appellant in an attempt to gain control of the pistol. The two men began to wrestle and fell into a loveseat, at which point, James heard two gunshots. James gained control of Appellant's left hand, and Appellant started pistol-whipping James on

the back of the head. When Burnham attempted to lift James off of Appellant, Michael lunged at Burnham, and all four men fell to the floor. Burnham stood up and ran out the door, fleeing the scene. As Appellant and James continued to struggle for control of the gun, Appellant eventually stood up, "leaned over and shot [the pistol] three times." James rolled over on top of Michael after the gun discharged, and Appellant fled on foot. James then spoke to Michael and saw that he was bleeding and unresponsive. Emergency medical personnel arrived and pronounced Michael dead. An autopsy revealed that he had been shot once in the head, near his left eye, and once in his back. Investigators also noted that Michael's legs had been bound with duct tape before the shooting.

***2** Appellant took the stand in his own defense and testified that he and Donald Burnham went to the apartment on the evening of the shooting to make separate purchases of marijuana from Michael. Appellant stated that he had bought marijuana from Michael on prior occasions and that they had a good relationship; however, Appellant claimed that he was not well acquainted with Burnham, whom he had met through a mutual friend, James Perrin. Burnham was supposed to purchase marijuana from Perrin.

Appellant testified that upon entering the building, he introduced Burnham to Michael, and the three men walked upstairs to Michael's apartment. Appellant paid Michael $60 for one-half ounce of marijuana, put the drugs in his pocket, and proceeded to use the bathroom. When Appellant exited the bathroom, he noticed that Burnham was holding a gun, Appellant asked Burnham what he was doing, and Burnham replied, "[C]hill out, I got this." Burnham then instructed Michael to place duct tape around his ankles, and Michael complied. Moments later, when James knocked on the apartment door, Burnham hid and waited for James to enter. Appellant admitted that he and James fought inside the apartment, but claimed that James was the aggressor, acting under the mistaken belief that Appellant and Burnham were confederates. Appellant denied shooting Michael Balint and maintained that he never intended to rob anyone.

Pa. Superior Court slip op., ECF No. 31-3 at 1–4 (citations omitted). [1]

1 The copy of the Superior Court's opinion contained in the Answer as an exhibit at ECF No. 31-3 at 1–16, was missing pages. The complete opinion, which is contained in the original state court record transmitted to the Clerk of Court, is attached hereto as an appendix and will be cited to hereinafter as "Appendix at ___".

B. Procedural History

The jury apparently discredited Petitioner's version and credited the prosecution's version as the jury convicted Petitioner of, *inter alia*, second degree murder, also known as "felony murder" and robbery. Petitioner was sentenced to life in prison for the second degree murder conviction. ECF No. 21-1 at 38. [2] Petitioner filed post trial motions, which were denied. Petitioner then filed a direct appeal to the Pennsylvania Superior Court. The trial court filed its opinion in response to the appeal. ECF No. 31-1. The Superior Court affirmed in an unpublished opinion. Appendix.

2 Petitioner was also sentenced to a consecutive period of 10 to 20 years of incarceration for the robbery conviction, which formed the predicate felony of the felony murder conviction. Under the Pennsylvania legal doctrine of "merger" the second degree murder conviction "merges" with the robbery conviction and Petitioner cannot be sentenced for both the robbery conviction and the second degree murder conviction as will be made clear below. ECF No. 22-1 at 9.

On February 15, 2006, Petitioner filed a pro se Post Conviction Relief Act ("PCRA") Petition. The PCRA trial court appointed counsel who filed an amended PCRA Petition. The PCRA trial court dismissed the PCRA Petition. Petitioner filed an appeal to the Superior Court. In response, the PCRA trial court filed its opinion explaining its rationale for denying the PCRA Petition. ECF No. 31-3 at 31–34. Among the issues raised in the PCRA Petition was the contention that Petitioner's sentence for the robbery conviction should "merge" (under the state law doctrine of merger) with his felony murder conviction. The PCRA trial court agreed but, inexplicably failed to vacate Petitioner's sentence imposed for the robbery conviction.

***3** On August 28, 2007, the Superior Court issued a Memorandum Opinion affirming the denial of the PCRA petition for the most part but remanded the case to the PCRA trial court for it to vacate Petitioner's sentence for robbery based on the state law doctrine of merger. ECF No. 31-4 at 28–41.

Notwithstanding the Superior Court's order remanding the case to the PCRA trial court to vacate Petitioner's sentence for the robbery conviction, the PCRA trial court failed to do so. Consequently, on May 21, 2012, Petitioner filed a Writ of Mandamus with the Superior Court, seeking an order directing the PCRA trial court to obey the Superior Court's prior order to vacate Petitioner's robbery sentence. The Superior Court granted the writ on May 24, 2012. The PCRA trial court complied with the Superior Court's issuance of the mandamus and vacated Petitioner's robbery sentence on June 6, 2012.

Meanwhile, Petitioner filed a second PCRA Petition (the "Second PCRA Petition"), on April 30, 2012. On June 20, 2012, the PCRA trial court dismissed the Second PCRA Petition as time barred. On August 23, 2013, the Superior Court affirmed. ECF No. 31-5 at 6–12.

During the pendency of the Second PCRA Petition, Petitioner initiated the instant habeas proceedings in this Court on June 27, 2012. ECF No. 1. Petitioner paid the filing fee and the Petition was filed. ECF No. 5. This Court stayed the habeas proceedings in light of the then pending Second PCRA Petition and the parties' requests to stay these proceedings. ECF No. 14. On October 22, 2013, the stay was lifted and the Court ordered the Respondents to file an Answer. ECF No. 20.

Respondents filed a Motion to Dismiss on November 13, 2013, contending that the Petition was time barred. ECF No. 21.

Coincidentally, also on November 13, 2013, Petitioner filed both a Memorandum of Law in support of his Petition, ECF No. 22 and a "Supplemental Memorandum of Law" in support of his Petition. ECF No. 23.

On December 16, 2013, Petitioner filed his Response to the Motion to Dismiss, contending that Petitioner was entitled to tolling of the statute of limitations. ECF No. 24.

On May 5, 2014, the undersigned issued the First Report, recommending that the Respondents' Motion to Dismiss be denied, albeit without prejudice to Respondents raising the statute of limitations defense in their Answer and responding to Petitioner's arguments for tolling. ECF No. 25. The parties did not object and Judge Cercone adopted the First Report as the opinion of the Court and denied the Motion to Dismiss. ECF No. 27.

After being granted an extension of time, Respondents filed their Answer. ECF No. 31. In the Answer, the Respondents conceded that the Petition was timely filed, id., at 10, but denied that Petitioner was entitled to any habeas relief. Petitioner filed a Reply to the Answer. ECF No. 33.

Petitioner raises the following issues in the instant Petition and the accompanying Memorandum of Law and Supplemental Memorandum.

> GROUND ONE: PETITIONER WAS DENIED HIS RIGHT TO A PETIT JURY SELECTED FROM A FAIR CROSS SECTION OF THE COMMUNITY.

ECF No. 5 at 5.

> GROUND TWO: TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO THE COURT'S ACCOMPLICE LIABILITY INSTRUCTION.

Id. at 6–7.

> GROUND THREE: TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO THE TRIAL COURT'S SECOND-DEGREE MURDER INSTRUCTION.

***4** Id. at 8.

> GROUND FOUR: PETITIONER WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY ON THE

LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER.

Id. at 10.

GROUND FIVE: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO INSTANCES OF PROSECUTORIAL MISCONDUCT[.]

Id. at 11.

GROUND SIX: TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A MOTION TO SUPPRESS THE IDENTIFICATION EVIDENCE.

Id. at 12.

C. The AEDPA Applies.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, § 101 (1996) (the "AEDPA") which amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254 was enacted on April 24, 1996. Because Petitioner's habeas Petition was filed after its effective date, the AEDPA is applicable to this case. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000).

Where the state courts have reviewed a federal issue presented to them and disposed of the issue on the merits, and that issue is also raised in a federal habeas petition, the AEDPA provides the applicable deferential standards by which the federal habeas court is to review the state courts' disposition of that issue. See 28 U.S.C. § 2254(d) and (e).

In Williams v. Taylor, 529 U.S. 362 (2000), the United States Supreme Court has expounded upon the standard found in 28 U.S.C. § 2254(d). In Williams, the Supreme Court explained that Congress intended that habeas relief for errors of law may only be granted in two situations: 1) where the state court decision was "contrary to ... clearly established Federal law as determined by the Supreme Court of the United States" or 2) where that state court decision "involved an unreasonable application of[ ] clearly established Federal law as determined by the Supreme Court of the United States." Id. at 404-05 (emphasis deleted). A state court decision can be contrary to clearly established federal law in one of two ways. First, the state courts could apply a wrong rule of law that is different from the rule of law required by the United States Supreme Court. Secondly, the state courts can apply the correct rule of law but reach an outcome that is different from a case decided by the United States Supreme Court where the facts are indistinguishable between the state court case and the United States Supreme Court case.

The AEDPA also permits federal habeas relief where the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

D. Discussion

1. Ground One—Denial of right to jury of fair cross section of community.

Petitioner's first claim is that he was denied his Sixth Amendment right to have his jury drawn from a fair cross section of the community. More specifically, he claims that there were only two African-Americans in his first jury panel of 35 people and there were no African-Americans in the second jury panel of 25 people. Consequently, he claims that African-Americans are systematically under-represented in the pool from which the Court of Common Pleas of Allegheny County draws its potential jurors. He further argues that the Superior Court's disposition of his fair cross section claim was contrary to or an unreasonable application of United States Supreme Court precedent. ECF No. 22 at 3. More specifically, he complains that the Superior Court required that he show a "discriminatory intent" in order to carry his burden to show a prima facie case. See Appendix, Superior Court slip op. at 12 ("Although Appellant claims he is not required to prove discriminatory intent under the United States Supreme Court's decision in ***Duren v. Missouri***,

439 U.S. 357 (1979), the Pennsylvania Supreme Court has held otherwise."). But see United States v. Weaver, 267 F.3d 231, 244 (3d Cir. 2001) ("We must be careful to note that intentional discrimination need not to be shown to prove a Sixth Amendment fair cross section claim.") (citing Duren, 439 U.S. at 368, n. 26).

***5** Even if we assume, without deciding, that Petitioner has shown that the Superior Court erred in requiring him to show discriminatory intent, this would not be sufficient under the AEDPA to merit relief. He must still show a violation of his Sixth Amendment right to a fair cross section. See, e.g., Aleman v. Sternes, 320 F.3d 687, 690 (7th Cir. 2003) (If state court's opinion was "contrary to" Supreme Court law under 28 U.S.C. § 2254(d), that section no longer applies; but, petitioner still must establish an entitlement to the relief he seeks under § 2254(a): that he is "in custody in violation of the Constitution or laws or treaties of the United States."); Gibbs v. VanNatta, 329 F.3d 582, 584 (7th Cir. 2003) (the petitioner "is not entitled to relief in the federal courts unless he can show that he was in fact denied effective assistance of counsel, not merely that the state courts bobbled the issue."); Harrison v. Superintendent of SCI Huntingdon, Civ.A. No. 09-574, 2010 WL 4617459, at *6 (W.D. Pa. Nov. 4, 2010) ("while establishing that the State Courts' decision was contrary to or an unreasonable application of Supreme Court precedent may be a necessary condition to obtaining federal habeas relief, it is not a sufficient condition; one also has to demonstrate that one's federal constitutional rights were violated, not just that the State Courts erred in their reasoning. This is the rule of law in the Third Circuit.") (quoting Saranchak v. Beard, 616 F.3d 292, 309–10 (3d Cir. 2010) ("He 'is not entitled to relief in the federal courts unless he can show that he was in fact denied effective assistance of counsel, not merely that the state courts' applied a different standard.")).

The United States Supreme Court has held that in order for Petitioner to establish:

> a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). Statistical analysis is needed to prove the second prong of group representation that is "not fair and reasonable." See, e.g., United States v. Weaver, 267 F.3d 231, 240 (3d Cir. 2001) ("The second prong of *Duren*.... is at least in part a mathematical exercise and must be supported by statistical evidence.").

We further note that the Superior Court panel of three judges which decided Petitioner's Fair Cross Section claim, issued two opinions: one designated as the "Memorandum" and one designated as a "Concurring Memorandum" authored by Judge Klein and joined by Judge Kelly. In that Concurring Memorandum, Judge Kelly found that Petitioner had failed to establish the second prong required under Duren, namely that Petitioner's statistical evidence did not establish that the representation of African-Americans in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community. We agree with this analysis and on that basis, recommend denying relief on this claim.

More specifically, Judge Klein found that Petitioner's statistical evidence established at best an "absolute disparity" of 5.53% and a "comparative disparity" of about 53%.[3] Judge Klein searched through case law at that time and found that the closet approximation of such disparities occurred in the case of United States v. Suttiswad, 696 F.2d 645 (9th Cir. 1982) where the statistics showed an "absolute disparity" of 7.7% and a "comparative disparity" of well over 50%. Judge Klein then observed that notwithstanding these numbers, the United States Court of Appeals for the Ninth Circuit found in Suttiswad that such numbers failed to establish the second Duren prong. Judge Klein concluded that if the starker numbers in Suttiswad did not establish the second prong, then Petitioner's less stark statistics also failed to do so.

3 See Appendix at 4–5 and United States v. Weaver, 267 F.3d at 242–43 for an explanation of "absolute disparity" and "comparative disparity."

We do not decide whether we must apply AEDPA deference to the reasoning contained in the Concurring Memorandum filed by Judge Klein and joined by Judge Kelly. Instead, we provide de novo review to this claim and in doing so, we adopt as our own, Judge Klein's reasoning and we find that Petitioner's statistical evidence fails to carry his burden under the second Duren prong. See United States v. Weaver, 267 F.3d at 243 (citing Suttiswad with approval for its "finding that where African–Americans comprised 9.3% of population, Hispanics, 11.7% and Asians, 8.3%, absolute disparities of 2.8%, 7.7%, and 4.7%, respectively, were insubstantial); Weaver 267 F.3d at 242 (finding comparative disparities of 40.01% (for African-Americans) and 72.98% (for Hispanics)) to be of questionable probative values given that such groups comprised such a small percentage of the general population but nonetheless concluded no Sixth Amendment violation was established and citing with approval United States v. Chanthadara, 230 F.3d 1237, 1257 (10th Cir. 2000) (finding that where African–Americans accounted for 7.9% of population, and Hispanics, 2.74%, comparative disparities of 40.89% and 58.39%, respectively, did not establish prima facie violation).

***6** Accordingly, we find that Petitioner has not established a Sixth Amendment fair cross section claim. Therefore, Ground One does not afford Petitioner relief.

2. Ground Four—Failure to instruct on lesser included offenses.

In Ground Four, Petitioner complains that the trial court failed to provide instructions to the jury on the lesser included offense of involuntary manslaughter. Petitioner now contends that the trial court's refusal to instruct the jury on the lesser included offense of voluntary manslaughter violated his Fourteenth Amendment right to substantive due process, i.e., rendered his trial fundamentally unfair.

First, it is not clear to this Court that Petitioner ever raised this claim as a federal constitutional violation in the state courts. He asserted that it was error not to give the involuntary manslaughter charge but nowhere did he rely upon the United States Constitution's due process clause. Instead, he appeared to have raised this solely as a state law issue, citing state law cases that did not appear to conduct any federal constitutional analysis but merely a state law analysis of when the involuntary manslaughter charge is required under state law. State law requires providing a lesser included instruction only when there is some evidence supporting the existence of involuntary manslaughter. See ECF No. 31-2 at 43–44. Hence, it would appear that this claimed violation of the Fourteenth Amendment's substantive due process protection was never fairly presented to the State Courts but rather was presented as a mere error of state law.[4] As such, the federal constitutional claim was not exhausted and, therefore, procedurally defaulted. See, e.g., Duncan v. Henry, 513 U.S. 364, 365-66 (1995) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."); Bond v. Fulcomer, 864 F.2d 306, 309 (3d Cir. 1989) ("both the legal theory and the facts supporting a federal claim must have been submitted to the state court"), *implied overruling on other grounds recognized in*, Hull v. Freeman, 932 F.2d 159 (3d Cir. 1991), *overruling on other grounds recognized in*, Caswell v. Ryan, 953 F.2d 853 859–60 (3d Cir. 1992). Because Petitioner raised this claim on direct appeal solely as a claim of state law violation, he has procedurally defaulted any federal law claim.

4 See, e.g., McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999) (for an explanation of how a federal law claim can be "fairly presented" to a state court so as to exhaust the federal law claim).

In the alternative, Petitioner has not shown that the Pennsylvania Superior Court's disposition of this claim was contrary to or an unreasonable application of United States Supreme Court precedent. The Superior Court essentially held that Petitioner was not entitled to an involuntary manslaughter instruction because involuntary manslaughter requires a showing that the defendant caused the "death of another person 'as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner....' " Appendix at 10 (quoting 18 Pa.C.S. § 2504(a)

the statute defining involuntary manslaughter). The Superior Court went on to reason that "Appellant flatly denied shooting Michael Balint and claimed he was an innocent bystander. ***See*** N.T. Trial, 1/21-26/04, at 560. Consequently, involuntary manslaughter was not an issue in the case, and Appellant was not entitled to a jury instruction on that offense." Id. Petitioner has not carried his burden to show that this disposition of his claim was contrary to or an unreasonable application of United States Supreme Court precedent.

***7** Petitioner does argue that the Superior Court's decision is contrary to Sansone v. United States, 380 U.S. 343 (1965) and to Keeble v. United States, 412 U.S. 205 (1973). ECF No. 22 at 15. However, Sansone and Keeble were not constitutionally based decisions but decisions concerning what Fed.R.Crim.P. 31(c) required at that time. Sansone, 380 U.S. at 350 ("The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31(c) of the Federal Rules of Criminal Procedure provides in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, '(i)n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it * * * (is) entitled to an instruction which would permit a finding of guilt of the lesser offense.' ")(quoting Berra v. United States, 351 U.S. 131, 134 (1956)); Keeble, 412 U.S. at 208 ("Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged, it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. The Federal Rules of Criminal Procedure deal with lesser included offenses, see Rule 31(c),6 and the defendant's right to such an instruction has been recognized in numerous decisions of this Court.") (citing Sansone, Berra v. United States, 351 U.S. 131 (1956)) (another case construing the Fed.R.Crim.P. 31(c)) and Stevenson v. United States, 162 U.S. 313 (1896) (a federal common law decision).

Hence, as a decision that does not construe what the Constitution requires but what the Federal Rules of Criminal Procedure require in federal courts, the Sansone and Keeble decisions do not constitute "clearly established federal law" within the meaning of AEDPA. See, e.g., Smith v. Dinwiddie, 510 F.3d 1180, 1186 (10th Cir. 2007) ("The only federal law that can be clearly established for purposes of Smith's § 2254(d) appeal is Supreme Court precedent interpreting the Constitution. We may not rely upon non-constitutional Supreme Court decisions to determine whether § 2254(d) relief is appropriate. Precedents not based on constitutional grounds are 'off the table as far as § 2254(d) is concerned.' ") (quoting Early v. Packer, 537 U.S. 3, 10 (2002)). This is sufficient for us to conclude that Petitioner failed to prove that the Superior Court's adjudication of this claim was not contrary to or an unreasonable application of United States Supreme Court constitutional precedent.

Moreover, we note that there is no United States Supreme Court case that research has uncovered that holds substantive due process requires a jury instruction on a lesser included offense outside the capital case context. See, e.g., Dickerson v. Dormire, 2 Fed.Appx. 695, 696 (8th Cir. 2001) ("The Supreme Court has never held that due process requires the giving of lesser-included-offense instructions in noncapital cases."); Randell v. Norman, No. 4:12CV01020, 2015 WL 1456977, at *4 (E.D. Mo. March 30, 2015) (holding that the Supreme Court has never held that due process requires the giving of lesser-included-offense instructions in noncapital cases) (quoting Dickerson); Wai v. Fischer, No. 02 CIV. 3778, 2003 WL 22416117, at *3 (S.D.N.Y. Oct. 22, 2003) ("Neither the Supreme Court nor this Circuit has determined that constitutional due-process requires that a defendant in a non-capital case is entitled to a lesser included offense charge. Indeed, Wai concedes as much when he notes that the Supreme Court in Beck did not foreclose the possibility that due process requires such an instruction in non-capital cases. Indeed, while the Court noted that 'the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard,' it also pointed out that 'we have never held that a defendant is entitled to a lesser-included-offense instruction as a matter of due process.") (quoting Beck v. Alabama, 447 U.S. 625, 637 (1980)). See also Paulding v. Allen, 393 F.3d 280, 283 (1st Cir. 2005) (discussing split in decisions by the Circuit Courts of Appeals regarding such a substantive due process right). [5]

5 We note that the United States Court of Appeals for the Third Circuit appears to have held due process requires the giving of a lesser included offense instruction outside of the capital case context. Vujuosevic v. Rafferty, 844 F.2d 1023, 1027 (3d Cir. 1988). However, because the United States Supreme Court has not so decided, Petitioner cannot carry his burden under the AEDPA.

3. Grounds Two, Three, Five and Six—Ineffective assistance of counsel claims.

***8** We now turn to Petitioner's four claims of ineffective assistance of counsel. We will initially address Ground Three and Ground Five on the merits. We find that Grounds Two and Six are procedurally defaulted.

In addressing the two claims of trial counsel's alleged ineffectiveness raised in Grounds Three and Five of the Petition, the Superior Court applied the state court test for ineffective assistance of counsel ultimately derived from Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987) (the "Pierce standard"). See ECF No. 31-4 at 31–32 (Ground Three); id. at 38–40 (Ground Five). This Pierce standard has been found to be materially identical to the test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). Werts, 228 F.3d at 203. The United States Court of Appeals for the Third Circuit has ruled that this standard is not "contrary to" Strickland in the sense of being a wrong rule of law, and therefore, "the appropriate inquiry is whether the Pennsylvania courts' application of Strickland to [petitioner's] ineffectiveness claim was objectively unreasonable, i.e., the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under Strickland." Id. at 204.

Because the state courts decided Petitioner's Grounds Three and Five under the standards of Pierce and those standards are essentially the same as the Strickland standard, this Court is required to apply the deferential standard of 28 U.S.C. § 2254(d), which demands that a habeas petitioner demonstrate that the state court's adjudication of the federal claim resulted in a decision that was contrary to United States Supreme Court precedents or an unreasonable application of federal law. Pursuant to the holding of Werts, Petitioner is barred from arguing that the decisions of the state courts, applying the Pierce standard, are contrary to the standard announced in Strickland. Petitioner could argue the second sense of "contrary to," i.e., the state courts reached a different result from that of the United States Supreme Court on a set of materially indistinguishable facts.

In the instant case, Petitioner has not carried his burden to show the Superior Court's disposition was contrary to clearly established federal law in the second sense, i.e., that there existed any United States Supreme Court decision on ineffective assistance of counsel, at the time that the Superior Court rendered its decision in this case, that has a set of facts that are materially indistinguishable from Petitioner's case where the outcome was different from the outcome reached by the state courts herein. Williams, 529 U.S. at 412 (analyzing whether a state court decision is "contrary to" Supreme Court precedent requires analysis of the "holdings as opposed to the dicta, of this Court's decisions as of the time of the relevant state court decision."). Indeed, even assuming that Strickland had a set of facts that are materially indistinguishable from the facts of Petitioner's case, the outcome of Strickland and the outcome in Petitioner's PCRA appeal in the Superior Court were the same, i.e., the criminal defendant was denied relief in both cases. Accordingly, Petitioner has not shown that the Pennsylvania Superior Court's PCRA decision in this case was contrary to clearly established federal law as determined by the United States Supreme Court.

***9** Thus it remains open to Petitioner to show that the decision of the Superior Court was an unreasonable application of federal law. However, Petitioner fails to show that the state courts' disposition of his claims was an unreasonable application of United States Supreme Court precedent concerning ineffective assistance of counsel. In Strickland, the Supreme Court explained that there are two components to demonstrating a violation of the right to effective assistance of counsel.

First, the defendant must show that counsel's performance was deficient. This requires showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688; see also Williams v. Taylor, 529 U.S. at 390-91. In reviewing counsel's actions, the court presumes that counsel was effective. Strickland, 466 U.S. at 689. There is no one correct way to represent a client and counsel must have latitude to make tactical decisions. Lewis v. Mazurkiewicz, 915 F.2d 106, 115

(3d Cir. 1990)("[W]hether or not some other strategy would have ultimately proved more successful, counsel's advice was reasonable and must therefore be sustained."). In light of the foregoing, the United States Court of Appeals for the Third Circuit has explained, "[i]t is [ ] only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997)(quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

Second, under Strickland, the defendant must show that he was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Williams, 529 U.S. at 391.

Moreover, because the Superior Court addressed some of Petitioner's claims of ineffectiveness on the merits, this Court must apply the deferential standards of the AEDPA as to those claims, which results in a doubly deferential standard as explained by the United States Supreme Court:

> "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' *id.*, at 689 [104 S.Ct. 2052]; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles*, 556 U.S., at ——, 129 S.Ct., at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at —— [129 S.Ct., at 1420]. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard."

Premo v. Moore, 562 U.S. 115, ——, 131 S.Ct. 733, 740 (2011) (quoting Harrington v. Richter, 131 S.Ct. 770, 788 (2011)). Accord Grant v. Lockett, 709 F.3d 224, 232 (3d Cir. 2013) (" 'A state court must be granted a deference and latitude that are not in operation when the case involves [direct] review under the *Strickland* standard itself.' *Id.* Federal habeas review of ineffective assistance of counsel claims is thus 'doubly deferential.' *Pinholster*, 131 S.Ct. at 1403. Federal habeas courts must 'take a highly deferential look at counsel's performance' under *Strickland*, 'through the deferential lens of § 2254(d).' ").

a. Ground Three does not afford Petitioner relief.

***10** In Ground Three, Petitioner contends that his trial counsel was ineffective for failing to object to the trial court's jury instruction on malice and contends that the jury instructions on malice created a mandatory presumption in violation of federal law.

The Superior Court addressed this issue on the merits, and quoted the relevant jury instructions and found that those instructions did not create a mandatory presumption of malice as Petitioner contends, and therefore, Petitioner's trial counsel could not be ineffective for failing to make a meritless objection to the jury instruction on malice. ECF No. 31-4 at 32–35.

We find this to be an eminently reasonable disposition of Ground Three. Werts v. Vaughn, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim."). We agree with this reasoning. The portions of the trial court's instructions that Petitioner quotes simply fail to establish a "mandatory presumption." See ECF No. 22 at 9–10. The trial court's use of the terms "you can find malice" and "you may infer malice" simply fails to create a "mandatory presumption" and instead creates merely a "permissive presumption." See, e.g., County Court of Ulster County, N.Y. v. Allen, 442 U.S. 140 (1979) (explaining differences between types of presumptions).

Petitioner's citation to Connecticut v. Johnson 460 U.S. 73, 78 (1983), ECF No. 22 at 10, is unpersuasive if only because there was no majority opinion in that case, and so, it is not precedential and thus arguably "not clearly established federal law." See Williams, 529 U.S. at 365 ("the phrase 'clearly established Federal law, as determined by [this] Court' refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."). Even if Connecticut v. Johnson could be said to constitute "clearly established federal law," the instruction at issue therein contained the objectionable verbiage that "every person is conclusively presumed to intend the natural and necessary consequences of his act" whereas here there is no such instruction on a conclusive or mandatory presumption in Petitioner's case.

Petitioner's citation to Francis v. Franklin, 471 U.S. 307 (1985) is similarly distinguishable as the United States Supreme Court characterized the instruction at issue therein as follows: "[t]he challenged sentences are cast in the language of command. They instruct the jury that 'acts of a person of sound mind and discretion are *presumed* to be the product of the person's will,' and that a person 'is *presumed* to intend the natural and probable consequences of his acts,' App. 8a-9a (emphasis added). These words carry precisely the message of the language condemned in *Sandstrom*, 442 U.S., at 515, 99 S.Ct., at 2454 ('The law presumes that a person intends the ordinary consequences of his voluntary acts').") (some internal quotations deleted). Petitioner fails to point out in the jury instruction in his case any such similar language.

Accordingly, there is no merit to the contention that the jury instruction on malice created a mandatory presumption and, therefore, no basis for Petitioner's trial counsel to object. Ground Three does not merit any relief.

b. Ground Five does not merit relief.

***11** In Ground Five, Petitioner asserts that some comments made by the prosecutor in his closing arguments constituted prosecutorial misconduct and that Petitioner's trial counsel should have raised objections to those comments. Petitioner contends that his trial counsel's failure to do so constituted ineffective assistance of counsel.

The Superior Court addressed this issue on the merits.[6] The Superior Court noted that PCRA counsel asserted in the counseled Petition for Remand that he (i.e., PCRA counsel) had investigated Petitioner's claims of prosecutorial misconduct in the closing remarks at trial but found that although the "prosecutor's comments might have been inappropriate, they were not tantamount to misconduct." ECF No. 31-4 at 38. The Superior Court agreed, finding that the prosecutor's comments on which Petitioner relied to establish prosecutorial misconduct, simply failed to establish prosecutorial misconduct and amounted to nothing more than pointing out the discrepancies between Petitioner's version of the events and the testimony of James Balint, the brother of the victim. Id. at 39–40.

6 The procedural context in which the Superior Court addressed this issue is of significance. After the appeal was filed by the PCRA counsel to the Superior Court, Petitioner filed pro se a Petition for Remand with the Superior Court, asserting his PCRA counsel's alleged ineffectiveness and seeking a remand to the PCRA trial court in order to develop the claims of ineffectiveness of PCRA counsel. Petitioner contended that his PCRA counsel was ineffective for, *inter alia*, failing to raise some issues, including the claim that trial counsel was ineffective for failing to object to prosecutorial misconduct, the same claim of trial counsel's ineffectiveness that Petitioner raises in Ground Five. Pursuant to applicable state law, the Superior Court forwarded the pro se Petition for Remand to PCRA counsel who then filed a counseled "Petition for Remand." It was in the course of addressing the counseled Petition for Remand that the Superior Court addressed the claim of trial counsel's ineffectiveness for failing to raise the claim of prosecutorial misconduct during the closing arguments. This procedural device of a petition for remand shows that under state law, there is a mechanism for exhausting claims of PCRA counsel's alleged ineffectiveness.

In other words the Superior Court concluded that trial counsel was not ineffective for failing to object to the prosecutor's closing remarks because those remarks were not objectionable, i.e., there was no merit to the claim of prosecutorial misconduct and, therefore, trial counsel could not be deemed ineffective for failing to raise a meritless objection. Werts v. Vaughn, 228 F.3d at 203 ("counsel

cannot be ineffective for failing to raise a meritless claim."). The Superior Court then went on to deny the counseled Petition for Remand, noting that PCRA counsel was not ineffective for failing to raise this claim of trial counsel's ineffectiveness given that trial counsel was not ineffective for failing to object to the prosecutor's closing statement.

We find the Superior Court's disposition eminently reasonable. Accordingly, Ground Five fails to afford Petitioner relief in these federal habeas proceedings.

c. Grounds Two and Six are procedurally defaulted.

***12** In the Answer to the instant Petition, Respondents point out that Petitioner procedurally defaulted Grounds Two and Six, the other two claims of trial counsel's ineffectiveness. Petitioner does not deny that he procedurally defaulted these two Grounds but invokes Martinez v. Ryan, —— U.S. ——, 132 S.Ct. 1309 (2012), and asserts the ineffectiveness of his PCRA counsel as "cause" to excuse the failure to raise these two specific claims of trial counsel's ineffectiveness. ECF No. 33. We will assume that this claim of PCRA counsel's ineffectiveness for failing to raise these two claims of trial counsel's alleged ineffectiveness was properly exhausted (i.e., raised in the Petition for Remand), [7] and not itself procedurally defaulted, as is required, in order for the claim of cause to be properly considered here in these federal habeas proceedings. See, e.g., Edwards v. Carpenter, 529 U.S. 446, 453 (2000)(holding that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted").

7 We make this assumption because Respondents failed to include in the record either the pro se Petition for Remand or the counseled Petition for Remand. We know that it is a Petitioner's burden to prove exhaustion of a claim of cause for excusing a procedural default, see, e.g., Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) ("The habeas petitioner carries the burden of proving exhaustion of all available state remedies."), and so the burden is on him to show where in the record he did exhaust this claim. Even though Petitioner would have the burden of proving that he exhausted this claim of "cause" (i.e., the claim that PCRA counsel was ineffective for failing to raise the claim that trial counsel was ineffective for not raising Grounds Two and Six), we nonetheless conclude it is a sounder basis to rest our recommendation on the fact that Petitioner failed to show PCRA counsel was ineffective rather than on Petitioner's failure to show that he exhausted this claim of PCRA counsel's ineffectiveness. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

We assume Petitioner's claim is that his PCRA Counsel in the first PCRA proceedings was ineffective because this was the first opportunity to raise trial counsel's ineffectiveness and because Martinez speaks in terms of "initial review" post conviction proceedings. A second or subsequent PCRA petition is, by definition, not "initial review." See, e.g., Franqui v. Jones, No. 07-22384-CIV, 2015 WL 4554523, at *3 (S.D. Fla. July 28, 2015) ("The limitations of *Martinez* remain clear: *Martinez* is limited to excuse a state procedural default when post-conviction counsel fails to assert a claim of ineffective assistance of counsel at the first opportunity that post-conviction counsel had to do so in the state courts."). Wayne R. LaFave, 7 Crim. Proc. § 28.4(d) (3d ed.) ("In *Martinez*, the Court held that cause for a petitioner's default of one particular type of claim—the ineffective assistance of trial counsel—may be established if 1) the claim is 'substantial,' 2) the default occurred during a state collateral proceeding designated by state law as the first opportunity for raising that particular claim, and 3) the petitioner lacked the effective assistance of counsel during that initial state collateral proceeding.").

The issues that PCRA counsel raised in the first PCRA Petition were:

> 12. Mr. Howell avers that he is entitled to a new trial because of the ineffective assistance of prior counsel for failing to object to the jury instruction that the commission of the robbery shall form the basis for malice, which created a mandatory presumption in favor of the Commonwealth with respect to a material element of the crime of second-degree murder, in violation of Mr. Howell's due process rights.
>
> ***13** 13. Mr. Howell avers that he is entitled to be resentenced because of the ineffective assistance of prior counsel for failing to object to the imposition of a sentence

> at CC number 200213879 for robbery, when said offense merged with the second-degree murder conviction for sentencing purposes.
>
> 14. Mr. Howell avers that he is entitled to be resentenced because an illegal sentence was imposed at CC number 200213879 for robbery, when said offense merged with the second-degree murder conviction for sentencing purposes.

ECF No. 31-3, ¶¶ 12–14.

We note that Petitioner's PCRA counsel was successful in the first PCRA proceedings in obtaining relief for Petitioner from the sentence for robbery. We further note that the issue of trial counsel's ineffectiveness, which PCRA counsel raised in quoted paragraph 12 above is also raised by Petitioner in the present habeas Petition as Ground Three. In view of the issues that Petitioner's PCRA Counsel did raise and his success in having the robbery sentence vacated, it is difficult for Petitioner to show that his PCRA counsel was ineffective. As the Supreme Court has declared:

> appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.... [I]t is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See, e.g.,* *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Smith v. Robbins, 528 U.S. 259, 288 (2000). Thus, "[i]f the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance." Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003) (internal quotation marks omitted). On the other hand, "if the omitted issue has merit but is not so compelling, [we must assess] the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance." Id. (citing Smith, 528 U.S. at 288).

Here, although Petitioner argues the applicability of Martinez, ECF No. 33, he fails to separately argue, yet alone convince the court, as is his burden, that these two issues of trial counsel's alleged ineffectiveness (for not objecting to the identification of Petitioner by James Balint's out of court identification of Petitioner as the perpetrator and for not objecting to the accomplice liability instruction) which were not raised by PCRA counsel were stronger than the three issues PCRA counsel actually did raise. Furthermore, Petitioner has failed to make a showing that, had PCRA counsel raised the two issues which Petitioner claims he should have, there was a reasonable likelihood that the result of the first PCRA proceedings would have been different i.e., that he would have received relief from his convictions and not just from his sentence. See Smith v. Robbins, 528 U.S. at 285-86 (a petitioner must show a reasonable probability that but for appellate counsel's unreasonable failure to raise issues, he would have prevailed on his appeal).

***14** For the above-discussed reasons, we find that Petitioner has failed to establish PCRA counsel's ineffectiveness and therefore, he has not established cause to overcome the procedural default of the two claims of trial counsel's ineffectiveness. Further, we do not find that Petitioner has established a miscarriage of justice, if this Court were to not excuse his procedural default and address the two procedurally defaulted claims of trial counsel's ineffectiveness on the merits. Accordingly, Petitioner's procedural default of these two claims of trial counsel's alleged ineffectiveness should not be overlooked and cannot be addressed on the merits.

Lastly, and for the sake of completeness, we address the issue of trial counsel's alleged ineffectiveness on the merits. We find that in light of the evidence presented at the trial and Petitioner's concession that he was present at the scene (which should obviate any identification issues), he has failed to show that he was prejudiced (i.e., that there is a reasonable probability that the result of the trial would have been different) due to trial counsel's failure to raise the two issues that Petitioner asserts he should have raised. [8]

8 Moreover, as to Petitioner's claim that the trial court's instruction on accomplice liability was constitutionally infirm, we note that it is not sufficient for Petitioner to establish that the instruction on accomplice liability closely tracked the instruction on accomplice liability found unconstitutional in Laird v. Horn, 414 F.3d 419 (3d Cir. 2005). ECF

No. 22 at 5 ("THE CHALLENGED JURY INSTRUCTION IS ALMOST, WORD-FOR-WORD, EXACTLY IDENTICAL TO THAT HELD TO BE UNCONSTITUTIONAL IN LAIRD[.]"). What the United States Court of Appeals for the Third Circuit stated in Williams v. Beard, 637 F.3d 195, 225 (3d Cir. 2011) is instructive:

> The problem in *Laird* was not the accomplice liability instruction's linguistic imprecision per se. Rather, the instructional ambiguity worked a critical error when viewed in the context of the trial record as a whole. Williams does not acknowledge this aspect of the holding. Instead, he argues that the similarity of both instructions demonstrates constitutional error. But as we indicated above, a rote comparison of the two instructions is insufficient in a due process inquiry. *See* *Waddington*, 555 U.S. 179, 129 S.Ct. at 831–33; *Estelle*, 502 U.S. at 72, 112 S.Ct. 475. Although the trial judge in *Laird* provided an accomplice liability instruction that was nearly identical to that rendered here, there was a profound difference between each proceeding's evidence, argument, and the charges as a whole. That difference is dispositive. In *Laird*, the ambiguity in the charge, coupled with the balance of pertinent considerations, made it reasonably likely that the jury applied the instruction in a manner which relieved the Commonwealth of its burden of proof.

Similarly, we find Laird distinguishable herein, because it involved a first degree murder trial where both co-defendants were tried together in one trial and the issue was one of proving the intent to kill for first degree murder. In Petitioner's case, he was tried individually, and the evidence of record as to Petitioner's liability either as principal of, or as an accomplice to robbery (and therefore, satisfying the transferred intent theory of felony murder, i.e., if one intends the robbery, then malice may be inferred for purposes of finding the defendant guilty of murder in the second degree where the murder is committed in the course of the robbery) was such that there is no reasonable likelihood that Petitioner's jury applied the challenged instructions in a way that violates the Constitution. Estelle, 502 U.S. 62, 72 (1991) (the proper inquiry is " 'whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way' that violates the Constitution.") (quoting Boyde v. California, 494 U.S. 370, 380 (1990)). However, even if Petitioner could show that trial counsel should have objected to the accomplice liability instructions, he cannot show prejudice on this record, and therefore, his ineffective assistance of trial counsel claim fails.

III. CONCLUSION

***15** For the reasons set forth herein, it is respectfully recommended that the Petition be dismissed and that a Certificate of Appealability be denied as jurists of reason would not find the foregoing debatable.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

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J. S09026/05

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH HOWELL, JR., Appellant	:	No. 686 WDA 2004

Appeal from the Judgment of Sentence of March 24, 2004, in the Court of Common Pleas of Allegheny County, Criminal Division, at No. 200213879, CC2002118304.

BEFORE: KLEIN, BOWES AND KELLY, JJ.

MEMORANDUM: Filed: June 29, 2005

Joseph Howell, Jr. appeals from the judgment of sentence imposed after he was convicted by a jury of second degree murder, robbery, conspiracy, and unlawful restraint. We affirm.

The following facts are relevant. James Balint testified that at 12:30 p.m. on July 13, 2002, he met his younger brother, Michael, at Michael's apartment on Jones Street in Verona, Pennsylvania. James noticed that two other individuals were present: Michael's roommate, a male identified as "J.R.," and Appellant, whom James had never seen before. N.T. Trial, 1/21-26/04, at 143, 146. Appellant, who had been talking on a cellular telephone when James arrived, promptly ended his telephone conversation, "said something about girls," and left the apartment. ***Id.*** at 145. James asked Michael who Appellant was, and Michael responded, "Don't worry about it." ***Id.*** at 146. James visited with Michael until 2:30 p.m., at which time he returned home.

At approximately 6:00 p.m., James decided to attend a street fair in Pittsburgh and drove back to Michael's apartment unannounced to see if Michael wanted to go with him. When James arrived, he rang the security buzzer at the front of the apartment building, but Michael did not answer. James then checked a side door and discovered that it was unlocked. He entered the building, walked to his brother's door, and knocked on it, expecting to find Michael cleaning the apartment. When James knocked on the door, however, it opened slightly, and he immediately observed Appellant "standing there with a [9mm] gun pointed at [Michael], and [Michael] had duct tape on his mouth." ***Id.*** at 149. A moment later, an African-American male named Donald Burnham reached through the door, grabbed James by the wrist, and said, "[G]et in here." ***Id.*** James reacted by throwing *his* shoulder into the door, knocking Burnham to the ground.

Once inside the apartment, James lunged at Appellant in an attempt to gain control of the pistol. The two men began to wrestle and fell onto a loveseat, at which point James heard two gunshots. James gained control of Appellant's left hand, and Appellant started pistol-whipping James in the back of the head. When Burnham attempted to lift James off of Appellant, Michael lunged at Burnham, and all four men fell to the floor. Burnham stood up and ran out the door, fleeing the scene. As Appellant and James continued to struggle for control of the gun, Appellant eventually stood up, "leaned over and shot [the pistol] three times." ***Id.*** at 151. James rolled

over on top of Michael after the gun discharged, and Appellant fled on foot. James then spoke to Michael and saw that he was bleeding and unresponsive. Emergency medical personnel arrived and pronounced Michael dead. An autopsy revealed that he had been shot once in the head, near his left eye, and once in the back. Investigators also noted that Michael's legs had been bound with duct tape before the shooting.

Appellant took the stand in his own defense and testified that he and Donald Burnham went to the apartment on the evening of the shooting to make separate purchases of marijuana from Michael. Appellant stated that he had bought marijuana from Michael on prior occasions and that they had a good relationship; however, Appellant claimed that he was not well acquainted with Burnham, whom he had met through a mutual friend, James Perrin. Burnham was supposed to purchase marijuana for Perrin.

Appellant testified that upon entering the building, he introduced Burnham to Michael, and the three men walked upstairs to Michael's apartment. Appellant paid Michael $60 for one-half ounce of marijuana, put the drugs in his pocket, and proceeded to use the bathroom. When Appellant exited the bathroom, he noticed that Burnham was holding a gun. Appellant asked Burnham what he was doing, and Burnham replied, "[C]hill out, I got this." ***Id.*** at 547. Burnham then instructed Michael to place duct tape around his ankles, and Michael complied. Moments later, when James knocked on the apartment door, Burnham hid and waited for James to enter.

Appellant admitted that he and James fought inside the apartment, but claimed that James was the aggressor, acting under the mistaken belief that Appellant and Burnham were confederates. Appellant denied shooting Michael Balint and maintained that he never intended to rob anyone.

The jury rejected Appellant's testimony and convicted him of the aforementioned crimes. Appellant subsequently filed a post-trial motion challenging the weight and sufficiency of the evidence, which was denied. On March 24, 2004, the trial court imposed a life sentence for second degree murder and a consecutive term of ten to twenty years incarceration for robbery. The court also imposed a ten to twenty year sentence for conspiracy, to be served concurrently to the robbery sentence. No further penalty was imposed for unlawful restraint. This timely appeal followed.

Appellant raises the following issues for our review:

I. THE EVIDENCE IS INSUFFICIENT IN THIS CASE TO SUPPORT MR. HOWELL'S GUILTY VERDICTS FOR THE CRIMES OF SECOND DEGREE MURDER, ROBBERY, CRIMINAL CONSPIRACY, AND UNLAWFUL RESTRAINT.

II. IN THE ALTERNATIVE, THE GUILTY VERDICT IN THIS CASE IS AGAINST THE WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT ERRED WHEN IT REFUSED THE DEFENSE COUNSEL'S REQUEST TO CHARGE THE JURY ON THE CRIME OF INVOLUNTARY MANSLAUGHTER.

IV. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE PANEL FROM WHICH THE JURY WAS SELECTED IN THIS CASE BECAUSE OF SYSTEMIC UNDER-REPRESENTATION AND/OR EXCLUSION OF AFRICAN AMERICANS, WHICH RESULTED IN THE EMPANELLING OF A JURY THAT DID NOT CONSIST OF MR. HOWELL'S PEERS, IN

CONTRAVENTION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 9 OF THE PENNSYLVANIA CONSTITUTION.

Appellant's brief at i.[1]

When considering a challenge to the sufficiency of the evidence, we must determine whether the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to establish every element of the offense beyond a reasonable doubt. ***Commonwealth v. Dailey***, 828 A.2d 356 (Pa.Super. 2003). Moreover, the Commonwealth may sustain its burden of proving every element of the offense beyond a reasonable doubt with evidence that is wholly circumstantial, and the trier of fact, in passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence. ***Id.***

Appellant's first claim is premised on the assertion that there was no evidence that he and Donald Burnham acted in concert or that they intended to rob the victim. In essence, Appellant posits that his convictions were based on pure conjecture, as demonstrated by the fact that defense counsel established "a variety of logical inconsistencies" in James Balint's direct testimony. Appellant's brief at 28. Consistent with this view, Appellant argues that all of his convictions should be reversed. We disagree.

[1] We have renumbered Appellant's issues for our convenience.

As noted *supra*, James Balint unequivocally testified that Appellant willingly participated in the events that lead to the victim's death. Specifically, James testified that Appellant: (1) pointed a loaded pistol at the victim, whose mouth and ankles had been secured with duct tape; (2) refused to relinquish the weapon, pistol-whipping James as he attempted to disarm Appellant; (3) fired multiple rounds, mortally wounding the victim; and (5) fled the scene after the shooting. Moreover, Appellant's testimony established that Burnham assisted Appellant by: (1) grabbing James's wrist in an effort to draw him into the apartment; and (2) attempting to pull James away from Appellant as they were fighting for control of the gun.

Based on this evidence, we find no error in the jury's conclusion that the victim was killed while Appellant was engaged in a conspiracy with Burnham to commit an armed robbery that involved restraining the victim with duct tape. Nevertheless, Appellant contends that his robbery conviction is infirm because the Commonwealth failed to prove that any property was taken from the victim. This claim is also unavailing.

The robbery statute, 18 Pa.C.S. § 3701, provides in relevant part:

> **§ 3701. Robbery**
>
> **(a) Offense defined.-**
>
> (1) A person is guilty of robbery if, in the course of committing a theft, he:
>
> . . . .

> (ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;
> . . . .
>
> (2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

Instantly, the evidence established that Appellant pointed a loaded handgun at the victim during the course of an attempted theft. Accordingly, we find that the Commonwealth established every element of the offense. Appellant's argument that the Commonwealth was required to prove that he took property from the victim does not comport with the language of the statute. ***See Commonwealth v. Everett***, 445 A.2d 514 (Pa.Super. 1982) (defendant convicted of robbery and murder despite evidence that he neither took nor demanded money from victim); ***Commonwealth v. Ennis***, 574 A.2d 1116 (Pa.Super. 1990) (to prove robbery, Commonwealth must demonstrate that defendant intended to take property from victim, threatened victim with immediate serious bodily injury, and took steps to deprive victim of property). Hence, this contention lacks merit.

Appellant's argument that his convictions were based on conjecture and surmise because James Balint's testimony contained inconsistencies implicates the weight of the evidence, not the sufficiency of the evidence. Therefore, we will address the purported inconsistencies in reviewing Appellant's weight-of-the-evidence claim, *infra*.

> A challenge to the weight of the evidence is addressed to the sound discretion of the trial court. ***Commonwealth v.***

> ***Widmer,*** 560 Pa. 308, 319, 744 A.2d 745, 751 (2000). Absent an abuse of discretion, we will not disturb the trial court's ruling. ***Commonwealth v. Lilliock,*** 1999 PA Super 244, 740 A.2d 237 (Pa.Super. 1999). A new trial should be awarded only when the verdict is so contrary to the evidence as to shock one's sense of justice. ***Id.***

Commonwealth v. Foreman, 797 A.2d 1005, 1013 (Pa.Super. 2002).

In the case at bar, Appellant contends that the verdict was contrary to the weight of the evidence because: (1) a homicide detective testified that police recovered 9mm and .380 caliber shell casings at the scene, which suggested that two guns were fired during the incident; (2) the detective admitted that no one examined James Balint's hands to determine whether he had discharged a gun on the night in question; (3) no one was able to corroborate James Balint's version of the shooting; (4) James Balint initially refused to cooperate with police; (5) a prosecution witness linked Donald Burnham to the 9mm handgun that fired the fatal bullet; (6) Appellant willingly spoke to police a few days after the shooting occurred; and (7) two defense witnesses presented "uncontradicted" testimony which corroborated Appellant's assertion that he went to the victim's apartment to purchase marijuana, not to commit a robbery. Appellant's brief at 37.

In addressing a similar argument, this Court recently observed:

> The weight of the evidence is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so

> contrary to the evidence as to shock one's sense of justice. Moreover, where the trial court has ruled on the weight claim below, an appellate court's role is not to consider the underlying question of whether the verdict is against the weight of the evidence. Rather, appellate review is limited to whether the trial court palpably abused its discretion in ruling on the weight claim.

Commonwealth v. Forbes, 867 A.2d 1268, 1272-73 (Pa.Super. 2005) (quoting ***Commonwealth v. Champney***, 574 Pa. 435, 444, 832 A.2d 403, 408 (2003), *cert. denied,* ___ U.S. ___, 124 S. Ct. 2906, 159 L. Ed. 2d 816 (2004) (internal citations omitted)).

In the instant case, we find that the trial court did not abuse its discretion in rejecting Appellant's weight-of-the-evidence claim. The record demonstrates that the jury was presented with two different versions of the shooting: Appellant claimed he was an innocent bystander, and James Balint testified that Appellant actively participated in the attempted robbery. The jury was free to accept James's testimony and reject Appellant's claim of innocence, notwithstanding the fact that two defense witnesses testified that Appellant had no intention of robbing the victim earlier that day. Likewise, the fact that police recovered a spent .380 caliber shell casing at the scene does not prove that James Balint's testimony was inherently unreliable. Contrary to Appellant's position, James Balint did not testify that every bullet was fired from Appellant's 9mm pistol. With respect to the first two gunshots, James stated, "A gun went off, I believe, twice." N.T. Trial, 1/21-26/04, at 150. Thus, the jury reasonably could have concluded that

Donald Burnham discharged a .380 caliber handgun while James and Appellant were wrestling on the loveseat. Given these facts, the verdict does not shock our sense of justice, and therefore, no relief is due.

Appellant next contends that the trial court erred in refusing to charge the jury on the crime of involuntary manslaughter.

An individual commits the crime of involuntary manslaughter if he causes the death of another person "as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner . . . ." 18 Pa.C.S. § 2504(a). A defendant in a homicide trial is entitled to a jury instruction on involuntary manslaughter if the offense is an issue in the case and the defendant requests the instruction in a timely manner. ***See Commonwealth v. McCloskey***, 656 A.2d 1369 (Pa.Super. 1995).

Herein, Appellant flatly denied shooting Michael Balint and claimed he was an innocent bystander. ***See*** N.T. Trial, 1/21-26/04, at 560. Consequently, involuntary manslaughter was not an issue in the case, and Appellant was not entitled to a jury instruction on that offense. ***See Commonwealth v. Wright***, 865 A.2d 894 (Pa.Super. 2004) (codefendant who denied committing any acts that could have caused victim's death was not entitled to jury instruction on involuntary manslaughter).

Lastly, Appellant argues that he is entitled to a new trial because the original jury pool included only two African-Americans. Appellant, an

African-American, asserts that the jury pool did not constitute a fair cross-section of his community, resulting in a violation of his due process rights afforded under the United States and Pennsylvania Constitutions. In leveling this claim, Appellant relies on the testimony of John F. Karns, Ph.D., who, after comparing demographic data concerning Allegheny County residents called for jury duty in criminal cases between May and October 2001 with data compiled by the United States Census Bureau during that same period, concluded that African-Americans are systematically underrepresented in Allegheny County jury pools. Specifically, Dr. Karns noted that the African-American population in Allegheny County at that time was 10.7%, while the number of African-Americans participating in jury pools was only 4.87%.

In ***Commonwealth v. Estes***, 851 A.2d 933, 935 (Pa.Super. 2004) (quoting ***Commonwealth v. Johnson,*** 576 Pa. 23, 55-56, 838 A.2d 663, 682 (2003) (footnote omitted)), this Court recently stated:

> To establish a *prima facie* violation of the requirement that a jury array fairly represent the community, [the defendant] must show that:
>
> > (1) the group allegedly excluded is a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation of the number of such people in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. "Systematic" means caused by or inherent in the system by which juries were selected.

Craver, 547 Pa. at 28, 688 A.2d at 696 (citing ***Duren v. Missouri***, 439 U.S. 357, 364, 366-67, 99 S. Ct. 664, 668-70,

> 58 L. Ed. 2d 579 (1979)). Proof is required of an actual discriminatory practice in the jury selection process, not merely underrepresentation of one particular group. ***See id.*** at 27-28, 688 A.2d at 696. The defendant bears the initial burden of presenting *prima facie* evidence of discrimination in the jury selection process. ***See Jones,*** 452 Pa. 312, 304 A.2d at 692.
>
> This Court has rejected various criminal defendant's attacks, on the basis that African-Americans were underrepresented, to the racial composition of a jury panel drawn from voter registrations lists. ***See Commonwealth v. Bridges,*** 563 Pa. 1, 18, 757 A.2d 859, 868 (2000); ***Commonwealth v. Henry,*** 524 Pa. 135, 144, 569 A.2d 929, 933 (1990). More recently, the reasoning and holdings of those cases have been extended to approve the usage of driver's license lists for purposes of jury selection. ***See Commonwealth v. Johnson,*** 572 Pa. 283, 305, 815 A.2d 563, 575 (2002) (plurality) ("Absent some showing that driver's license selection procedures are inherently biased, [the defendant] has failed to distinguish jury pool lists derived from voter registration records from those derived from driver's license registration lists"); ***accord Commonwealth v. Cameron,*** 445 Pa.Super. 165, 175-76, 664 A.2d 1364, 1369 (1995).

The argument Appellant raises in the case *sub judice* was squarely rejected by this Court in ***Estes, supra***. Like the defendant in that case, Appellant fails to demonstrate "an actual discriminatory practice in the jury selection process . . . ." ***Johnson, supra*** at 55, 838 A.2d at 682. Although Appellant claims he is not required to prove discriminatory intent under the United States Supreme Court's decision in ***Duren v. Missouri***, 439 U.S. 357 (1979), the Pennsylvania Supreme Court has held otherwise. ***See Commonwealth v. Johnson,*** 576 Pa. 23, 838 A.2d 663 (2003). As we are

bound by the prior decisions of our Supreme Court, ***see Commonwealth v. Darush***, 798 A.2d 214 (Pa.Super. 2002), Appellant's claim fails.

Judgment of sentence affirmed.

Judge Klein files a Concurring Memorandum. Judge Kelly joins both the Majority and Judge Klein's Concurring Memorandum.

Judgment Entered:

Eleanor R. Valecko
Deputy Prothonotary

DATE: June 29, 2005

J. S09026/05

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH HOWELL, JR., Appellant	:	No. 686 WDA 2004

Appeal from the Judgment of Sentence of March 24, 2004, in the Court of Common Pleas of Allegheny County, Criminal Division, at No. 200213879, CC2002118304.

BEFORE: KLEIN, BOWES AND KELLY, JJ.

CONCURRING MEMORANDUM BY KLEIN, J.:

In ***Commonwealth v. Estes***, 851 A.2d 933 (Pa. Super. 2004), a panel of our Court determined that evidence presented by Dr. Karns was insufficient to show that Allegheny County used a jury selection system that unconstitutionally underrepresented African-Americans. In that opinion we stated, "[i]t is hoped that the current issues being raised by Appellant will not be a problem in the future. We are certain that, if the problem is not corrected, the criminal defense bar will again bring this issue to the attention of the trial courts." ***Id.*** at 937. The criminal defense bar has taken us up on our suggestion and so I believe the issue requires a greater exploration.

Dr. Karns has apparently used the same data set as a baseline in this matter as was used in ***Estes***. The main difference here is that the trial in ***Estes*** took place in 2001 and the trial here took place in 2004.[1] This raises

[1] Given that the baseline data was collected approximately five years ago, with no apparent update, it appears possible, statistically speaking, that the jury pool used in this matter was a one day statistical anomaly. Given the

the implication that the concerns noted by our Court last year have, at least to some extent, continued. Thus, a greater analysis of the claim is appropriate.

This "fair cross section" claim is being presented under both the Sixth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution. Because I believe that Pennsylvania provides the same protection as the federal government on this issue, and because federal case law is more developed on this matter, I look primarily to federal case law for guidance.

Initially, I note that while a statistical analysis is necessary to prove this claim, ***see generally Duren v. Missouri***, 439 U.S. 357 (1979); ***Taylor v. Louisiana***, 419 U.S. 522 (1975), a statistical analysis alone does not necessarily prove the claim. ***See United States v. Lynch***, 792 F.2d 269 (1st Cir. 1986).

Testimony from Regan Nerone, Jury Coordinator, Court Administrator's Office, County of Allegheny, indicates the master list of jurors is taken from the voter registration list (VRL) and PennDOT driving records, see 42 Pa.C.S. § 4521(a). (N.T., 7/15-16/03 at 38.) While ***United States v. Weaver***, 267 F.3d 231, 245 (3d Cir. 2001), indicates there may be some circumstances where the use of the VRL "could constitute a violation of a defendant's 'fair

---

history presented, it would be crass and dishonest to fob off this claim on that basis. Also, while the trial took place in 2004, the hearing on Dr. Karns' evidence of improper cross section took place in 2003.

cross-section' rights," in general the use of VRL's as a basis for generating a jury list is constitutionally sound.

> In so providing, Congress recognized that the use of VRL's, which have been compiled in a nondiscriminatory manner as the source for selection of federal juries, necessarily would exclude from jury service those individuals, whatever their color, race, or age, who had not registered to vote. But it determined that such a procedure would not violate the constitutional mandate of the sixth amendment, since no cognizable age group would be "systematically" or intentionally excluded by that procedure...
>
> The use of voter registration lists has been consistently upheld against both statutory and constitutional challenge, unless the voter registration list in question had been compiled in a discriminatory manner. Congress recognized that the use of voter registration lists in this manner would exclude from jury service those individuals who do not register to vote. However, Congress concluded that such an exclusion would not be unfair since no economic or social characteristic would prevent a person from placing his name on the voter registration list. Thus, the mere underrepresentation of black males on voter registration lists is not sufficient to establish a violation of the Act or of the Constitution.

United States v. Cecil, 836 F.2d 1431, 1446 (4th Cir. 1988).

Here, Allegheny County not only uses the VRL, but supplements the list with PennDOT information. If a VRL generated list on its own is generally acceptable, then a VRL generated list supplemented with a motor vehicle list would appear to be equally sound. It must be noted as well that Dr. Karns provided no evidence that either the VRL or the list from PennDOT was generated in a discriminatory manner.

As presumptively acceptable as the Allegheny County list may be, it is cold comfort if that list nonetheless produces a constitutionally unsound

result. Here, we need to examine the specifics of the claim. Dr. Karns reports that Allegheny County has a 10.4% African-American population but that the jury pools are only 4.87% African-American. The body of case law indicates there are two ways of viewing these numbers – in absolute disparity and comparative disparity. Absolute disparity in this case is 5.53% (total percentage minus represented percentage[2]). Comparative disparity is best illustrated by example – if we assume (for the basis of explanation only) a base of 1000 jurors, we would expect to see 104 African-American jurors. Instead, according to Dr. Karns' information, we are presented with only 49 (rounding up from 4.87%) African-American jurors. Comparatively, African-Americans are therefore underrepresented by about 53%.[3]

Searching through case law, the closest approximation to these numbers is found in ***United States v. Suttiswad***, 696 F.2d 645 (9th Cir. 1982), where Hispanics constituted 11.7% of the population and had an actual disparity of 7.7%.[4] This produces a comparative disparity of well over 50%. Nonetheless, the defendant could not prevail on his fair cross section claim. If the disparities in ***Suttiswad***, which are greater than the disparities

---

[2] ***Henry v. Horn***, 218 F.Supp.2d 671 (E.D.Pa. 2002), explains this calculation.

[3] The explanation for the calculation of comparative disparity is found in ***United States v. Weaver*** at 238.

[4] A 7.7% actual disparity would mean that Hispanic juror representation was 4.0% - 11.7 total population minus 7.7 actual disparity. In other words of the 1000 hypothetical jurors 117 should have been Hispanic when in actuality only 40 were Hispanic.

found here, pass constitutional muster, then the Allegheny County numbers, troubling as they initially seem, also pass muster.

Finally, and very importantly, I note this general statement on this issue:

> The Supreme Court has never gone so far as to hold that the constitution requires venires to be, statistically, a substantially true mirror of the community.... While courts often speak in terms of "fair cross section," they have realized that practical reasons, as well as the sterility of such endeavor, militate against total realization of this ideal.... Because a true cross section is practically unobtainable, courts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not *actively* prevent people from serving or actively discriminate, and *so long as the system is reasonably open to all*.

United States v. Cecil at 1445-1446 (italics in original).

The Allegheny County venire system does not truly mirror the county population as a whole. Yet, there is no showing that, even after our decision in ***Estes*** and time lapse between that case and the present, the Allegheny County system is not reasonably open to all. Allegheny County is attempting, as indicated in ***Estes*** and by the testimony of Nerone, to bring the jury panels into greater conformity with the general population. While the numbers are not perfect, the system is not constitutionally flawed.

EXHIBIT Q

Plea to add blacks to jury pool rejected

Jurors must be picked at random, a judge says.

BY WYNNE EVERETT
TRIBUNE-REVIEW NEWS SERVICE

An Allegheny County judge on Tuesday rejected a defense lawyer's request that two blacks be added to the jury pool for the homicide trial of a Rankin man.

Joseph Howell, 25, is accused in the July 13, 2002, killing of Michael Balint of Verona. Police say Balint was fatally shot during a botched robbery attempt in his apartment by Howell and Donald Burnham, 25, of Munhall.

Two blacks are in the 35-person pool from which 12 jurors and two alternates will be chosen for Howell's trial on criminal homicide and other charges.

Defense lawyer Lisa Middleman told Judge Lawrence O'Toole that because Howell is black and Balint was white, the racial makeup of the jury is particularly important. She suggested two blacks from another pool be moved into the group from which Howell's jury will be chosen.

O'Toole rejected [illegible] of citizens, "[illegible]

The racial makeup of juries and jury pools came under scrutiny after a 2002 Pittsburgh Tribune-Review investigation showed blacks in Allegheny County were less likely to be called for jury duty than whites. The story also showed the typical criminal jury room was only 4 percent black.

Subsequent studies by the state Senate and the state Supreme Court concluded that blacks are underrepresented in jury service and called for measures to correct the imbalance.

In July, O'Toole denied a motion to delay the murder trial of brothers Sean and Laurence Bush, of the West End, rejecting a defense claim that too few Allegheny County jurors are black. The pair were acquitted about a week later in the 1994 killing of a North Side man.

In June, Common Pleas Judge Lester Nauhaus granted a similar motion filed by the brothers' lawyer, Assistant Public Defender Christopher Patarini, in a separate homicide trial.

Wynne Everett, a reporter [illegible] dispatch [illegible] reached [illegible] at weverett@[illegible].com.

EXHIBIT E

Dearth of black jurors holds up trials

The county is acting to boost the number of blacks on jury pools.

BY GLENN MAY
TRIBUNE-REVIEW

An Allegheny County prosecutor and two defense lawyers plan today to try for a fourth time to select a racially balanced jury for the homicide trial of two black men from East Liberty.

Attorneys Paul Gettleman and Kenneth Haber argued there were too few blacks in the jury room to guarantee a fair trial for Alonzo Kemp, 30, and Robert McCary, 26. The attorneys won a delay in the trial Tuesday until the jury room is more racially balanced.

Each morning since, Gettleman, Haber and First Assistant District Attorney Edward J. Borkowski have returned to the jury room to determine if there are enough black jurors in the jury pool to choose a panel.

For three days, there haven't been.

Common Pleas Judge Donald E. Machen has ruled that the checks will continue until Gettleman and Haber agree the pool of potential jurors more closely reflects Allegheny County's 11 percent black population.

Court Administrator Ray Billotte did not return a call for comment about the ethnic makeup of juror pools for the case.

Haber declined to comment, and Gettleman could not be reached for comment.

A Pittsburgh Tribune-Review investigation in 2002 showed that blacks were underrepresented on Allegheny County juries. Reports issued last year by the state Supreme Court and the state Senate recommended that courts begin tracking the race of candidates for jury duty.

In its first racial assessment of individuals who fill out jury duty forms, Allegheny County Court in December reported numbers that seem to show that blacks are underrepresented in the pool of potential jurors.

The county also has introduced a new computerized mailing system to help improve the accuracy of mailings of juror questionnaires, which are used

SEE JURORS • B6

Dearth of black jurors holds up trials

JURORS • FROM B1

to assemble pools of qualified people to be summoned for jury duty.

Jury selection was completed yesterday in another homicide case in which defense lawyers had mentioned the ethnic makeup of county jury pools.

Attorneys for Carl Scott, 22, of Duquesne, argued in pretrial motions last year that the county's long-standing problem with recruiting black jurors precludes a fair trial.

Prosecutors have said they will seek the death penalty against Scott if he is convicted of first-degree murder in the deaths of his mother and two men. His trial is scheduled to begin Feb. 17.

Common Pleas Judge Donna Jo McDaniel in December denied a motion from defense attorney Kathleen Cribbins to delay Scott's trial until juries become more balanced.

Eleven white jurors and a 12th who declined to state her race on selection forms were chosen over three days this week for Scott's trial.

Warner Mariani, one of Scott's lawyers, said the final juror appears to be of mixed race. He said all jurors chosen seem dedicated to giving his client a fair trial.

"All the people we picked seemed to clearly and sincerely state they could be impartial," Mariani said.

Three of 105 potential jurors over the three-day selection process were black.

Scott is accused of killing his mother, Cynthia, 42, of Duquesne; his cousin, Tyrone Wells, 21, of Wilkinsburg; and a friend, Andre D. McBryde, 21, of Duquesne, in a two-month span in 2002.

Kemp and McCary are accused of the July 13, 2002, shooting death of James Adams, 20, of Garfield, outside a Garfield restaurant.

All victims in both cases were black.

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More black jurors needed in Allegheny County

Lack of diversity delaying one trial

Friday, February 13, 2004

By Jim McKinnon, Pittsburgh Post-Gazette

A lack of racial diversity in the daily jury pool, an ongoing problem in Allegheny County, is delaying one homicide trial while a second trial, a capital case, is forging ahead.

The homicide trial has been delayed because defense attorneys and their black clients successfully argued for a more diverse pool from which to pick a jury, but an all-white jury has been seated in the capital case against the wishes of black defendant Carl Scott and his attorneys.

"It's happened before," said Common Pleas Judge Donald E. Machen, who acquiesced to the requests of defense attorneys Kenneth Haber and Paul Gettleman.

The lawyers, representing two black men charged with homicide in a trial scheduled to begin this week, complained that almost no blacks were among the more than 300 jurors summoned this week to serve.

Machen agreed to test the jury pool daily, putting off the trial until more people of color were randomly summoned for jury duty by the county's computers.

"My position is, always has been and always will be that if a defendant feels he can't get a fair trial because the jury pool is not representative of the county's population, I'm not going to force them to go on with the trial," Machen said yesterday.

Based on the 2000 census, about 12 percent of the county's population of just more than 1.2 million are African-American. About 10.8 percent of the county's black population are over 18.

The U.S. and Pennsylvania constitutions guarantee a defendant in a criminal trial the right to be judged by a jury of his or her peers. In recent years, African-American defendants have requested that more minorities be seated on their juries.

Recent studies show that about 5.5 percent of any jury pool is black. However, this week's samplings showed that 2 percent of the pool was black, according to the surveys taken by Machen, Haber, Gettleman and First Assistant District Attorney Edward J. Borkowski, who is prosecuting the defendants in the homicide case.

The two defendants, Alonzo Kemp, 30, and Robert McCary, 26, both of East Liberty, are accused of shooting James Adams during an ambush in Garfield on July 13, 2002.

On three days this week, including today, a total of 251 potential jurors were assembled. Five were black, a number that is well under the percentage of black adults in the county. There were two potential black jurors Tuesday, none Wednesday and three yesterday.

"I don't think it's just this case that's at issue," said Haber, who represents McCary. "I think it's sad that this is supposed to be a major metropolitan area and you'd expect there'd be a better cross-section of the community than we're getting."

Common Pleas Judge Donna Jo McDaniel, who is presiding over the trial to begin next week for Carl Scott, has not been swayed by complaints from Scott and his attorneys about the lack of African-Americans on his jury.

The selection process was completed yesterday. Six men, six women, and two female alternates, all white, have been seated for opening statements and testimony to begin next Tuesday.

Scott, 22, is accused of the serial slaying of his mother, his cousin and his next-door neighbor.

If Scott is convicted, the jury will determine whether he is sentenced to life in prison or death by lethal injection.

McDaniel denied three defense requests regarding their concerns over the makeup of the jury pool.

"Jury selection in Allegheny County, where some judges have ruled that African-Americans are underrepresented, can be difficult. It seems that some people would prefer if the defendant were quietly executed at counsel table in order to avoid the bother of a trial," said Assistant Public Defender Kathleen Cribbins, who, if Scott is convicted, will

argue for the jury to spare his life.

"We need to improve our system," Cribbins continued.

Ray Billotte, the county's court administrator, said that county computers are programmed to send summonses randomly to about 60,000 potentially eligible jurors a year. The computer program does not consider race in the selection.

To serve, a juror must be a citizen over 18 years old, be able to read, write and understand English, and have no physical or mental infirmity that would prohibit the rendering of a verdict. A juror also cannot have a criminal conviction that called for as much as a year in jail.

That last stipulation, Billotte said, may be among the biggest encumbrances on the county's effort to diversify its jury pool. A conviction for any crime as minor as a third-degree misdemeanor at any time in a potential juror's past would eliminate that person from eligibility to serve.

If the law were changed, or if amnesty could be offered in such cases, more people would be eligible, Billotte said.

He also believes the Legislature could require the state departments of Revenue, Welfare and Housing to release the names of potential jurors who fail to show up when they are summoned.

The agencies have refused to relinquish the information on privacy grounds.

Currently, the county chooses potential jurors from the Pennsylvania Department of Transportation driver's license rolls and from lists of registered voters.

"In 2002," Billotte said, "this is my No. 1 priority."

(Jim McKinnon can be reached at jmckinnon@post-gazette.com or 412-263-1939.)

EXHIBIT F

Color in the court

Struggling to diversify the county's juries

Lack of racial diversity on juries in Allegheny County has led to a delay in a homicide trial with two black defendants. Sticky questions about what it means to be judged by one's peers are being raised in another trial, a capital murder case involving an African-American defendant. That trial has not been delayed, but the defendant's lawyers believe it should be.

There was a time in American jurisprudence when all-white juries were the norm and justice was anything but colorblind. It was a shameful time and we should avoid repeating it in the 21st century.

But Allegheny County is having difficulty seating black jurors, and everyone should be concerned.

Jurors are sought through methods that are supposedly insulated from race. The county sends about 60,000 summonses a year to potentially eligible jurors whose names appear on driver's license rolls and lists of registered voters. In both cases, however, blacks in an urban area may show up in disproportionately low numbers.

In Allegheny County, African Americans of voting age make up 10.8 percent of the population. Yet last week only 2 percent of the jury pool was black. Unfortunately, the number of black defendants on trial at any given moment is not low.

One complicating factor in finding black jurors is that people lose the right to vote in Pennsylvania for conviction of a crime as minor as a third-degree misdemeanor at any time in their past. If it's remotely true that 25 percent of African-American men between 15 and 39 are involved with the criminal justice system at any given time, then the outlawed poll tax has been replaced by something far more onerous.

As black defendants and their counsel hold out for rare black jurors, the criminal justice system in Allegheny County will begin to run aground.

Ray Billotte, the county's court administrator, says he has no greater priority for 2004 than jury diversity. At the same time, black residents must register to vote, if only to become eligible for jury duty, and must welcome the call to serve.

While this is not a problem that will be solved overnight, it's also a situation that reflects poorly on the county. There is much at stake here, not the least of which is a fair trial by a jury of one's peers.

2/17/04 Pitt. Post-Gazette A16
2004 WLNR 4900789

Pittsburgh Post-Gazette (PA)

February 17, 2004

Section: EDITORIAL

COLOR IN THE COURT STRUGGLING TO DIVERSIFY THE COUNTY'S JURIES

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While this is not a problem that will be solved overnight, it's also a situation that reflects poorly on the county. There is much at stake here, not the least of which is a fair trial by a jury of one's peers.

CORRECTION: The following CORRECTION/CLARIFICATION appeared on February 18, 2004: An editorial in yesterday's editions said incorrectly that the right to vote is lost in Pennsylvania when a person is convicted of a third-degree misdemeanor or greater crime. It's the right to serve on a jury that is lost.

---- Index References ----

News Subject: (Judicial (1JU36); Legal (1LE33); Social Issues (1SO05); Minority & Ethnic Groups (1MI43))

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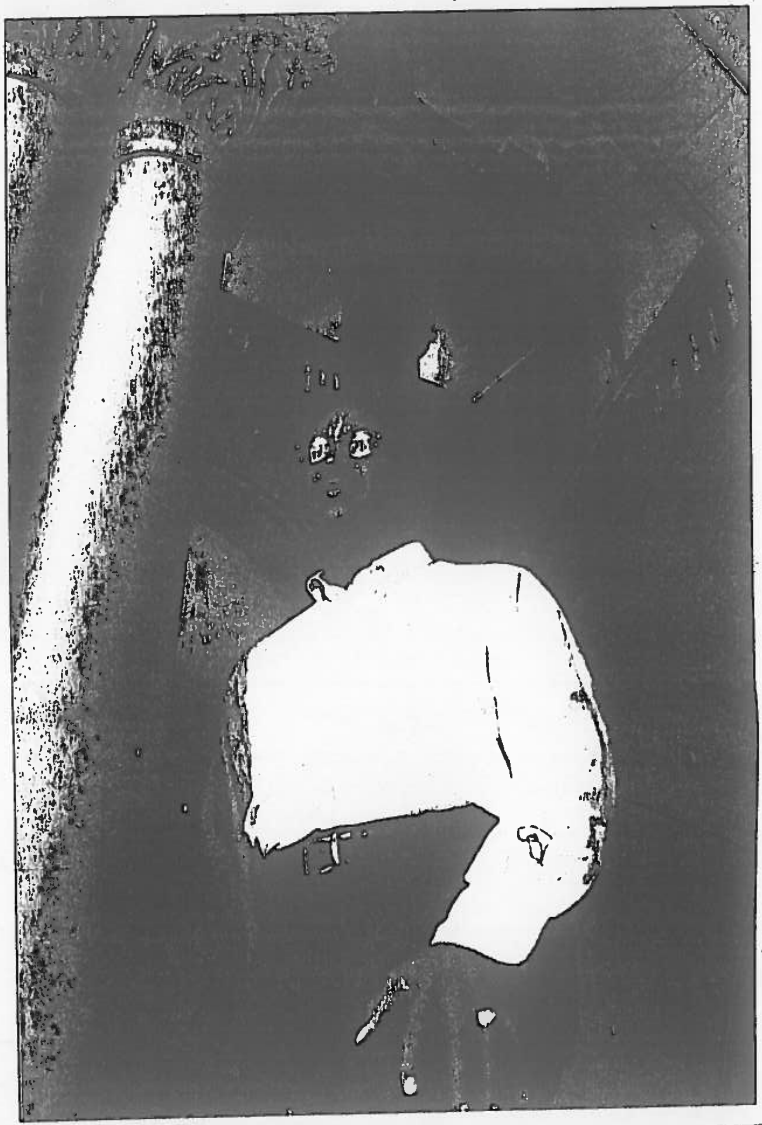
A jury of peers?



On Wednesday Delvon Anderson, a systems analyst from Scott Township, was one of four blacks among 75 potential jurors in the criminal jury room of Allegheny County Common Pleas Court. That means the jury pool was only 5 percent black, about average for the room, but less than half of the 11 percent of the county's adult population that is black. "It would be better to look into things and see why it happens rather than just leave things as they are," Anderson said.

James Knox/ Tribune-Review

County system underrepresents mostly black neighborhoods

Stories by Mark Houser
TRIBUNE-REVIEW

The system that picks people for jury duty in Allegheny County consistently overlooks blacks and favors whites, a Pittsburgh Tribune-Review investigation has found.

Though jurors are supposed to be selected at random, people living in white neighborhoods are more than twice as likely to be called for jury service as residents of black neighborhoods, according to a Trib analysis of thousands of people recently summoned for criminal jury duty.

Day after day, blacks are proportionally underrepresented in Room 318 of the Allegheny County Courthouse, where jurors summoned for duty wait to see if they'll be picked to hear a trial.

While every ninth adult in the county is black, fewer than one in 20 people in the jury room is black.

As a result, blacks on trial often look to the strangers in the jury box charged with judging their actions, hearing their reasons and deciding their fate, and see a dozen white faces looking back.

> **"I just don't understand. It's supposed to be a cross-section of your community."**
>
> — Reggie Flowers
> PROSPECTIVE JUROR

This imbalance, say many observers, casts a reasonable doubt on the very promise and purpose of the courts: to provide a fair trial by a jury of one's peers.

Criminal courtrooms in Allegheny County frequently look "like South Africa during apartheid," said Pittsburgh attorney Caroline Roberto.

"You sit there and think everybody in the courtroom is white oftentimes except the defendant," said Roberto, a former president of the Pennsylvania Association of Criminal Defense Lawyers.

Reggie Flowers, a child development specialist, was dumbfounded when he showed up for jury duty one recent morning and found himself the only black in a room of 88 potential jurors.

"I just don't understand," said Flowers, 51, of East Liberty. "It's supposed to be a cross-section of your community."

Constitutional law demands a random pool of jurors

PLEASE SEE **BLACKS/A10**

Details

▷ **OVERLOOKED:** Summons rates for mostly white, mostly black communities.

▷ **TO BE CONSIDERED:** How to make sure your name is on the list of potential jurors.

— Page A10

▷ **CASE STUDY:** A white jury judges a black defendant.

— Page A10

FROM PAGE 1

Blacks underrepresented in jury pool

BLACKS FROM/A1

to ensure fairness, representation and ultimate justice. The county officials charged with assembling juror lists attest that their methods are random.

But the evidence points to serious flaws in that system.

A Trib investigation of the last 18 months of jury arrays, the complete lists of everyone summoned for criminal jury duty, found a consistent pattern of racial exclusion.

Pinpointing the home addresses of the nearly 45,000 potential jurors using a computer mapping program, the Trib found that residents of black neighborhoods were half as likely to be called to jury duty as residents of white neighborhoods.

In neighborhoods that were at least 98 percent white according to the last census, on average 53 of every 1,000 adults were summoned in the last year and a half. But in neighborhoods where blacks are in the majority, only about 26 of every 1,000 adults got a summons.

To take an example, in the predominantly black Hill District, 177 of its 6,227 adults were summoned for jury duty. Nearly twice as many, 345, were called from almost totally white Kennedy Township, although its adult population is slightly smaller than the Hill's.

While the countywide average was 44 per 1,000, not a single black city neighborhood or suburb had a jury service ratio higher than 31 per 1,000. On the other hand, many white neighborhoods — affluent, middle- and working-class alike — had ratios considerably higher than average.

The courts don't keep records of the racial balance of jury panels. But analyzing a five-month survey last year of people reporting for jury duty, University of Pittsburgh criminal justice professor John Karns determined that the county's criminal jury rooms are typically less than 5 percent black.

A Trib survey of 1,031 prospective criminal jurors over 12 days this spring confirmed Karns' conclusion, finding only 42 blacks, or 4 percent. The county's adult population is 11 percent black.

While blacks don't get the same chance to judge, there is no short age of them being judged. Over the same 18-month period, black defendants in jury trials actually outnumbered whites. Presiding over all of those trials were 15 criminal judges, all of them white.

BLACKS MISSING FROM PANELS

Storming into the men's room during a break in a jury selection in May, defense attorney George Bills railed about race. His client, a black man, was facing homicide charges for stabbing another black man in Larimer.

"Did you see that panel?" Bills said. He was referring to the group of 35 prospective jurors waiting in an adjacent room. None was black.

"I think it sucks," he said. "I don't know how it happens ... but statistically I have problems with that. I just want to know how it happens before I retire."

Days later, an all white jury found Bills' client, Hosea Davis, 25, of East Liberty, guilty of third-degree murder.

That same week, another black man on trial for murder, Stanley Treadwell, 21, of Penn Hills, sat quietly as attorneys picked his jury from 51 people, every one of them white.

"That is a problem, I think," Treadwell said as he was led away afterward by a deputy. He eventually was convicted of first degree murder.

"If you see no one on the jury that represents you socially, economically, racially, and that jury is about to judge the appropriateness of your actions, I can clearly see where somebody might be very, very wary of that jury," said Common Pleas Judge Robert Colville Sr., who long served on the other side of the bench as district attorney.

Many lawyers, experts, judges, jurors and observers have said that an all-white jury isn't necessarily unfair to a black defendant, nor are black jurors more likely to go easy on him.

Some people don't see things that way.

Shauna Browne, who is white, said she and others charged last year with deciding the fate of a black murder suspect, Raj Edge, were uncomfortably aware of their own color from the trial's opening moments.

"The first time we were led into the courtroom, his family was there and they were commenting on it," said Browne, 28. "It was something that was thrown up in our faces right away: 'Oh, here comes the all-white jury.' It was black against white almost off the bat."

Browne said the jurors talked about the defendant's race, their own, their different life experiences and whether it all would affect their verdict. She said she wished someone black had been in the deliberating room. But in the end, she said, the jury did the right thing by sending Edge, 23, of the Hill District, to prison for life.

PROBLEMS WITH THE SYSTEMS

Republican Jury Commissioner Allan Kirschman denies any intentional discrimination by his office, which sends questionnaires to 100,000 adults each year to assemble a pool of potential jurors for later summons by the county courts.

The addresses the commission uses are picked at random from driver's license and voter rolls, he said. Race is not noted on either.

But the commission does not buy change-of-address data from the U.S. Postal Service, something direct-mail companies and some courts do to improve accuracy and prevent wasting money on postage.

Census data show blacks in Allegheny County are much less likely than whites to own homes and therefore are probably prone to move more often. Almost 15,000 questionnaires were returned by the post office for a wrong address last year, according to the commission's records, and the commission does not have the time or manpower to locate the new addresses and send another questionnaire, Kirschman said.

Another 17,000 questionnaires — nearly one in six — were simply not returned. The jury commission also makes no effort to contact those people to see if they're dodging duty.

"It's not the top priority," Kirschman said. "The top priority is getting a number of qualified jurors."

For working class people who get one of those questionnaires, the top priority may be protecting their paychecks.

"It's not that blacks are consciously choosing not to serve on juries. It's systematic biases and bad summons lists," said Robert Bastright, an assistant professor of political science at Swarthmore College in suburban Philadelphia.

Bastright surveyed adults in Montgomery County and three jurisdictions outside the state in 1999 to find out why people avoid jury duty, and he found money an object.

Blacks often work low paying jobs, Bastright said. Jobs like that often don't pay workers for days missed because of jury duty, where as many salaried positions do.

Courts in Pennsylvania pay jurors a paltry $9 a day for the first three days of service, plus 17 cents per mile. That won't even cover parking in a Downtown garage, let alone put food on the table. The daily pay increases to $25 after the third day of service, but most jurors don't serve that long.

Bastright is working with Pennsylvanians for Modern Courts, a judicial reform group based in Philadelphia, to persuade legislators to bring the commonwealth's courts in line with those in reform-minded states.

In Massachusetts, employers have to pay workers' daily wages for up to three days of jury duty. After that, the state takes over. Because only a few jurors serve that long, the courts can afford to pay them $50 a day.

President Judge Robert Kelly, a member of the jury commission with Kirschman and Democrat Jean Milko, said the commission has sought out lists of potential jurors in other places, such as state income tax rolls. But the requests are routinely turned aside, typically for reasons of confidentiality.

"Of course we'd like to have a greater representation (of blacks in jury rooms)," Kelly said. "But to skew the list some other way would also be improper."

ABANDONING "RANDOMNESS"

Some Pennsylvania courts have bypassed so-called random selection, at least temporarily, for the sake of balanced juries.

Two months ago, a Northumberland County judge became concerned when a computer glitch packed a jury room with men. So sheriff's deputies were dispatched to grocery stores, gas stations and a high school prom decorating meeting to round up 50 women to appear for jury duty. The judge explained that an overwhelmingly male jury could make it easy for defendants to appeal convictions.

Last October in Allegheny County Common Pleas Court, Senior Judge Raymond Novak cut aside racial randomness altogether in response to a challenge by Assistant Public Defender Chris Patarini.

Patarini claimed, on the basis of the Pitt study showing jury room racial imbalances, that his black client, Richard Estes, could not get a fair trial by his peers.

Novak overruled the challenge because it relied on an estimate of the black adult population; an actual number was not then available. Now that it is, he said, a new challenge could spark a major legal battle over whether the rights to receive a fair trial and to serve on a jury mean current jury selection methods are unconstitutional.

If it were to succeed, such a challenge would not just disqualify an entire jury room; it would set a precedent for every black defendant thereafter and give fodder for appeal or retrial to many already convicted.

While the Pennsylvania Supreme Court has upheld racially unbalanced jury pools picked from voter-registration lists, it has also cited Duren v. Missouri, a U.S. Supreme Court decision that allows challenges to the pool if racial exclusion is unreasonable and systematic.

And although he overruled Patarini, Novak nevertheless did something unprecedented.

Instead of having the Estes panel picked from the jury room at random, he required every minority in the room to be added automatically. A black woman eventually was seated on the jury, which still found Estes, 26, of Penn Hills, guilty of third degree murder. The case is being appealed.

"It was a form of affirmative action," Novak said. "... I felt that the higher ends justified a departure from random selection.

"This issue has bothered me for years, and I'm glad someone is finally doing something to examine it."

He suggested that legislators bypass the courts and push through reforms to end jury pool imbalances.

Patarini, meanwhile, has asked Karns, the Pitt professor, to update his study with the new census numbers. The jury commission recently sent Patarini a response to a list of questions about how jurors are picked, and he said he will make the challenge again in a trial this year.

"People walk around today and say there is no racism, there is no racial prejudice," Patarini said. "Sure, you could say that, but ask the same people how they would feel if they were on trial and the jury was all black. They would have a problem with it."

(Christopher Horner/Tribune-Review)

Allegheny County Senior Judge Raymond Novak said he hopes legal challenges or legislative action will correct the problem of racial imbalance in the jury room. "Lawyers have kicked and screamed about this issue for years," Novak said.

Overlooking black jurors

The county's system for selecting trial jurors is supposed to be random. However, in the last 18 months, every black neighborhood in Allegheny County had its residents summoned for criminal jury duty at a lower rate than the county average. A sampling of communities' summons rates:

	Percent black	Jurors summoned per 1,000 18-and-older residents
Fox Chapel	0.5%	70
Chestnick	0.5%	67
Upper St. Clair	0.7%	64
Green Tree	0.8%	57
Regent Square	2.2%	57
Brookline	1.8%	46
Allegheny County	11%	44
Pittsburgh	24%	35
Homewood	97%	10
Wilkinsburg	63%	25
Hill District	82%	21
East Liberty	70%	21
Larimer	66%	20

Sources: Allegheny County criminal jury arrays January 2001-June 2002, 2000 U.S. Census; Tribune-Review research

Tribune-Review

Racial disparities

Though blacks make up 11 percent of Allegheny County residents 18 and older, on a typical day the criminal jury pool is only 4 percent black. In contrast, black defendants outnumbered whites in criminal trials over the last year and a half.

In Allegheny County...

18 and older population	11% black
Serving jury duty	4% black
Defendants facing trial	63% black

Sources: Allegheny County Criminal Court records, January 2001-June 2002, 2000 U.S. Census; Tribune-Review research

Tribune-Review

Reform proposals

One way to fix the county's broken jury pool is to correct wrong addresses and look up people who don't return their questionnaires. Here are some other reform ideas:

Proposal	Pro	Con
Require jury pool racial balance to reflect the population at large, as Georgia courts do	Straightforward solution to bias problem	Race-neutral result requires non-race-neutral sampling techniques; liable to quota challenge
Create "jury districts" and call on equal number of jurors from each	Established, because it resembles how we get minorities elected to legislatures	Doesn't directly target race, so it may not fix the problem
Look for jurors in other databases, such as state income tax filings, welfare rolls, utility bills	Might catch people driver's license and voter rolls miss	Privacy objections, and no better than existing lists if jury commission won't follow up on non-responses

Source: Jury scholars, other state court administrators, Tribune-Review research

To be considered

One way to correct racial imbalances in county jury rooms is for blacks to make sure their names aren't left out of the jury pool.

If you want to make sure your name is on the list of potential jurors, clip, fill out and send this form to the Allegheny County Jury Commission:

I WANT TO BE CONSIDERED FOR JURY SERVICE.

I understand that this information will be used to ensure that I am represented in the jury pool in Allegheny County. I am at least 18 years old, a U.S. citizen, and a resident of Allegheny County. I have no felony convictions. I understand that this program will not guarantee that I will be called for jury service or be assigned to a jury panel. This information will be used exclusively by and will remain the sole property of the Allegheny County Jury Commission.

Name (print) _____

Address _____

Phone _____

Mail it to the Commission for the Selection of Jurors, County of Allegheny, 301 County Building, Pittsburgh, PA 15219-2904.

About the analysis

The Pittsburgh Tribune-Review used computerized street mapping to pinpoint the home addresses of 99 percent of the nearly 45,000 county residents summoned for criminal jury duty over the past 18 months. The Trib then compared the number of people called for jury duty in each municipality or city neighborhood with the 18-and-older population there, producing a rate of jurors summoned per 1,000 adults.

Jurors who were summoned more than once because of postponement and rescheduling were counted only once in the Trib's analysis.

JURIES AND SOCIETY

Nicholas Cafardi, dean of Duquesne University's School of Law, said the Trib's findings confirm what he's learned after more than two years as chairman of the Pennsylvania Supreme Court Committee on Race and Gender Bias in the Justice System.

"I think it's indisputable that the results aren't great," he said. "I think everybody involved in the justice system, the people we've talked to — the lawyers, the prosecutors, the defense attorneys, certainly the jury commissioners in Allegheny County — they all have an interest and would like to see a jury list that reflects the population.

"But we're not getting that, and we know we're not getting that. So what can we do?"

Cafardi would not say whether reforms to address jury room racial imbalances would be part of his committee's final recommendations to the court in December. His nine-member committee must decide, he said.

But Cafardi said he worries that the scarcity of blacks in jury rooms and on juries undermines courts' legitimacy.

"In the United States, we rely on respect for our legal system by all of our citizenry as a means of creating social order. To the extent anybody feels disenfranchised from the system, then we are knocking out the underpinnings of their commitment to that social order," he said.

Alexis de Tocqueville, the 19th-century French chronicler of American democracy, praised the jury system as a bulwark of liberty.

Juries, he said, "instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free."

Philadelphia Criminal Judge Gregory Smith said the numbers tell him the system needs to change.

"Black people are citizens of Allegheny County like everyone else, and I would hope that (county residents) want their government to run fairly and have the appearance of fairness, and include all people, all citizens," said Smith, who is black.

Many have given up already, said Flowers, the lone black lift operator recently.

"A lot of people in the black community don't want to participate in the process because they have a perception of the judicial system that's about the same as they do of the police," he said.

Mark Houser can be reached at mhouser@tribweb.com or (412) 320-7824.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

- - - - -

COMMONWEALTH OF PENNSYLVANIA	CRIMINAL DIVISION
vs.	
SEAN MAURICE BUSH	CC 200213175
and	
LAURENCE HARLEM BUSH, a/k/a LAURENCE HARLEM BENTON, Defendants	CC 200214185

Excerpted Transcript
of Hearing on Pretrial
Motions
(Defense Challenge
to the Jury Pool
Composition and the
Court's Ruling)

Reported by:
Philip Marrone
Registered Merit Reporter
Official Court Reporter

Hearing Dates:
July 15, 2003
July 16, 2003

Presiding:
The Honorable
Lawrence J. O'Toole

(Continued)

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

- - - - -

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July 15, 2003
Defendants Present
In Open Court

- - - - -

EXCERPT

- - - - -

THE COURT: So you want to move ahead with the challenge to the jury selection?

MR. PATARINI: Yes.

We maintain that the process in Allegheny County by which we pick juries is a violation of my client's Sixth Amendment constitutional right and Article I, Section 6 of the Pennsylvania Constitution.

These particular amendments and articles and sections have been described in *Duren vs. Missouri*, 439 U.S. Supreme Court, and *Commonwealth vs. Craver* at 688 Atlantic 2d 691. That's a 1997 case.

In this situation what we're saying is that the population in Allegheny County has been determined to have approximately between ten and 12 percent African-Americans. That we did a study through the Public Defender's Office with Dr. Karns and Gentile investigative

agency.

THE COURT: Do you have evidence or are you going to make a speech?

MR. PATARINI: I'm prepared to put Dr. Karns on, if I could proceed to the evidentiary hearing, if you want.

THE COURT: I thought we were going to do an evidentiary hearing.

MR. PATARINI: We'll call Dr. Karns.

THE COURT: Very well.

- - - - -

JOHN F. KARNS, Ph.D.,

called as a witness on behalf of the defendant Sean Bush, and having been first duly sworn, is examined and testifies as follows:

THE COURT: Mr. Patarini.

MR. PATARINI: Thank you.

DIRECT EXAMINATION

BY MR. PATARINI:

Q Would you state your name for the record.

A John F. Karns. K-a-r-n-s.

Q And would you state your educational background.

A I have a bachelor's degree, Bachelor of Arts, in political science, the honors program, from the University of Pittsburgh; a law degree from the

University of Pittsburgh in 1967; a master's degree in sociology from the University of Pittsburgh in 1974; and a Ph.D. in sociology from the University of Pittsburgh in 1978.

Q Are you presently employed?

A I am.

Q How are you employed?

A I am associate professor at the University of Pittsburgh, the Graduate School of Public and International Affairs.

Q And how long have you been employed as a professor at the University of Pittsburgh?

A Thirty-six years.

Q You stated that you are teaching sociology. Is that correct?

A No. I'm teaching criminal justice and statistics.

Q And your degrees involve sociology?

A Yes.

Q Also demographics; is that correct?

A Demographics is an aspect of sociology. That's correct.

Q In your study of statistics, has that been a part of what you're teaching at the present time?

A Yes, it has.

MR. PATARINI: And we'd offer Dr. Karns

for purposes of giving expert opinion on statistics in Allegheny County.

THE COURT: Mr. Fitzsimmons, any questions for the doctor?

MR. FITZSIMMONS: Not about his qualifications.

THE COURT: Very well. Go ahead, Mr. Patarini.

MR. PATARINI: Thank you.

BY MR. PATARINI:

Q Dr. Karns, you were contacted by our office to do some statistical analysis of the jury selection process in Allegheny County. Is that correct?

A Yes.

Q Do you want to tell the court what that involved?

A It involved the receipt of data from Gentile Meinert & Associates. Those data were in fact the counting of individuals who appeared for the venire. And they were asked questions on their age, their gender and their race.

I then took those data from May the 12th, 2001, through October the 11th, 2001, the daily appearance of individuals for venire, and aggregated them and then compared them to the population of Allegheny County as reported by the

U.S. Bureau of Census on their Web site, www.census.gov, in 2001, and with updates of that.

Q Now, approximately how many people were involved -- the number -- were involved in the counting of prospective jurors from May 12th to October 11th?

A About 4500, as I remember, approximately.

Q And have you had an opportunity or did I provide you with a certain -- some numbers after that --

A Yes.

Q -- of a count that took place, I believe, on ten separate days counting the race of the actual people that showed up for jury in December of 2002?

A Yes.

Q Did you have an opportunity to review a study that was done by the Allegheny County Court Administration's office?

A Yes.

Q By Carnegie Mellon graduate students?

A Yes.

Q Those were the sources of your basis for formulating your opinion?

A Yes, they were.

Q With the 2001 U.S. Census, what were the percentages of African-Americans in Allegheny County?

MR. FITZSIMMONS: Objection, Your Honor. Just for the record, I believe they do censuses every ten years, and the number of the year always ends in a zero, I believe.

THE COURT: It would be the 2000 census.

MR. PATARINI: I'm sorry.

BY MR. PATARINI:

Q Was it the 2000 census?

A 2000.

Q 2000 census.

A The percentage that was originally reported was 12.4 percent. That was later revised downward to 10.7 percent.

THE COURT: To 10.7?

THE WITNESS: 10.7 percent.

BY MR. PATARINI:

Q When you are comparing the numbers of individuals, the total number of people that actually come into the jury room for jury process, and you are determining the percentage of African-Americans in that particular group, why are you doing that?

A There are two purposes. One is to see whether or not the venire representation of African-Americans, for instance, is a fair representation of their presence in the community as a whole. And secondly

is to determine whether or not, if the first question is no, whether or not the proportions that appear for the venire are in fact the luck of the draw or whether they represent the results of some systematic process producing a nonrepresentative venire.

MR. PATARINI: Your Honor, do you want me to give him this microphone so it would be easy for the court to hear?

THE COURT: I can hear.

MR. PATARINI: Would you like a microphone?

THE WITNESS: No, I'm fine.

BY MR. PATARINI:

Q You stated "the luck of the draw." Would you explain to the court what you mean by "the luck of the draw."

A We're talking about inferen -- there are two types of statistics. One is descriptive and the other is inferential.

The descriptive statistics simply are percentages. They are proportions. They describe, as the word implies, the population of which you are speaking. Inferential statistics view the question of whether or not a sample that one has

taken truly represents the population from which that sample was drawn.

And there are mathematical techniques available to make decisions within certain ranges of error as to whether or not the sample is truly representative of the larger population.

Q When you speak about statistical significance, would you explain to this court what you mean by statistical significance.

A That is a term of art that talks about what degree of risk one is willing to take in making a statement as to whether or not there is representativeness of the sample that has been drawn.

To put it more technically, you set up what is called a null hypothesis, essentially a straw man, and you examine the data from the sample to make a decision as to whether the null hypothesis should be accepted or rejected. You make that decision on the basis of the mathematical calculations, and you do so within a certain degree of risk of error in making that decision.

The null hypothesis can be set in the positive or the negative. And the decision that you make can be within any degree of error that one is willing to assume.

Most commonly you assume a risk of error of ten percent or .1, or a bit more rigorous test would be .05 or five chances in a hundred.

Q When you talk about this risk of error, if I may, it's a situation where you have a pool of people, and the pool of people that you are looking at you are comparing to another pool.

That's one of the things that you're doing. Is that correct?

A Comparing it to a population.

Q A population. You're comparing a portion of the population to the population as a whole.

A The sample to the population.

Q And when you are comparing the makeup of the sample, you look at that for a period of time as we did in this particular case.

A We looked at the totals.

Q You looked at the totals over a period of time. And what you want to do is you want to make a conclusion in just looking at those totals over a period of time.

A That's correct. You want to determine whether or not when they reject the idea that the sample, the people -- the 4500 or so people that were studied from May the 12th to October the 11th are in fact

representative of the larger counting.

Q And you make the conclusion, correct, when you first look at the sample and you look at the sample, that one of the conclusions that you made, I believe, was that the African-Americans were underrepresented in this sample.

A That is correct.

Q In a situation where you go in on one particular day and you see that you have 200 people, and if the conclusion was that there's approximately ten percent in Allegheny County of African-Americans, if you had 200 people, you would expect to see 20 people. Not that you would expect, but that's one of the things that you could say, well, maybe you would see 20 people there.

A That would be a fair representation.

Q And then if you didn't see 20 people on that particular day, you couldn't go out and say, Well, this is a systematic exclusion, could you?

A It could even be the luck of the draw or systematic exclusion.

Q You can't tell just from looking at one day. So you use your larger group.

A That's correct.

Q And once you use your larger group, you use that

and your findings in your larger group to determine what your conclusion is. Is that correct?

A That's correct.

Q Now, what kind of conclusions did you make?

A That whites are overrepresented in the county. And the probability of being wrong in making that statement is about one in a hundred thousand.

Q How did you come to that conclusion?

A By looking at what is called a difference-of-proportions test using what is called the Z-statistic, which looks at the area under the normal curve. It's a two-tailed test, they call it, on the right and the left, and the distribution as to whether or not the analysis that you do, the mathematics that you do on the sample show that there is a probability less than your alpha level, your risk of being wrong, or whether it's greater than your risk of being wrong.

Q And what conclusions did you make, if any?

A Again that the chances of being wrong in stating that there are too few African-Americans are about four in 10,000.

This is on the updated analysis. On the original analysis it's about less than one in a hundred thousand. And it's still about one in a

hundred thousand risk of being wrong by saying that there are too many Caucasians.

Q And the percentage that you actually had during that period of time from May 12th to October 11th of 2001, what was the percentage that you were drawing?

A 4.87 percent of African-Americans --

Q That's all we need to say. This issue that we're raising here just involves African-Americans. But you did do it as far as gender and age?

A Yes.

Q And you calculated those also.

A That's right.

Q Is this situation in which we have that sample and we're comparing the sample to the whole, you stated that the manner in which you used to evaluate the likelihood of being wrong when you make that conclusion, are these standards -- where are these standards? How are these standards in the science of statistics or the art of statistics?

A They are accepted statistical procedures for making decisions of the type as I would estimate. In this case I was using a difference-of-proportion test.

Q And are these the things that you teach or are part of what you've been doing through the years in the

University of Pittsburgh?
A Yes.
MR. PATARINI: I have no further questions.
THE COURT: Mr. Fitzsimmons, any questions for the doctor?
MR. FITZSIMMONS: I have some, yes, Your Honor.

CROSS-EXAMINATION

BY MR. FITZSIMMONS:
Q Doctor, in terms of your numbers, you base them on the 2000 census. Is that right?
A That's correct.
Q And you indicate that it was revised I guess at some point after it was initially published?
A Yes. The original publication numbers were estimates. They were refined as the count got more accurate.
Q Do you know when they were revised?
A October of 2002.
Q That would be nine months ago or so.
A Approximately so, yes.
Q Now, you testified about these same matters in front of Judge Nauhaus June 6, 2003? Is that correct?

A I did.
Q Unless I missed it in this transcript, you were citing to the 12.4 percent when you were giving testimony about the percentage of African-Americans in the community and did not reveal to the court or to counsel the revision of October of 2002. Is that accurate, sir?
A I was not asked about the revision. That's correct.
Q So you didn't volunteer that information either. Is that right?
A I believe the court asked me at that point whether or not ten persons per hundred would be a fair number, fair percentage, to require for representativeness of a venire. I responded that it would.
You'll find that toward the end.
Q So when the court asked you the direct question, quote, What's the percentage of African-Americans at Allegheny County? your response being 12.41 really should have been the revised numbers of 10.4, sir?
A As I said, I was testifying as to my original report. And for consistency sake I used those numbers. But when the court asked me what

would be a fair representation, I said 10.
Q The survey that was conducted, as I understand it, was conducted -- at least for the report that I've received a copy of -- May 12 through October 11, 2001. Is that right?
A That's correct.
Q And that was done, I understand -- and correct me if I'm wrong -- at the direction of the Honorable Lawrence J. O'Toole, the judge presiding in this matter.
A I am not certain of that, Mr. Fitzsimmons.
Q And you received some additional statistics. You were asked about ten days in December by Mr. Patarini. Is that right?
A Correct.
Q Now, the numbers gathered in the first part, I guess the May 12th through October 11th part, you say that Meinert & Company gathered those numbers?
A Yes, they did.
Q And do you have any idea who gathered the numbers in the ten days in December, I guess, which is in 2001?
A I do not. They were provided to me by the Public Defender's Office.

Q So you have absolutely no idea of the accuracy of those numbers then?
A No, I don't.
Q And in terms of the Meinert numbers, do you know the method upon which they arrived at whatever numbers they gave you, sir?
A They appointed a person to appear each day in the jury room. That person handed out a questionnaire asking age, gender and race. Those questionnaires were then collected. They were then aggregated, totaled. The data were then entered into a spreadsheet Excel file. I then took those data day by day, further aggregated them into a statistical package for the social sciences, SPSS.
Q It was done by a paper survey handed out to jurors then. Is that right?
A Yes.
Q Now, you have no idea whether every juror complied with your request that they fill out that survey? Is that right?
A Personally, no.
Q And you have no idea if, even if they did that, they entered accurate information on those surveys? Is that right?
A That's correct.

Q Now, were some of the surveys -- did you actually look at the papers yourself, sir?
A No. Not after the first few days.
Q Did some of the surveys contain incomplete information such as neglect or refusal to fully complete the survey forms?
A There were a very small number of them.
Q There were some of those?
A Yes.
Q Were there mixed responses? Did people indicate that there were a mixture of different races of people?
A Yes, they were aggregated under the term "other."
Q So they weren't put in, for example, white if they said they were part white or black if they were part black? They were mixed into others. Is that what you're saying?
A Correct. There were very few.
Q The survey was conducted only in criminal court, correct?
A As I understand it, yes.
Q And I don't know if you're aware of this or not, but jurors who gather in the civil court assignment room who oftentimes are brought over to criminal court when we run out of jurors here were never

surveyed. Is that right, sir?
A To the best of my understanding, yes, that's true.
Q And you'd agree with me that the sample space, to use one of your terms -- that is, the group of people actually included in the survey -- is somewhat small, sir?
A A sample of 4500 is relatively large. The normal amount that you need --
THE COURT: How many jurors do we call for a year here in criminal court? Does anybody have that number? Do you know the total number of jurors called into service?
THE WITNESS: During that time, no, I don't. Civil and criminal, no, I don't.
BY MR. FITZSIMMONS:
Q You'd agree, sir --
MR. PATARINI: Objection. He was finishing his answer. He didn't get a chance to finish his answer.
MR. FITZSIMMONS: Were you finished with your response?
THE WITNESS: Yes.
BY MR. FITZSIMMONS:
Q Next question. You'd agree, sir, if a survey were conducted over a longer period than May through

October, that the statistics would be much more significant, would you not, sir?

A The significance level would rise because you have a larger sample. That tends to be what happens statistically. However, I don't think that the results would be different.

The data that you've received for last December and the data that I received today, for instance, on the venire are all as bad if not worse.

Q What information did you receive today that you're mixing into this now, sir?

A I received information from Mr. Patarini that one out of 71 members of the venire today were African-American. That's 1.408 percent.

Q One day's sample, sir, is absolutely insignificant, is it not, sir?

A It's not insignificant. The chances of it having statistical significance rising beyond the point of 5 level are small.

Q You'd agree also that most of the months of this survey from May to October 2001 were in the summertime. Is that correct, sir?

A Obviously.

Q And did you give any consideration to the fact that

because of the fact that these are summer months for the most part, that people's vacations and other activities that tie them up from coming downtown for jury service might have skewed these results, sir? Did you give that any consideration at all?

A No. That would require speculation on my part. I dealt with the people who appeared for the venire.

Q Say that again.

A I dealt with the people who appeared for the venire. The reason for doing so or not doing so.

Q Let's turn to that, if we could.

These numbers are people that actually show up in the criminal jury room on a given day between May and October of 2001, right?

A Yes.

Q These numbers have no correlation to the number of people that were sent questionnaires to see if they were even qualified to serve as a juror. Is that right?

A I'm not certain of that. You would have to talk to the Jury Commissioner on that. But they are in fact the people who are the venire from which the jurors are selected.

Q Have you done a study on the makeup of people

that are sent questionnaires to see if they're eligible for jury service, sir? Yes or no.

A No.

Q Have you done a study on the makeup of people who actually respond to those questionnaires so that they might be included in the jury pools?

A No.

Q Have you done a survey of people who actually do respond and who are qualified and who are placed into the pool of people that might be picked for jury service summonsing, sir?

A No.

Q Have you done a study of those people who are actually summonsed by the Jury Commission to see what their makeup is in terms of race, sir?

A No.

Q Have you done a survey of the makeup of people who fail to respond either to jury questionnaires or to summonses to see what the makeup of those people is, sir?

A No, I haven't.

Q So you can't say whether the low numbers, according to your results, are due to the government failing to summon people of a certain race, color or creed as opposed to the numbers being underrepresent-

ative because people don't respond either to a questionnaire or to a summons to appear for jury service in either the criminal or civil side, can you, sir?

A I cannot attribute causation to the reason for failure to appear. All I can do is say there is a systematic process. It is not necessarily intentional, but it is certainly systematic.

Q How can you say that it's systematic, sir? How can you draw that conclusion when you're just looking at the number of people who have appeared on a given set of days in May through October of 2001? How can you say that that's systematic exclusion of those people?

A Because those are the people from whom the petit juries are selected. And secondly, the pattern persists for May through October. It's a persistent pattern. It's not a luck of the draw. And the statistics show that you would be wrong in drawing that conclusion less than 100,000 times.

Q And who's behind this systematic exclusion in your opinion then, sir?

A I don't know that there is any intentionality. It's simply the process that is. I don't attribute any.

Q You don't have an answer for that.
A No, I don't.
Q There's been no more recent studies since October of 2001. Is that right?
A I believe there was a study done by some students from Carnegie Mellon. But it was primarily descriptive and not all inferential.
Q Do you know when that was done?
A No, I'm not certain.
Q You have absolutely no idea? After your study? I mean, the Meinert study, to use that term, or during the same time period. Or are you not aware?
A I'm not aware of when the Carnegie Mellon students studied this.
Q Are you aware that that study came up with numbers different than yours, sir?
A I am.
Q Showing that the numbers of African-Americans as a percentage of the people who do show up in the criminal jury room is higher than the numbers that are included in your study, sir?
A Yes. As I remember it, it was for a very short period.
Q But you're aware that their study differed from yours and it was a higher percentage that they came

up with, correct?
A Yes, somewhat.
Q Sir, you're aware that the County of Allegheny has recently taken steps to address the claim or the issue of underrepresentative minority numbers in the jury pools in Allegheny County? Is that right?
A Of my personal knowledge, no.
Q Do you think that further study of the impact of that would assist in seeing this problem still persists such as you claim that it does, sir?
A It would depend on what is done and how systematically it's performed.

MR. FITZSIMMONS: Those are all the questions that I have for Dr. Karns.

THE COURT: Mr. Brennan, any questions for the doctor?

MR. BRENNAN: No questions.

MR. FITZSIMMONS: Your Honor, I would point out one thing before we have Dr. Karns go.

The one motion that was filed on behalf of Sean Bush raises an issue about age, gender and race underlying its claim of systematic exclusion. That motion was joined by Mr. Brennan in a blanket motion that he filed

joining the pretrial motions of the defense. And I've heard no testimony about the other two categories; that is, age or gender. So I'm assuming that both counsel are abandoning any efforts to claim that there's under-representative numbers in those two categories?

MR. PATARINI: That is correct. We're just raising the issue of race.

THE COURT: Thank you, sir.

MR. PATARINI: I have some cross-examination also -- I mean redirect.

MR. FITZSIMMONS: Is Mr. Brennan joining in that retraction of that portion of the motion then?

MR. BRENNAN: Yes, Your Honor.

THE COURT: Yes.

MR. FITZSIMMONS: Thank you.

THE COURT: Go ahead, Mr. Patarini.

REDIRECT EXAMINATION

BY MR. PATARINI:

Q Now, Dr. Karns, you stated that your sample included approximately 4,000 people?

A Yes.

Q And through a period of May 12th through October 11th?

A Correct.
Q On cross-examination there's been a number of questions as to question the reliability of your conclusions based on that sample.
A Yes.
Q Now, you could say that the sample -- you could start since the inception of the Allegheny County Courthouse, Allegheny County courts, up to 2003. Is that correct?
A It could --
Q You could conceivably say that could be the only acceptable sample. But in statistics that is the way studies are done.
A No.
Q Samples of 4,000, is there anything significant in a sample of 4,000 people?
A Depends on what you mean by the term "significant." In the sense of the size of the sample, that is a large sample.
Q That is a large sample. And for the conclusions that you're being asked to make in your opinion, is that a significant amount of people for a significant period of time?
A It is.
Q Now, you stated that on cross-examination you were

asked a question that some of the forms that you were given had incomplete answers.

A Yes.

Q And that some -- and some of the answers were difficult -- may have been difficult to categorize.

A Very few.

Q Now, did the fact that some of the forms were incomplete or that were incapable of readily being categorized, does that change your opinion?

A They were so small that it would not change my opinion. Small in number.

Q Basically all you're doing is comparing numbers which involves, as you said, the total population and the sample. You're not involved in trying to speculate as to the reasons that this is the percentage that you get in the sample.

A That's correct.

Q That's not part of what you do as a statistician, is it?

A No. In this case, no.

Q You were also asked about other studies that were done. In fact, when we were involved in another case in this courthouse, we contacted the Jury Commission and we provided the Jury Commission with a questionnaire which included almost every

question that Mr. Fitzsimmons asked you, isn't that correct, about whether they had done any investigation as to their total samples?

A I believe so.

Q And the Jury Commission had done no investigation as to their pools, let's call it, when they say voter registration and licensing. The Jury Commission had done no investigation whatsoever. Isn't that correct?

MR. FITZSIMMONS: Objection. This calls for hearsay, I believe, Your Honor.

THE COURT: If he knows the answer. He's an expert witness.

BY MR. PATARINI:

Q We asked them those questions?

THE COURT: If you know the answer, Doctor.

A Yes.

THE COURT: He's kind of dipping into testifying himself here.

THE WITNESS: Yes.

BY MR. PATARINI:

Q Well, isn't that true?

A Yes, it is.

Q And as far as any steps that were taken to remedy

the problem, that study was done because the Allegheny County Court Administrative Office believed there was a problem. Isn't that what that was about?

MR. FITZSIMMONS: Objection, Your Honor. This calls for speculation, I believe.

MR. PATARINI: I have no further questions.

MR. FITZSIMMONS: If I could.

RECROSS-EXAMINATION

BY MR. FITZSIMMONS:

Q Sir, take this as a hypothesis. People fail to respond either to questionnaires or to summonses. And assume for a moment that the possibility that a higher number of, say, African-Americans fail to respond than is represented in the population. Might that well skew the numbers, make them somewhat closer to five percent, which is what your survey is more or less, as opposed to ten percent, which is what the census numbers say that the population in Allegheny County is?

A It could well, but it doesn't get you past your fundamental problem.

Q Just answer my question. Is that a possibility? If that were to be the case that a high --

MR. PATARINI: Objection. Calls for speculation. It calls for --

MR. FITZSIMMONS: Let me finish my question.

MR. PATARINI: He's asking the expert to speculate on things that he's never testified to.

MR. FITZSIMMONS: I think the court will see where I'm going when I follow up with the next question.

BY MR. FITZSIMMONS:

Q Sir, let's assume for a moment that that is true, that a higher percentage of African-Americans than is represented in the population failed to respond either to these questionnaires or to summonses. Certainly that would skew the results as a result of their inaction. Am I correct about that?

A Oh, yes.

Q When you say that there's a systematic exclusion of people, you've already told us, I believe, that you can't say who's behind that.

What you mean by "systematic" is that something in the system causes an under-representation, not that the people who operate the system cause that to happen, but the system itself

relying on people, for example, to respond causes that. Is that right?

A The process as it exists produces the results that I've described, yes. And I don't attribute any intentionality to anyone or any organization or institution to do so deliberately.

Q So if you call a person -- citizen's inaction in responding cause of this, or at least the potential cause, it's not necessarily, from your results anyway, an act of the government in systematically excluding the people. Would you agree with that, sir? If you understand my question.

A I do.

The process as it exists produces the results that were described. The government is responsible for that process. So in that sense, the government is responsible for there not being a sufficient proportion of African-Americans in the venire.

Q Are you or are you not familiar with recent steps taken by the government, meaning Allegheny County and the court administrative staff, to address nonresponsive people, whether they're African-American, Caucasian or some other race, color or creed of person?

A They're making a sincere effort to do so.
Q And you haven't studied the effect of their sincere efforts to do that.
A I have not.

MR. FITZSIMMONS: No other questions.

MR. PATARINI: I have no further questions.

THE COURT: Mr. Brennan, any questions?

MR. BRENNAN: That's all I have, Your Honor.

THE COURT: Is that all for the doctor then? May he be excused?

MR. PATARINI: Yes.

THE COURT: He was here all day yesterday. He's been very patient with the court.

MR. PATARINI: I received nothing as to what the Commonwealth is going to produce. So I don't know if they're going to have any expert opinions or anything. So I would like him to stay.

THE COURT: He can stay if he wishes.

MR. PATARINI: I would like him to stay.

THE COURT: Doctor, thank you very much for your patience.

All right, Mr. Patarini, any other testi-

mony?

MR. PATARINI: We have no other testimony.

We believe at this point in time that the burden shifts to the Commonwealth. We believe that we -- my argument would be --

THE COURT: So there's no further testimony.

MR. PATARINI: No further testimony.

THE COURT: Mr. Brennan, do you wish to offer testimony?

MR. BRENNAN: No.

THE COURT: Mr. Fitzsimmons?

MR. FITZSIMMONS: If I could just have one moment, Your Honor.

THE COURT: Yes, sir.

MR. FITZSIMMONS: Your Honor, I have Mr. Nerone here. He's from the court administrative staff to address what has been done recently in the last year or so to address concerns about the underrepresentative number of certain groups in the jury pools. And he's prepared to address the court and explain to the court what steps have been taken in that regard. And I think it's proper evidence and it bears upon the question here.

But I do have a concern, Your Honor, whether the defense has even made out a *prima facie* case.

THE COURT: Before we argue about where they are legally, if we have a witness who's here, wouldn't it make more sense just to get all the testimony in? It might be appropriate.

I mean, this gentleman was here all day yesterday also. And I know he was thrilled to sit here most of the day.

MR. FITZSIMMONS: I bring it up because, unless there is a *prima facie* indication, it doesn't shift any burdens.

THE COURT: I understand that. Before we get into all that, he's here.

Does anybody object to our getting his testimony on record?

MR. FITZSIMMONS: Very well. I would like to call him at this point.

THE COURT: Thank you, sir.

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REGAN NERONE,

called as a witness on behalf of the Commonwealth, and having been first duly sworn, is examined and testifies as follows:

THE COURT: Tell our court reporter your name and spell your last name for him.

THE WITNESS: My name is Regan, R-e-g-a-n. Last name is Nerone, N-e-r-o-n-e.

THE COURT: Thank you, sir.

Mr. Fitzsimmons.

DIRECT EXAMINATION

BY MR. FITZSIMMONS:

Q Sir, tell us what you do for a living.

A I'm employed by the County of Allegheny as the jury coordinator in the department of -- in the Court Administrator's Office.

Q Can you tell us, are you a lawyer as well --

A Yes, sir.

Q -- aside from being employed as a jury coordinator?

A Yes, I am.

Q How long have you been working in that position, sir?

A Since May I think it was 17th of last year, 2002.

Q And what has been your mission so long as you've been the jury coordinator, I guess, working over at the Court Administrative Office, sir?

A Initially I started the study and prepared a preliminary plan to handle a number of issues in the Jury Commissioners' Office and now am in the

process of further revising that plan and implementing the plan.

Q And one of the parts of your mission has been to address concerns about the numbers of different discrete races and colors and creeds of people that are representative in our jury panels?

A Yes.

Q And can you describe the efforts that have been made during the last year or two to address those concerns? The ones that you've been involved with, sir.

A The first thing and I think the most important thing we've done, we completely revised the questionnaire that is sent to citizens throughout the county. And we included in that questionnaire questions pertaining to both race and gender.

Prior to this, we were completely racially and genderly blind.

For example, somebody with a name like mine, you have no idea what my gender is just by looking at my name. Likewise, you have no idea what my race is by just looking at the name. And that's all the information we had.

After 1960 -- I should say the 1960s -- racial information was discarded even from the

Election Department. They could not ask for that information on their forms, so that you had no racial information.

Our sources are two sources. So we gather people from the voters registration lists which we get from the Department of Elections here in the county and from the Department of Transportation, PennDOT. They submit to us drivers information. So that racial information was not a part of that information.

So we cannot tell you whether a person is African-American, Caucasian, Hispanic or whatever from just our records. And that's a very important thing. It now will enable us to do some analysis, to determine what is going on demographically within our lists, within the source list themselves.

For example, I don't know at this moment in time whether there is a source list problem, whether there is an overrepresentation of Caucasians on the voter registration list in the County of Allegheny, nor do I know whether there's an overrepresentation of Caucasians on the drivers list. Or we could say conversely underrepresentation of African-Americans. We don't know that

right now.

By asking for this information, we will then be able to run the computer run and determine whether -- we can go into statistical analysis and what have you to determine whether there is an overrepresentation or underrepresentation on the source list themselves.

That also will be very, very helpful for us in analyzing issues such as nonresponses, or are we getting an overrepresentation of African-Americans who do not respond to our questionnaires?

If I may by way of example give you last year, 2002. 100,000 questionnaires were sent to people in this county randomly selected from this combined list, which is called a master list. It's a combined drivers list and voters registration list form as master list. And from that we sent out a hundred thousand questionnaires.

Now, of those, 22,000 were completely non-responsive. We had no idea what had happened to them. They just went out and they didn't come back. Another roughly 19,000-some were returned by the post office that the address -- the person was not at that address.

So that you started with that number of

roughly 40,000 people that didn't respond back.

Now, I can't tell you how many of those -- I can tell you that the roughly 19,000 -- the post office tells us they were no longer living where we thought they were based on the information we had.

Now, what we've done there is we've implemented a process or procedure to follow up on those nonreturns. With those where there are returns, there is an effort made by going through PCs and what have you to determine address. That can be a difficult process. But the ones --

Q Can I stop you before you go on to that?

A Sure.

Q In terms of just to sort of sum up, the one thing that's being done is to collect data as a part of the questionnaire about race and about gender. Is that right?

A That's correct.

Q That will be used to make sure that the master list is representative of the population then. Is that right?

A One of the things that we can do is that. We can get into a number of other issues can be analyzed so that we can come forth with some facts that we don't have now.

Q One of the means that that information will be used is to try to make sure that the master list, the list of people that you use to summon people at random to come into court to be jurors, is representative of the population. Is that right?

A It will give us some indication of that, whether the source list themselves are representative.

Q And if they're not, then that would allow you to --

A We can make adjustments for that. I'll give you an example of that.

Let us say we find that the drivers list is -- we see Caucasians are heavily over-represented. One of the things we may be confronted with, do we want to continue to use the drivers list? Because it may throw our whole system off cue. That's an issue here. That's excluding the drivers list.

Another way of approaching the same issue, we may say that maybe what we have to do is go and get some other lists. We may go to the Department of Public Welfare, which they have done in the past. But we now are asking for legislation to require the Department of Public Welfare to supply this information. The Department of Labor through the Unemployment Compensation Bureau, maybe

their list would be helpful.

But we need to know what facts, before we start mixing things up and changing the facts, where are your problems? Right now we can't identify them, if they do in fact exist.

Q Moving on to the second topic then, there are steps being taken to address the nonresponse issue. Is that right, sir?

A Yes.

Q And if in fact people who don't respond are over-represented in terms of one racial category, for example, or another, correcting that problem may well bring more balance to the final jury panels in the county. Is that correct?

A That's correct.

Q Can you briefly describe for us what efforts are being taken to address the nonresponse issues, sir?

A We have totally automated the system. So when a questionnaire goes out, the computer 45 days later will tell us whether or not that person has responded.

If they fail to respond, the first thing we do is we check with the post office. There's a form that goes to the postmaster of the area where they live to determine, first of all, whether the

address we have is correct. It's a confirmation system. When that comes back, depending on what information -- we're going to get one of two answers. We either have a correct address or an incorrect address.

If it's an incorrect address, we attempt to find the address. Absent the ability to do that, then they are removed from the master list.

If they have failed to respond and the post office has reported that in fact that is the correct address, then we send out another questionnaire to give that person an opportunity to submit the information. It may wind up on the refrigerator and forgotten about. Who knows? We're giving them another opportunity.

They're then given 15 days by the computer. If they fail to respond to the questionnaire within 15 days thereafter, again a certain element of time to give them, then a summons will go out from the Commissioners' Office itself requiring them not only to send the questionnaire in but also to come personally into the Commissioners' Office and fill it out.

In that summons they are given a third opportunity to send the questionnaire in. We tell

them if they send it in one week before their appearance date, they would not have to come in.

If they fail to appear before the Commissioners' Office or if they came to the Commissioners' Office and refused to fill out a questionnaire, it is then referred to the President Judge for the court's involvement. And at that point in time an order of court to show cause why they should not be held in contempt is entered by the President Judge setting a hearing date for them to come in and explain the situation to the judge.

Their failure to appear before that court will cause a bench warrant to be issued to have them brought in.

In any event, when they're before the court, they will either have a satisfactory explanation or they will not. And if the court is not satisfied with their explanation as to why they did not fill out the questionnaire, then the case is to be held over for criminal contempt. And then the case would be tried.

Q Now --

A I might point out -- well, no, excuse me; I'm sorry.

Q Now, is there also a concern about not just -- not

the issue of not responding to questionnaires, but people not actually responding to summonses after they've been identified as proper candidates for jury service? If they failed to show up in, say, the Criminal Division or Civil Division when they're called to be here?

A Yes.

Q And has there been an increase in efforts by the court administrative staff or by the Jury Commission to address those kinds of concerns, sir?

A Yes, similarly again totally automated. When someone fails to appear pursuant to a summons to appear for jury duty, a letter goes to them from the President Judge giving them an opportunity to explain their situation.

There are numerous things that could have happened. If they have a satisfactory explanation, they are rescheduled for jury duty.

Their failure to provide a satisfactory explanation will again cause an order to show cause from the President Judge to go out and giving them a date in court again to appear and explain themselves, their failure to satisfy the court again or a bench warrant if they fail to appear.

If they do appear and fail to satisfactorily explain themselves, again that case will be held over for criminal contempt.

There's specific reference in the statute, in the Commonwealth statute, they're subject to a $500 fine and/or ten days incarceration.

Q Now, are there other efforts which have been taken besides the jury questionnaire enforcement, if you will, and the jury summons enforcement and also the collection of gender and racial information process that had been taken by the Court Administrative Office to try to address concerns about underrepresentation of jury panels in the county?

A Yes.

Q Would you describe those other efforts for us, sir.

A One of the other things is attempting -- we are attempting to address the problem of being able to locate people, particularly with certain economic groups, those who rent.

There's a tendency for people to move more. This is pretty well-known not only in the jury system but in marketing studies and what have you.

And our address -- we are subject always to the source information we have. We're taking

addresses from voter registration lists.

To give you an example, for myself, my address was last changed on my voter registration in the early seventies.

Now, there are many people out there that are very similar to myself. Now, some have moved, and they fail to advise the post office. And even if they had advised the post office under the old system, we wouldn't have known that, because unless it got back to the Department of Elections, if they were coming only from that list, if they were coming from the PennDOT list -- they may have changed their address with PennDOT -- we would have picked that up at some point in time. But if they failed to make those changes, we don't know that. So we send out correspondence and it comes back from the post office saying, We don't know where they're at. Or they don't return it for whatever reason.

What we've done, we've engaged Pitney Bowes, who has a system, a commercial system that they have out. It's appropriate where they do -- they take information from the post office.

When you file that little change-of-address card, that little green card, with the post office,

that is picked up on a national system and brought in here. So so long as they file the change-of-address card, we can keep somewhat current.

And that system with Pitney Bowes works within one week. Now I think realistically it's one week after they get the information. I think you really have to figure probably two to three weeks we're behind at all times. Only if they file the information.

If they don't file the information, we still have a problem there. And we don't really know how to address that, and I don't think anybody has come up with that solution. But that's a major thing for us.

In the past when we've been behind on the addresses, it was not because of something we did. It's because we didn't have the tools to come in and make those change of addresses.

We also try to cut back on the number of mailings that we do. For example, that same system will address to us -- rather than sending out questionnaires to people who are living in Westmoreland County, we delete those from the get-go. So we start cutting back on that, and we can get more manageable numbers. We get less

nonqualifieds that way.

Q Besides those four efforts then, are there other efforts which are being taken to try to address these same concerns, sir?

A Yes.

Could I please refresh my recollection? I made some notes for myself, if anybody wants to see them.

THE COURT: You can use those.

THE WITNESS: My memory is not what it used to be.

BY MR. FITZSIMMONS:

Q Go ahead.

A Merging. One of the issues that you have to do is you've got to merge your lists. You'll have duplication. You'll have somebody on your drivers list and you'll have somebody on your voters registration list.

For example, if a person's name is Robert Charles Smith, on one list it will say Robert Charles Smith; on another list it will say R. C. Smith. Is that the same person? It may or may not be.

We don't have Social Security data generally in the beginning, because neither the voter

registration nor -- that's an ideal thing when you can merge them with Social Security numbers.

But merging is important to get your master list into a manageable shape when you're dealing with these issues.

Heretofore, the county used to also include telephone directories on their list. They found that completely unmanageable. There's so many different -- we use different names. Widows, for example, frequently use their husband's name, and we're sending out questionnaires to a lot of people that are no longer here. So that has been deleted.

But the other thing when we get into the merging, that is done automatically. Last year, for example, it took them better than six months to merge the two lists, because what they were doing, they'd get a printout and they'd work with the brain.

We let the computer do the work. We merged those same two lists this year, and it took us ten days. And that was going rereading from what the machine had already done.

Now, where that comes in and is going to be a valuable aid to us is if we want to add -- let's say we want to add the Public Welfare list or the

Bureau of Unemployment Compensation list. We will be able to do that readily. It's not a major project like it had heretofore been. So that is important in the overall solution to a potential problem.

We have also addressed on two fronts an issue, and we don't know whether it's part of the problem or if there is a problem on excuses. From the standpoint of qualification, persons who are either physically because of some infirmity or mentally incapable of serving on juries, they can be taken off and be not qualified. The same thing with somebody that's on military duty. They can become unqualified.

Again what has been done before, we've had lay people who have no medical knowledge, no checking on these people. If you put down you were in the service, there was relatively -- they were trying to call and make a lot of phone calls. They were taking information from doctors. The doctor would say, I don't think this person can serve on a jury. Well, that didn't tell us very much if we were in court.

But we've changed that so automatically if someone says they have one of those problems on the

qualification side, when the questionnaire goes out, there's a certificate going out for them to have their physician under oath and perjury to fill it out, identify himself by his physician license number, and to specify what in fact is the problem.

Now, that problem can either be a temporary disqualification or it can be permanent, depending on the nature.

If you have somebody that, for example, just had recent open-heart surgery, they probably are not going to be able to serve on the jury for a couple of months but thereafter they're going to be fine. So we excuse them for six months and they go on. The military are automatically two years.

Now, that feeds into another issue. That is the excusal issue.

We're basically getting these short, little notes from doctors on excusal. Excusal is a real issue because again that confronts us once they've been summonsed, people have an opportunity to come in and say, I've got this problem. We're now sending out these certificates for the physicians and the military commanders to fill out on those cases.

Q Given that we're focusing on attempts or approaches to address racial imbalance on these panels and not perhaps other issues that are identified with jury selection, are there efforts which are being made to address that specific concern?

A I must say this. All of these issues that I mentioned, let me link them together for you. Once we have the sufficient data available to identify people by race, we'll be able to say whether we're excusing more of one group than another. We'll be able to say whether more than one group or another is not returning them. We'll be able to tell you whether more than one group or another is asking for excuses. And that's how all of this ties back in. But you had to have that linkage of that racial information in order to even get into it.

Right now I can give you percentages; I can tell you what's happening in some years. I can't give you every year, but I can tell you for 2002 an awful lot of what happened. But I can't tell you whether that's a causation problem, because I can't identify them by race.

Other things, we've upgraded the amenities to make it nicer for people to come in. For example, when the summons goes out today, they're

told where to park and where to get good parking rates, what restaurants will give them fairer rates. Child care is being -- will be implemented shortly, these type things, to make it easier for groups. And that may have an impact on the African-Americans. I don't know, because again I can't identify them.

But at least what we're trying to do is make it better for people and easier for them to serve on juries. We're trying to take excuses away from people so that they will be here for jury service.

Q Have there also been attempts to reach out to the community, especially perhaps in areas that are felt to be underrepresented, to address the imbalance question, sir?

A Yes, but not very successful to date.

Q Would you briefly describe those efforts.

A Yes. Last year there was a meeting with a number of public officials, with ministers and other leaders in the African-American community. And they were asked to go out into their parishes and what have you, in their churches, and to get people to volunteer to serve on jury, people who were not on the voter registration list or the drivers lists.

And people can do that. Anybody in this room who is not on those lists can submit their name, and we will put them on the master list. But to date what has happened, last year the results were 128 volunteers came in, only five of which were not on one of the other lists.

Now, a more extensive effort needs to be made. We are now engaged in the planning and working on getting a more extensive -- and this may involve public speakers, television, what have you.

The whole focus is to educate the community on why it is important for people to serve on juries, and particularly in the African-American community where it is something that can help them. It's not to hurt them.

We're told that there's an attitude people don't want to get involved. Some people are saying they're afraid to serve on juries. These are things, maybe public relations and going out and getting people and explaining to them what the process and the system is all about.

Those of us who work here, there are no problems as such. But we need to go out and tell the rest of the world that, and we recognize that.

Q Does that cover the major efforts under the Office

of the Court Administration, the Jury Commission, that are being made to address these imbalance concerns, sir?

A I should mention with the new technology that we're bringing in, we're getting two major things that are going to be a big help to us. One is speed. Some of these issues are going to take much longer here. For example, just scanning material.

The Court Administrator's Office has just spent $31,000 buying a new scanner that will make it seven times faster for us to get the data into our system.

We also have built into this flexibility. Already this whole system, our questionnaire, we just finished putting it into process a month ago. We've already decided we needed to change something.

We had a little square block for people we wanted them to fill out. Well, for the machine to read it, we found the square -- they tended to want to put an X or a check in it. So we changed that to a little circle. That can be done very quickly now.

Heretofore, you sent these questionnaires

to a printer; you'd order 100,000 of them, and you'd wait till the next year. We don't have to do that anymore. We can get on the PC and make the changes and implement it. So you've got that kind of flexibility.

And once we identify areas, causation problems, we'll be able to address them. We'll be able to make the changes.

There are some restrictions. We've got to stay within the statutes and what have you. We've got to stay within the law. There may be some financial restraints. But for all intents and purposes, we'll be able to move much quicker and be much more flexible.

Q These efforts that are in place, I mean, the ones that have actually been implemented, they've been in place for some time. Is that right?

A Well, that's a relative term. Actually the planning phase of this, like I said, started last summer and has been going on and actually is now implemented, and it's only -- this is July 15 today. We started sending out questionnaires under this system on June 9 this year. So that we're just recently into it.

There's not sufficient data to make any

conclusions from the data that we have to date. We'll need more, as the professor said. We're not at that point where we can make conclusions.

Q In terms of the, for example, enforcement of nonresponsiveness, that's in place.

A It's in place, but what we've elected to do there is to announce to the whole world we're doing it, and we started as of June 9. And the system goes forth.

Tomorrow -- for example, those who were sent questionnaires on June 9, tomorrow is the forty-fifth day. The inquiry will go out to the post office tomorrow in that first batch. And then that will follow on a time sequence from there.

So we can expect to see people who for whatever reason don't respond and don't follow up will be next called in for summonsing before the Jury Commissioners and then on to the court. But it's going -- it takes a while for the whole system to get into play.

Q These efforts, at least the intent of them, would that be in a sense to systematically include all people within all races, color and creeds of this county?

A Oh, yes. The intent is to include, not exclude.

There's no doubt about it. Every effort is made to get everybody, both from the standpoint of the individuals who are being -- we're asking them to participate in the system, and we're making an effort for ourselves to make sure we go out and contact them.

MR. FITZSIMMONS: That's all the questions I have of the gentleman.

THE COURT: Mr. Patarini, questions?

MR. PATARINI: Yes.

CROSS-EXAMINATION

BY MR. PATARINI:

Q Sir, who are the Jury Commissioners in Allegheny County?

A Jean Milko and Allan Kirschman. And I should say the President Judge, too.

Q And you're aware of the fact that the Public Defender's Office submitted questionnaires to the Jury Commissioners three years ago as far as these problems. You're aware of that?

A No. My first awareness was -- and it's the only awareness I have -- was your statement earlier during this hearing. I've never seen them. I've never been told about that.

Q And you work through the Court Administrator's

Office.

A That's correct.

Q And the Court Administrator's Office suspects that there's a problem in the racial makeup of the panels from which we pick juries from in Allegheny County. Is that correct?

A No, I can't say that that's correct.

Q You're focusing on --

A I don't know who the Court Administrator's Office is, to start with.

Q What office do you work for?

A I work for the Court Administrator's Office, but I don't know that we have a collective view on anything.

Q You're aware of the fact that the number of challenges that have been made through the Public Defender's Office, that they've made a number of challenges.

A I was aware that there was one other case. I don't know any of the details of that other case.

Q You were aware of the fact that there's been complaints that the panels from which criminal juries are picked are underrepresented in African-Americans. You're aware of that. Isn't that true?

A I'm aware from people telling me that you had raised the issue in prior litigation. I'm aware of some newspaper articles. And quite frankly, I haven't even read all the articles.

And beyond that -- and I'm also aware of the bringing a lot of information, including Dr. Karns' report, into a study done by the State Senate and by the Commission of the Supreme Court.

Q You're aware of all those studies that have been done.

A I'm aware of those studies.

Q And you're aware that they say it looks like there's a problem. Isn't that correct?

A I'm aware that people are saying statistically that the stats do not necessarily jell. I'm not aware of what the problem is, if in fact there is one.

Q All right. So you know that the Jury Commission has discretion in types of number and lists that it can use. Is that correct?

A No, that's not true. They're limited by statute.

Q I'll strike that question. I'll strike that question, and I'll ask a new question.

The Jury Commission presently can use voter registrations and drivers' licenses. Isn't

that correct?

A That's correct.

Q And they have discretion that they could use other legally permissible lists.

A Which are enumerated in statutes.

Q And they're allowed to --

A May I say --

Q Answer the questions yes or no.

THE COURT: Let him answer the question. You asked a question. Let him answer it.

A There are a number of things. There's a generic statement in that portion of the statute that allows them to go to any state sources. In fact, the Jury Commissioners have gone to a number of state agencies, and they've been turned down. The Department of Public Welfare is one I know of.

I also would like to have had the Department of Health to determine whether people have died before we sent out questionnaires, those type of things.

THE COURT: Why won't the Department of Welfare give the lists?

THE WITNESS: Privacy is the issue that's written by some lawyer in-house.

THE COURT: Some lawyer.

THE WITNESS: Whether in fact that's the case, I don't know.

BY MR. PATARINI:

Q The question is the Jury Commission has discretion in using other lists. Is that correct?

A Within the confines of the statute.

Q Within the confines of the statutes it's legally permissible.

A Yes.

Q And to date the Jury Commission has never done any investigation to determine the racial makeup of the general pool that they use, correct?

A Well --

Q The Jury Commission -- I'll ask the question more clearly. Did the Jury Commission ever attempt to try to determine the racial makeup of the voter registration lists?

A I'm going to have to give this answer two ways. The answer is yes -- well, you asked the Jury Commissioners. I know from the Court Administrator's Office we did do that. We were able to compile information on total numbers prior to the sixties. Thereafter it would be impossible for anybody to do it because the data is not there.

Q So my question is, after the sixties, the Jury

Commission was unable to determine the racial makeup of the voter registration lists.

A That's correct.

Q The Jury Commission was unable to determine the racial makeup of the driver's license list.

A That's correct.

Q And other than those two lists, there's been no investigation to determine the racial makeup of any group.

MR. FITZSIMMONS: Objection, Your Honor.

A I'm not sure I understand.

Q Any group. The overall pool that you already answered that.

A Well, when you combine the two lists, the voters' and the drivers' list, that is the pool.

Q Then there's the group that fails to respond. Is that correct?

A That's correct.

Q And according to your testimony as well as the Jury Commissioners' testimony, the response rate is approximately 60 percent?

THE COURT: What percent?

MR. PATARINI: Of the people that respond to the questionnaires.

THE COURT: It's 60 percent of the --

MR. PATARINI: Yes.

A Roughly.

Q Roughly 60 percent. And of the people --

A Now, that was based on one year's analysis, I should say, and that's going to vary from year to year.

Q I understand, but we're saying roughly. The response rate is approximately 60 percent.

A I would prefer to say that was in 2002.

Q Well, you have no reason to believe that that response rate has changed.

A I don't have any reason the believe one way or the other on the subject.

Q And as far as the people -- the percentage that did not respond, there's been no investigation as to the racial makeup of that.

A Again there was no capability of doing that.

Q That's what I mean. You have not been able to make any type --

A We're mixing words. We don't have the ability is what I'm saying.

Q You do not know the racial makeup of the people that did not respond, do you?

A That's correct.

Q You do not know the racial makeup of people that

did respond --

A That's correct.

Q -- other than what Dr. Karns testified to.

A I don't even know that.

Q Well, that's what I'm saying. The Jury Commission never made an effort to try to make that determination.

A The Jury Commissioner couldn't make that determination.

Q The Jury Commissioner -- are you familiar with the lists that are filled out when people actually come in and do serve jury duty and are selected to serve on the jury? Are you familiar with that list?

A You're talking about the array list.

Q Yes.

A Yes.

Q On that array list it actually states the race. Isn't that correct?

A No, it does not.

Q Have you ever seen the list?

A When it leaves the Jury Commissioners' Office, there's no information on race there. It's not there.

Q When they come into the jury room and they are selected -- and they are in the panel from which

the juries are selected, they fill out a questionnaire. Are you familiar with that list?

A I'm not really familiar with either the assignment or criminal jury room. I'm not familiar with procedures there.

Q So you don't know whether or not they ask the question of race on that questionnaire, do you?

A I don't.

Q So you stated that you've done a certain number of things, and you're saying that the things that you've done as far as improving your mailing capabilities, changing the questionnaire on the initial questionnaire that goes out for the person to come in to serve on jury duty. And one of the things that you changed on that questionnaire was you asked them to include the race of the person. Isn't that correct?

A That's correct.

Q And the reason that you did that is because you suspected there's a problem with race being underrepresented in the jury pools from which the juries are selected.

A That's incorrect.

Q You did not know the answer to that.

A No. But what I testified to and said, we don't

know people's race and therefore can't come to any conclusions.

Q That's right. You can't. But you stated at least three times that there's a concern about whether or not the racial makeup of the panel from which the juries are selected accurately represents the population in Allegheny County in general. You also used the word "problem" on at least three occasions.

Now, when you put that question as to race, that is a concern. Is that fair to say?

MR. FITZSIMMONS: Objection, Your Honor. That question is so compound I don't know how any response could be viewed in light of the question.

MR. PATARINI: I'll rephrase the question.

BY MR. PATARINI:

Q The question of race is one of the only changes in the questionnaire, the information that's requested.

A Negative.

Q What's the other information that's requested?

A Gender, age.

Q Was age on the original questionnaire?

A We made changes on age. Heretofore, we asked the

question and we also asked them to fill out blocks. We've changed that.

Q And you're aware of the fact --

A I should also point out we've added to that questionnaire rather extensive directions on how to fill it out and what have you.

Q But age and gender and race.

A They're major changes. I will agree with you on that.

Q And those are the issues that we raised with Dr. Karns.

A From the testimony that I've heard here, yes.

Q And you would agree with me that that would be a concern of the Court Administrator's Office.

A I'm not sure what you mean by "concern." We certainly are interested to make sure that we're doing everything that we know how to do at the moment to include all peoples in the work that we are doing.

Q And it would be fair to say that you do not know that the voter registration lists and the driver's license list, you do not know presently whether or not those lists -- the percentage of African-Americans in those lists. You do not know that answer.

A I do not know.
Q You do not know the racial makeup of the people that just do not come in and serve, do not respond.
MR. FITZSIMMONS: Your Honor, now we're getting repetitive. I think this has already been asked.
THE COURT: You have kind of asked it. We'll let you. It's cross examination.
BY MR. PATARINI:
Q You do not know the racial makeup?
A I don't know the racial makeup of anybody because we haven't had that data.
Q You don't have that data.
A That's correct.
Q And what you're trying to do is trying to gather that data.
A That's correct.
Q And the reason that you're gathering that data, because there may be a problem or there may not be a problem.
A We want to evaluate the situation to determine whether in fact the problem exists.
Q So you don't know whether there is one or not.
A That's correct.
Q And you just started doing it in June.

A No. I consider planning very much a part of it. We've been working on it since May 17 of last year.

Q Now, the questionnaires that are going to go out --

A At least I had been working on it that long.

I might point this out, too, that there were others who were working on it longer than I. They put me in there at a certain point to follow up. But there had been work going on prior to my becoming involved.

Q Questionnaires just started going out in June. Is that fair to say?

A The new questionnaires under this new system, that's right.

Q And now we have a master list?

A We've always had a master list, at least for some time.

Q But a criminal defense lawyer could not go and look at the master list and know the racial makeup of the people from which he could be picking a jury.

A Not probably since the sixties.

Q Now, the situation, even if you were to go look at the master list now, only a portion of the master list would include the people that actually had the new questionnaires on that list.

A Of course.

Q Because --
A A very small portion.
Q A very small portion.
A That's why you cannot draw any conclusions yet.
Q You cannot conclude that the people that are not responding are overrepresented African-Americans.
A At this point the answer is yes, I cannot conclude that.
Q You cannot make a conclusion that people that are asking for medical excuses are overrepresented African-Americans, can you?
A The same answer there.
Q You cannot conclude that people who may have change-of-address problems are overrepresented African-Americans, can you?
A I cannot say that.
Q So in effect what your office is attempting to do is to educate itself as far as what's going on in the system as it stands.
A I would have to say that that is -- it's a gathering of data, if you mean by that education. It is also to automate, to expedite.

There are a lot of things happening. I don't know that I would use the word "education." But there's certainly gathering of data and

attempting to gather accurate data so that it can be utilized. To date, without the data, we're not able to draw any conclusions.

Q You're in the dark as to the racial makeup of the groups that I've enumerated. The overall pool, the people that actually show up, the people that are excluded for various reasons, you're in the dark.

A No, we're not. Because you made the statement that those that actually show up we are able to see. And there have been some studies, Dr. Karns' study through the defense attorneys, and the CMU study dealt with that subject. The Court Administrator's study.

And that study, by the way, the numbers were different than the doctor's numbers. It was a different period of time.

Q It was inconsistent with the percentage in the general population.

A Yes.

MR. PATARINI: No further questions.

THE COURT: Mr. Brennan, any questions?

MR. BRENNAN: No, Your Honor. Thank you.

MR. FITZSIMMONS: Does the court have any questions?

THE COURT: No, I do not.

MR. FITZSIMMONS: I have no follow-up.

THE COURT: Thank you, sir. You may step down.

Any other testimony on behalf of the Commonwealth?

MR. FITZSIMMONS: No, Your Honor.

THE COURT: So that's it in terms of the evidence on this point.

MR. PATARINI: We'd ask the court to take judicial notice that my client as well as Mr. Brennan's client are African-Americans.

THE COURT: Not only are they African-Americans, but they are both better looking than their lawyers.

Anything else you want me to take notice of?

MR. PATARINI: No.

THE COURT: Can we go to lunch?

MR. PATARINI: As far as I'm concerned, yes.

THE COURT: Take the Bush brothers back.

On this matter we're in recess until 1:30.

- - - - -

July 16, 2003
Defendants Present
In Open Court

- - - - -

EXCERPT

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THE COURT: We're back then on the challenge to the jury? We're all done with all the testimony on that.

MR. PATARINI: Yes.

THE COURT: Any argument?

MR. PATARINI: Yes, Your Honor.

As I stated before, my argument is that this is a violation of my client's Sixth Amendment rights to a jury that reflects a fair cross section of the community as well as violation of his Pennsylvania constitutional rights, Article I, Section 6.

This right has been described in two cases. The U.S. Supreme Court case is *Duren vs. Missouri*, which is 439 U.S. Supreme Court at 364, and which has been adopted in Pennsylvania through *Commonwealth vs. Craver* at 688 Atlantic 2d 691, which is a 1997 case.

We maintain that in this particular case our *prima facie* showing, that there is a

violation of the requirement that the jury array must fairly represent the community.

To make our showing we have to show three things. First, that the group allegedly excluded is a distinctive group. And we cite for that *U.S. v. Weaver* at 267 Federal 2d -- Federal 3d, I'm sorry, at Page 231. That's Third Circuit. And *U.S. v. Royal*, R-o-y-a-l, at 174 F.3d Page 1. That's First Circuit. Those cases have stated that there is no dispute that blacks are unquestionably a distinctive group for purposes of a fair cross-section analysis.

We'd ask the court to take judicial notice that my client, Sean Bush, as well as Laurence Bush are African-Americans. We maintain that we met that first step.

The next step we have to establish, that the representation of this group of venires from which the jury are selected is not fair and reasonable in relation to the number of such people in the community.

In this particular case we had Dr. Karns testify based on the 2000 census that at one point in time that the percentage of African-

Americans in Allegheny County was approximately 12 percent and then as has been revised is close to ten percent. Based on that, he was able to take a sample which was from a period of May 12th to October 11th of 2001 in which approximately over 4,000 questionnaires were evaluated.

He did comment that there were some questionnaires, that the information was not readily discernible, that some questionnaires were not filled out, but that the few questionnaires that were not -- that the answers were not readily discernible or were not filled out did not have any significant impact on his conclusion because they were so few.

As far as what we were saying, Dr. Karns was not saying that in each panel from which you pick the jury from, that there should be ten percent African-Americans. And we're not saying today that the panel that's downstairs, if it does not have ten percent African-Americans, that that's not what we're objecting to.

We're objecting to the process by which

those panels are brought in systematically excludes African-Americans. And we believe that we do not have to show that it is intentional.

And we base that on Commonwealth -- I mean *Duren*, which, as I just read, which said that we must be careful to note that intentional discrimination need not be shown to prove a Sixth Amendment fair cross-section claim.

That's how this is described in both *Commonwealth vs. Craver* as well as *Duren*. It's called a cross-section analysis.

In *Duren*, the court went on to say that a systematic exclusion can be shown by a large discrepancy repeated over time such that the system must be said to bring about the under-representation.

We believe that evaluating over 4,000 questionnaires from May 12th through October 11th is sufficient for our expert to base his opinion that what is actually occurring is a conclusion that is accepted based on statistics.

There have been other attempts by

defendants to attempt to show what we're attempting to show, that the exclusion happens at a large rate of time over a period of time, and that the conclusions that you make is that African-Americans are underrepresented in that panel, that that is based on an opinion based on statistics, and not only that but it considers the margin of error. And he explained how he did that.

I won't go through his testimony, but he basically stated that in a situation such as this, that the margin of error is so great and the underrepresentation is so significant that to say that this is anything other than a systematic exclusion, there's no basis to make that conclusion.

The systematic exclusion does not have to come from someone intentionally looking at questionnaires and intentionally excluding them, or someone doing something that -- going to a pool that they know would have less a percentage than in the actual population. It doesn't mean that.

It means that the system in and of itself by using the voter registration and by using

the driver's license, by using those pools, number one, they don't know the racial makeup of voter registration, and they do not know the racial makeup of drivers' licenses.

However, there is case law to the effect that's saying using voter registration and/or using voter registration in conjunction with driver's license has been found to be constitutionally sound. However, in *U.S. v. Weaver*, the court stated that if use of voter registration lists over time did have the effect of sizably underrepresenting a particular class or group on the jury venire, then under some circumstances this could constitute a violation of defendant's fair cross-section rights under the Sixth Amendment. That's what we're saying here.

We're saying that the Jury Commission admits it does not know the percentages from the pool from which it draws. It admits that it never had made any attempt to try to do that, that it could know that back in the sixties but since the sixties it does not know that and has never made any effort to try to find that answer.

At the present time they're starting to do that. That's what they're starting to do. They may not be attempting to determine the racial makeup of the whole voter registration list or the whole driver's licensing. But what they're doing is when they get their list which they pool randomly from that larger list, they're going to be able to analyze the racial makeup of that.

It's like trying to say, Well, we don't know the percentage of the group, of the total, but if we take a large group of that total and try to analyze the racial makeup of that part of the larger group, then we may have a better idea as to whether or not that larger group is sound.

But that's what we did in this particular case. We took a sample of what they've been giving to us to pick juries from. We took a sample of that and we did the same thing. We said, statistically speaking -- and it is significant under the science of statistics, that what we've been getting is four percent. And that is a significant departure from ten percent.

And then it has happened over a period of time from May to October, and there's no reason to believe that it's any different if you were to evaluate it for any other period of time.

Dr. Karns testified that he was given numbers from December of 2002. And they were consistent with his conclusions.

So we maintain that we met our burden and that the Commonwealth has failed.

The third step would be that the underrepresentation is due to systematic exclusion of the group in the jury selection process. "Systematic" means caused by or inherent in the system by which juries are selected. That's *Duren* once again.

That's what we're saying. We're saying the system is producing panels from which you pick the juries that do not reasonably reflect the same percentages that are in the community. We're not saying that it's malicious or that it's intentional, but that is the end result.

We believe that we've produced enough numbers and an expert opinion who stated that the conclusions that he makes are to a degree of scientific certainty.

THE COURT: Thank you, Mr. Patarini.

Mr. Brennan, anything you want to add to that?

MR. BRENNAN: No, Your Honor. Thank you very much.

THE COURT: Mr. Fitzsimmons, any response?

MR. FITZSIMMONS: Yes.

Your Honor, a large part of what Mr. Patarini says is based upon the *Duren* case, the *Craver* case, and upon the *Weaver* case.

I would think that you caught that he said that the *Craver* and the *Duren* cases are both United States Supreme Court cases and that *Weaver* is a Circuit Court decision, as it turns out in the Third Circuit.

As to the *Duren* and the *Craver* cases, those have been followed by the Pennsylvania Supreme Court in the last two cases that I could find wherein they talked about the subject of challenges to the manner in which jury pools are composed in the Commonwealth.

Those cases, the most recent being the *Lopez* case at 739 Atlantic 2d 485, and the *Smith* case at 694 Atlantic 2d 1086 --

THE COURT: What's that cite again?

MR. FITZSIMMONS: 694 Atlantic 2d 1086.

Neither of those cases takes cognizance of the *Weaver* case. It's not surprising either, because the *Weaver* case was decided after they were decided.

In any event, if you choose to be guided by the *Weaver* case -- and I'm not sure that you need be -- in terms of the third prong, that is, that there is a systematic exclusion of a certain group of people -- in this case African-Americans -- it would indicate by the passage cited to you by Mr. Patarini that there must be a large discrepancy repeated over time.

And I question -- first of all, in terms of the survey that was done, there are certain flaws that have been pointed out in terms of the manner in which the data was collected and its accuracy. But beyond that, it was over a period from, I believe, May to October of the year 2001. And a study of that breadth I don't know would suffice to show that there is a large discrepancy repeated over time. It's a four-, five-, or six-month period in one year and nothing more than that.

In addition, Your Honor, I would cite to the *Smith* case, which seems to suggest something different than what Mr. Patarini has said is the law when he cites the *Weaver* case.

Our Supreme Court in the *Smith* case in interpreting the *Craver* case and what it requires, they also cite to another of their decisions, *Taylor vs. Louisiana* at 419 U.S. 522. But they indicate that the United States Supreme Court likewise requires a showing of actual discriminatory practice to prevail on this issue. The issue being systematic exclusion of a certain group of people.

And they go on and say, now citing from the *Taylor vs. Louisiana* case: Defendants are not entitled to a jury of any particular composition, but the 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.

I would submit, based upon our own Supreme Court's recent pronouncements in the *Smith* case, that it is required in fact that there be -- it be shown that there is an actual

discriminatory practice in place that in fact does systematically and unreasonably exclude distinctive groups of people in the community. And I certainly don't think that that's been proven in this particular case.

I don't dispute that the first prong certainly of this three-part test is proved. It's indisputable that African-Americans as a group must be considered as a distinctive group within the community. But I do question whether the evidence presented by way of Dr. Karns' study shows what Mr. Patarini purports to say that it shows, and that is that there is a systematic and I think it's required as intentional discrimination or exclusion of people in the African-American segment of our population.

THE COURT: Anything else on this issue?

MR. PATARINI: If I may just briefly respond.

THE COURT: Yes, Mr. Patarini.

MR. PATARINI: Your Honor, we are not stating that this is anything other than discriminatory practice. I think what

Mr. Fitzsimmons is doing is confusing intentional with discriminatory.

The Supreme Court of the United States, which the Supreme Court of Pennsylvania cannot lessen our clients' rights through any holding of the Supreme Court of Pennsylvania. The Supreme Court of the United States stated that: We must be careful to note that the intentional discrimination need be shown. Intentional discrimination.

We're not saying this is intentional. We're saying this is a discriminatory practice. It doesn't mean that there was someone deciding to exclude African-Americans. It means that the system in fact excludes African-Americans. And once again the Supreme Court of the United States states: "Systematic" means caused by or inherent in the system by which juries are selected.

He also stated as far as the breadth of the study. I've reviewed every case in Pennsylvania; I reviewed every federal case. There's no criticism out there in any published case law that addresses a study as extensive as we did it. And for this particular case there

is none.

The criticisms that are published do not apply to this particular case. I read them all. We believe the Commonwealth has not produced any type of evidence, any contradictory evidence that 4,000 people from a period of May to October is anything other than acceptable in Dr. Karns' opinion. Obviously, as a fact finder you can decide not to accept it, obviously. But in this particular case, the Commonwealth hasn't produced anything to counteract that.

MR. FITZSIMMONS: Your Honor, just in a brief rejoinder, if I could.

In fact, I guess Mr. Patarini overlooks the testimony of the witness that I did call. In fact, the county through the Court Administrative Office which, as I understand, works under the aegis of the President Judge, who is a member of the Jury Commission, has in fact implemented significant activity designed to identify problems in the composition of jury pools and to correct any problems that are identified by that particular research, gathering of data that he described that

they're involved in.

In fact, at the conclusion of his testimony he had indicated that in fact their efforts are meant at systematic inclusion of all peoples into the process of having juries composed in this county.

THE COURT: Okay. Is that it?

MR. PATARINI: I don't believe anything that individual testified to had anything to do with the case.

It just said -- all he testified to is what steps that they finally must realize there is something other than a problem, because he would not say there is a problem and this is what they're doing to try to take care of it. But the problem has been going on for years. And I don't think he did anything to address this particular situation.

THE COURT: All right.

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LATER

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Defendants Present
In Open Court

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THE COURT: With respect to the attack on the selection of the jury here in Allegheny County, this issue has cropped up repeatedly across the Commonwealth. And the courts, as I read them, have repeatedly struck down attacks on counties using driver registration lists and voter registration lists to pick up and create a pool of jurors out of which a panel can be selected.

In every case that I've read, the Supreme Court and Superior Court have found that those attacks are unavailing.

Most recently, the case decided July 22, 2002, the court said, talking about driver registration lists and motor vehicle lists, that the court observes that they have rejected in the *Commonwealth v. Bridges* a similar claim that a jury pool compiled from these lists systematically excluded minorities. And they

go on to state that a criminal defendant may not attack the racial composition of jury panels drawn from voter registration lists on the theory that blacks are underrepresented in voter lists, because such computer generated lists are compiled without regard to race. Likewise, driver license lists are compiled without regard to race.

The only distinction that I see in this case is the Public Defender's Office has run a statistical analysis of sorts by compiling the information that they have. And the court finds that the information, while anecdotally interesting, does not support the idea that the juries as they're selected here are a result of a systematic exclusion of a group.

The information selected did not talk to or gather any information from civil juries. In addition, probably more persuasively, the county has now recognized, I believe, its mandate to include as many people as possible. And the testimony of Mr. Nerone dealt with that.

And I believe that to the extent there is a greater effort or change in the way jurors

are to be selected, that would tend to in this court's judgment undermine at least in part the testimony of Dr. Karns.

So for those reasons and for the reasons given to the court in terms of guidance from the Pennsylvania Supreme Court and the Pennsylvania Superior Court, the motion is denied.

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COMMONWEALTH OF PENNSYLVANIA, :
: SS:
COUNTY OF ALLEGHENY :

CERTIFICATION OF REPORTER

I, Philip Marrone, do hereby certify that this excerpt of evidence and proceedings is contained accurately in the machine shorthand notes taken by me on the trial of the within cause, that the same were transcribed under my supervision and direction, and that this is a correct transcript of the same.

Philip Marrone, RMR
Official Court Reporter

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

_____

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

JOSEPH HOWELL
DEFENDANT

CRIMINAL DIVISION

CC: 200211830

CHARGE: CRIMINAL HOMICIDE

JUDGE LAWRENCE J. O'TOOLE

TRIAL DATE: JANUARY 20, 2004

MOTION TO ENSURE REPRESENTATIVE VENIRE

FILED ON BEHALF OF:
JOSEPH HOWELL
DEFENDANT

COUNSEL OF RECORD:

MICHAEL J. MACHEN
PUBLIC DEFENDER
PA I.D. #40551

LISA G. MIDDLEMAN
HOMICIDE DIVISION
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OFFICE OF THE PUBLIC DEFENDER
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(412) 350-2401

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

v. CC: 200211830

JOSEPH HOWELL
DEFENDANT

MOTION TO ENSURE REPRESENTATIVE VENIRE

1. The Defendant is accused of criminal homicide.

2. The Defendant in the above-captioned case is a 20-year-old African American male.

3. The 2000 census results which are included in the Defendant's expert's report are available to describe the age, race and gender of the population of Allegheny County.

4. The non-Caucasian minority population in Allegheny County represents 13% of the total population.

5. The Caucasian population in Allegheny County represents 87% of the total population.

6. The male population of Allegheny County represents 47% of the total population.

7. The age groups are as indicated in the attached report.

8. The female population in Allegheny County represents 53% of the total population.

9. The Sixth Amendment to the U.S. Constitution provides for a trial by jury of one's peers, "drawn from a source fairly representative of the community", Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1915).

10. Article I, Section 6 of the Pa. Constitution guarantees a jury of one's peers, 42 Pa.C.S. §4501, Commonwealth v. Craver, 547 Pa. 17, 688 A.2d 69.

11. In order for the Defendant to receive a fair trial by a jury of his peers, a jury pool reflecting a fair cross section of the community that is representative of the racial, gender and age makeup of Allegheny County is mandated. Duren v. Missouri, 439 U.S. 357, 995 S.Ct. 664, 58 L.Ed. 579 (1999); Taylor, Supra.

12. Currently, in Allegheny County, it is believed that those individuals in the under-25 age group of male African-Americans are underrepresented in the group from which venires are selected. The numbers are not fair and reasonable in relation to the number of such persons in the community addressing age, gender and racial makeup jointly and separately.

13. This under-representation is due to the systematic exclusion of the group in the jury-selection process.

14. In order to provide an expert a basis from which to formulate an opinion, data of the Allegheny County venire was obtained for approximately six months.

15. To deny Defendant a representative venire would be contrary to and an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States, that being Duren, Taylor (Supra) and their progeny.

Wherefore, Defendant respectfully requests that this Honorable Court grant a hearing to permit Defendant's expert to demonstrate to this Honorable Court why the panel from which the jury to be selected in the Defendant's case is under-represented in African-American males under the age of 25, due to systematic exclusion.

Respectfully submitted,

Lisa G. Middleman /bjk

Lisa G. Middleman
Homicide Counsel

1/20/04 BJK

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA — CRIMINAL DIVISION

v. — CC: 200211830

JOSEPH HOWELL
DEFENDANT

PRELIMINARY ORDER

AND NOW, to-wit, this ____ day of _____, 2004, it is hereby ORDERED that a hearing shall be heard on the ____ day of _____, 2004, at ___ a.m./p.m. on the within Motion To Ensure Representative Venire.

BY THE COURT:

_____, J.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

v. CC: 200211830

JOSEPH HOWELL
DEFENDANT

ORDER OF COURT

AND NOW, to-wit, this ____ day of _____, 2004, upon full consideration of the within Motion to Ensure Representative Venire, it is hereby ORDERED, ADJUDGED and DECREED that the above be _____

_____

_____.

BY THE COURT:

_____, J.

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

vs.

JOSEPH HOWELL

CRIMINAL DIVISION

CC 200211830

Type of Proceeding:
Jury Challenge

Reported and Transcribed by:
Mary Beth Perko, RMR
Official Court Reporter

Date:
January 20, 2004

Before: The Honorable
Lawrence J. O'Toole

COUNSEL OF RECORD:

For the Commonwealth:
Darrell Dugan, ADA

For the Defendant:
Lisa Middleman, Esq.

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P R O C E E D I N G S

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January 20, 2004

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THE COURT: Mr. Dugan, Ms. Middleman.

MS. MIDDLEMAN: We have a solution to our problem we wanted to run past you. I had mentioned to Mr. Dugan I was unhappy there were only two African-American females out of the panel of 35. Of the entire jury pool today, there is another African-American female and an African-American male.

Mr. Dugan, in response to my unhappiness, suggested that perhaps after review of the questionnaires there would be some people who would be obviously unable to sit on the jury that we would substitute for the jurors that would not sit, that we would substitute those two jurors for two that we had on the panel that could not sit.

THE COURT: You want to take people off the panel of the 35 and put others on?

MS. MIDDLEMAN: Yes.

MR. DUGAN: It was an off-the-top-of-

my-head suggestion.

THE COURT: I don't think that's a good idea. It's got to be a random sample of citizens. And if you're right that the way we pick jurors here in Allegheny County is not representative in some fashion, I think you're better off making a record. I know your office has challenged it in the past.

MS. MIDDLEMAN: Yes. Would you be willing to entertain such a challenge, given that this case is one with an African-American defendant and a Caucasian victim?

THE COURT: You can challenge it.

MS. MIDDLEMAN: I would have to file a written motion and bring my witnesses in. Mr. Patarini is an expert at that, and I would ask that to allow --

THE COURT: The last time we did that, Mr. Patarini, I denied his request.

MS. MIDDLEMAN: Yes.

THE COURT: And sadly for him, his client was acquitted, so he couldn't take it up.

MS. MIDDLEMAN: Right.

THE COURT: So I suspect the same thing

will happen here.

MS. MIDDLEMAN: Would it be possible, given that the evidence and the witnesses would all be the same --

THE COURT: You want to adopt the record that he made? There was a rather extensive record.

MS. MIDDLEMAN: Yes.

THE COURT: He called an expert witness to testify. The Commonwealth called an expert, and we spent a good bit of time on it, maybe a day, just on that one point. So if you want to adopt that record, I have no objection to you doing that because it would appear to apply to this case. That was Commonwealth versus Lawrence Bush.

MS. MIDDLEMAN: Yes. I would ask you adopt the challenge made by the defense in that case as our challenge in this particular case.

THE COURT: Any objection to that?

MR. DUGAN: No.

THE COURT: Would you reduce that to writing, though, just so we have a written record of your request?

Jury Challenge

MS. MIDDLEMAN: Okay. So I not only challenge the manner in which the juries are selected in Allegheny County, I also am challenging this particular jury panel as well.

THE COURT: Very well.

MR. DUGAN: And just for the record, there are 35 on this panel, two of which are African-American.

THE COURT: Thank you.

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(Proceedings adjourned.)

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THE COURT: Mr. Dugan, Ms. Middleman.

MS. MIDDLEMAN: For the record, I am renewing my prior objections and objecting again to this jury panel. We had two African-American women on the panel today.

One was a single mother of two children who was unable to be on the jury because it would be a severe financial penalty or hardship for her. The other lady was allergic to perfume and such and could not serve on a jury. So she had a physical hardship.

MR. DUGAN: It was clear that those two

were cause.

MS. MIDDLEMAN: Right. They were for cause.

MR. DUGAN: They were adamant, the one about her health issue, the other about she works at night, had two small children to take care of during the day. This would be an extreme financial hardship for her.

MS. MIDDLEMAN: You know what, though, Judge? I still object to the panel. I object to the whole panel that was there. 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 the 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.

And then you have any person that reads about this or any person that comes to watch it

and sees that the black kid's getting tried by the white jury and the white lawyers, I don't see how anybody could ever have any faith in that kind of system.

It's a disgrace. And it's a disgrace not only for my client, it's a disgrace for us and for me.

THE COURT: All right. Thank you.

MS. MIDDLEMAN: And I'm asking to renew my objections. I'm asking for you to throw this panel out and let us have some faith in the system that tries people where people are tried by juries of their peers. I mean, you've got a kid who's got --

Well, I've already said it. I renew my objections and ask that you allow me --

THE COURT: I think the case law supports, generally speaking, the way jurors are selected here in Allegheny County. There is certainly sensitivity to the issue that you broach in that the court administrator is trying to do a much better job of making sure there is a good statistical cross-section of the community.

We have to have faith in the system, and we

have to be consistent with the Supreme Court cases that deal with this issue. And as much as the Court appreciates the passion with which you are asserting this argument, I am constrained to follow the law and deny your request to throw out this jury panel.

MS. MIDDLEMAN: I think that the Court -- I understand the cases, and I understand that they're doing what they can to try to have a more representative group come in for jury selection. But I think, as the Court, you have the right and you have the ability and the necessity in this case to do what you think is the right thing and to do what we know is the right thing and to keep picking jury panels until you get one that's fair and representative.

I understand the case law. I understand the law, but I think as a matter of equity and as a matter of constitutional law that you could continue to throw out jury panels until you get one that's constitutionally adequate for these purposes. And I think that you're mandated to do it, given the fact that the lack of faith in

the criminal justice system in the African-American community I believe is at its all-time high.

And to have, once again, another black man tried for the murder of white people by a white jury mandates that you do something other than what the Supreme Court envisioned.

THE COURT: All right. Thank you, Ms. Middleman. Thank you, Mr. Dugan. We'll see you here tomorrow.

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(Proceedings concluded.)

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C E R T I F I C A T E

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I hereby certify that the proceedings are contained fully and accurately in the notes taken by me on the hearing of the herein cause and that this is a true and correct transcript of the same.

Mary Beth Perko, RMR
Official Court Reporter

The foregoing record of the proceedings upon the hearing of the herein cause is hereby approved and directed to be filed.

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IN THE COURT OF COMMON PLEAS OF ALLEGHEN
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIV

vs. CC 200211830
200213879

JOSEPH HOWELL, Trial Transc

Defendant. Before:
HON. LAWRENC
And a jury

Reported by:
Susan E. Llo
Official Cou

Date:
January 21-2

COUNSEL OF R

For the Comm
DARRELL DUGA
Assistant Di
Attorney

For the Defe

LISA MIDDLEM
Assistant Pu
Defender

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I N D E X

WITNESS	PAGE			
	Direct	Cross	Redirect	Recross
JERRY FRANKOS	51	66	78	82
BENNET OMALU	83	101	111	112
JEFF KVEDERIS	112	122		
ADAM KVEDERIS	129	135		
JAMES BALINT	140	174	227	227
LEE YINGLING	228	256		
ROBERT CRAIGHEAD	302	307		
JAMIE THOMAS	319	322		
TOM MEYERS	336	361	380	381
DANA BENSON	383			
WAYNE KIEFER	403	422	429	
ROBERT LEVINE	430	447	456	461
CHRISTOPHER KEARNS	482	484		
WILLIAM PALMER	485	490	491	493
	495			
JAMES PERRIN	496	509	516	520
RICHARD OWENS	520	530	531	
JOSEPH HOWELL	535	561	582	582

P R O C E E D I N G S.

THE COURT: How come you are not picking?

MS. MIDDLEMAN: Judge, I came up to place another objection on the record.

THE COURT: What objection is this one?

MS. MIDDLEMAN: Well, we have selected eleven Caucasian jurors. We have one juror left and two alternates. We were given a panel of 25 individuals from whom to pick these.

And I wanted to come up and object to this panel, also, and ask you to reconsider your prior decisions.

These 25 people are all Caucasian. My client is black, the victim is white, the witnesses are white, the cops are white, the Crime Lab people are white, the firearms expert is white. Pretty much everybody is white except my client. And --

THE COURT: There are a lot of white people.

MS. MIDDLEMAN: A lot of white people,

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Judge. And I know that I am familiar, very familiar, having argued it before you before, with -- I am familiar with the case law from Supreme Court.

However, the cases also state that you can't consider not only the method that is used to seat these jury veneers, but you can consider the end result in determining whether it is a fair seating of these people.

And given this particular case and the result that has been -- the result of this case is that we have had out of 60 people, two African Americans from whom to choose.

And that cannot be considered by any stretch of the imagination, a fair result or a fair representation of the ten to twelve percent African American population in Allegheny County.

And given that my client is black and the victim is white, I am asking you again to allow us to release those that have been selected, release these people, and do what

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your learned colleague did, which is allow us to go down and have --

THE COURT: Who is the learned colleague?

MS. MIDDLEMAN: Judge Nauhaus.

THE COURT: He is a former Public Defender.

MS. MIDDLEMAN: Yes, he is. Maybe that's why he is so fair and reasonable, I am not sure, now.

THE COURT: You are probably right. All right. Your objection is noted.

MS. MIDDLEMAN: What I would like for you to do is I would like to release all these people and go down every day and not pick our jury until the end result is a representative sample of the communities of Allegheny County.

THE COURT: Okay, your objection is noted. Your request is denied.

MR. DUGAN: Thank you, Judge.

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(Thereupon, the jury was duly sworn.)

THE COURT: Good afternoon, members of

BX 47097

T204-448
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,

PENNSYLVANIA

- - - - - -

COMMONWEALTH OF PA,

Plaintiff,

vs.

JOSEPH HOWELL,

Defendant.

CRIMINAL DIVISION

CC NO.: 200211830

PROCEEDINGS:
Sentencing

REPORTED BY:
Karen Robb
Official Court Reporter

DATE:
March 24, 2004

HELD BEFORE:
The Honorable
Lawrence O'Toole

COUNSEL OF RECORD:

For the Commonwealth:
Darrell Dugan, Esq.

For the Defendant:
Lisa Middleman, Esq.

- - -

P R O C E E D I N G S

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March 24, 2004

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THE COURT: This is the time set for the sentencing of Joseph Howell.

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(Witnesses sworn)

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THE COURT: Ms. Middleman, do you want to bring your client forward?

MS. MIDDLEMAN: Before I do that, pursuant to the Rules of Criminal Procedure, I would like to make an oral motion for extraordinary relief today.

THE COURT: What's the nature of the motion?

MS. MIDDLEMAN: The nature of the motion is a request for a new trial. The basis for my motion is that Mr. Howell was not tried by a jury of his peers, he was not tried by a jury that was representative of the community at large.

My purpose is not to rehash old arguments or to question your judgment on

pretrial motions.

I believe, however, that this particular case is ripe for this type of motion for a couple of reasons. One, it was different in that Mr. Howell is African-American. The victim on the case was Caucasian, as were a majority of the witnesses.

I think in this particular case you can grant this motion for extraordinary relief. The co-defendant is scheduled for trial and it would not cause undue prejudice to the prosecution if you were to grant such a motion as there is a trial already scheduled for that co-defendant, and I'm asking for Mr. Howell to be granted a new trial and to join in that trial.

I believe that the motion is appropriate or that that type of relief is appropriate for him because although there are some cases that say that to use voter registration lists in order to select a venire panel is constitutionally adequate, I believe that there is both statistical and anecdotal evidence that in Allegheny County, this system still persists in all white juries for black

Defendants.

I would suggest to the Court that the result speaks for itself, and the result is unjust.

THE COURT: What's unjust? What are you talking about?

MS. MIDDLEMAN: To have a black male tried by an all-white jury is unjust and it's in violation of the Constitution of the United States and the Constitution of Pennsylvania.

THE COURT: That's never been the law.

MS. MIDDLEMAN: What's never been the law?

THE COURT: That you can't have an all-white jury try a black person or an all-black jury try a white person. That's never been the law.

Why would you say something like that if you know that it's not true?

MS. MIDDLEMAN: The law is the venire panels from which you select your jurors --

THE COURT: What is the law in the Commonwealth of Pennsylvania right now?

MS. MIDDLEMAN: The law in the

Commonwealth of Pennsylvania is that you cannot exclude any large or identifiable segment of the community, that the venire panels must be representative of the community at large. That's the law. We're not having those venire panels.

Perhaps I misspoke when I said that we're persisting in all-white juries. What I mean is all-white venire panels or venire panels that do not represent adequately the community at large.

THE COURT: That makes more sense.

MS. MIDDLEMAN: I apologize, Your Honor.

It seems that in this county we seem to be focusing more on the system that we use to select our venire panels than we do on the individual rights of the criminal defendants.

As I know and everybody knows, the Constitution of the United States provides that -- if you protect the rights of the individual, you end up protecting the rights of the community.

This country and our criminal justice system have always put individual rights way

above the rights of a system to work in a certain way, and I think that what we currently have in Allegheny County is a situation where you have this constant tension between the individual rights and a system that seems to work, and it doesn't work.

It's like a big, old piece of machinery that was designed a certain way and that most of the time spits out a particular product.

Unfortunately, it is an archaic, old machine that isn't spitting out the product that was it was intended to spit out, which is a venire from which people can pick a jury that is representative of the community.

If you give me a little leeway on my argument here, I would suggest that there are reasons why this tension between the system and the individual -- the system keeps winning, why that causes us such a problem.

First of all, I think it interferes distinctly with the integrity of the verdicts that you're getting out of Allegheny County.

We're supposed to have verdicts that are well thought-out by individuals, jurors who

all are told to bring their common sense, judgment and their life experiences into the jury room when they're making their decisions.

I think that we are supposed to be avoiding the possibility that the composition of the jury would be arbitrarily skewed so that you don't have the common sense judgment of the community. That's what we're getting.

I'm not suggesting to the Court that if you have African-American people on the jury that they will vote a certain way or that their life experiences will cause them to come up with certain conclusions, and I would not suggest that they would vote as a block because I think to suggest that would basically be a mockery of the values that the jury system is supposed to promote.

I'm saying simply that -- and I would never attempt to stereotype or to characterize a certain type of person or a certain type of juror as having a certain type of view, but I think that given that you're supposed to have the common sense judgment of all the different types of people in the community available to a Defendant when he's picking a jury, we're

failing miserably.

It's extremely important, I will use a very, I guess, mundane sort of example to express to you the importance of having people of different races available to Defendants to have on their jury.

I mean, I have a friend who, I will say, is probably on paper identical to me. We both are college-educated. We're both lawyers. We both have children. We fight to do our jobs in a system that's male-dominated. We fight to balance our family lives and our work lives. We both have parents that are still alive. Our oldest children are the same age and have similar problems in school. We on paper or in that kind of description are basically the same person.

But she's black and I'm white, and our life experiences change or make an extraordinary difference when you're talking about the opinions that we have or the way that we look at things.

I never had to worry when my brother was in high school that he wasn't going to make it home because he wore the wrong thing to

school or the wrong colors to school.

I worried that he would make me look stupid and I might not be popular. That's what I worried about in terms of my brother.

She worried that her brother would get shot and killed because he wasn't wearing the right colors in Wilkinsburg.

I don't know what it feels like to have somebody at Saks follow me around like I'm going to steal something. I don't know what it feels like to have to tell my son about race when he's three years old or four years old because some moron makes a comment to him about race.

We have so many different life experiences that we don't ever bring to the table the same opinions.

As a result, we're not different because of the color of our skin; we're different because of the experiences that we have as a result of the color of our skin.

When someone says to my child, "Oh, are you going to be a basketball player when you grow up," it doesn't offend me because I don't presume that someone is saying that's all

he can ever be.

It would offend her if someone said to her child, "Are you going to be a basketball player when you grow up," because she'd say, "Well, why don't you think my child would be a neurosurgeon?"

It doesn't offend me if someone says, "Give me five," to my child. It offends her because they're presuming that he doesn't know how to shake hands like a gentleman. That's her perception.

Those fundamental differences in the way you perceive things and the way that we discuss things makes a difference.

If you have a jury venire panel that is all of one race, you lose that intangible ability to bring all of the community into a jury trial, and so I believe that you have jurors who don't and can't ever fully understand a black Defendant or black witnesses or their perceptions of the world.

I love her. I try to understand. She loves me. She tries to understand. I don't know how she feels and I never will.

So I believe that the integrity of

the verdicts is compromised when you have venire panels of all one race.

I think also when you have these venire panels of all one race, not only do you have a problem with the integrity of a verdict, you have a problem with the integrity of the whole criminal justice system.

We lawyers in the system are so careful to avoid the appearance of impropriety or the possibility of a conflict or that there might be an inequity. Sometimes we withdraw from cases. Sometimes judges don't hear cases where they might know someone and there may be an appearance of something.

Here we have not possible inequities; we have inequities. And we have a lack of common sense, community spirit on our juries, and yet we're doing nothing about it.

When you have a verdict rendered by a jury that was selected from an all-white venire panel or a venire panel that is not representative of the community, you have a Defendant who does not have any respect for the system, and you should have a community that doesn't have respect for the system.

You have some judges -- and I don't mean this as a criticism of this Court or any --

THE COURT: Go ahead. Be a critic.

MS. MIDDLEMAN: You have some judges who say, "You may go down to the jury room. You don't have to select your jury until you have a representative venire panel. You can wait until there are ten percent blacks on your venire panel before you select a jury."

And you have other judges who have interpreted the law or interpreted their responsibility differently.

So you may have two guys next to each other in the Allegheny County Jail, two individuals, two men awaiting trial. One is tried by a venire panel that is representative of the community and one is not.

How can both of those people have the same view? How can the community have the same view of the verdicts on both of those cases when it's fundamentally unfair that there are two different methods of selecting a jury?

So I think that we have a problem with the integrity of the verdicts and a

distinct problem with the integrity of the system.

The Supreme Court of the United States, as you well know, Judge, has been concerned with this since the 1800s.

One of the things the Supreme Court has said is that 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.

That's why I can't tell you that this is why it made a difference. This maybe made a difference, and I think the Supreme Court has recognized that.

We don't necessarily know what effect it has to exclude a certain kind of people from a criminal justice system or from a particular case in the system.

But because we don't know, I think that makes it all the more imperative that we ensure that we don't ever do it.

In this case you have the opportunity, because of the unique procedural

history of the case, that there is going to be another trial on these same facts.

I'm not asking you to put victims through an additional trial. I'm not asking you to put any -- it will cause the Commonwealth no difficulty or no problem in proceeding, in having my client be tried again by a jury that is representative of the community.

I'm asking you, I guess, to be proactive and to make a change in the system and to make a change for this particular Defendant.

I mean, you have a unique opportunity to rectify what I believe is an extraordinary injustice in this case.

This is basically your chance to champion individual rights and fundamental fairness and faith in verdicts and faith in the system, rather than to allow this horrible, old archaic machine to keep spewing out injustice and unjust verdicts on the people of our community.

So for those reasons I'm asking you to grant him a new trial and to ensure that

that venire panel from which he selects his jury is comprised of at least ten percent African-Americans.

THE COURT: Thank you, ma'am.

Any response to that, Mr. Dugan?

MR. DUGAN: Very briefly, Your Honor. I don't have cases with me because I wasn't aware that this issue was going to be raised this morning.

But it's clear that the case law does not guarantee an individual a jury that is racially-mixed or has the exact representation on the jury as the general population does.

The only thing that has to be is that the process in collecting these jurors is fair and is not biased, and case after case has held that the process being used here that has been used is fair.

This issue was raised pretrial, and the Court has already ruled on it.

My recollection is that there were three African-Americans on the panel that we chose from. They were struck for cause.

So this was not a venire that had no African-Americans on it, but, again, the case

law is clear that whether it be an African-American Defendant, Hispanic, Asian, they're not guaranteed to have that mix on the jury.

Ms. Middleman asked for a severance of this case. There's no unique procedural history here. The defense asked for a severance of this case from the other case. That was granted by the Court.

The trial proceeded against Mr. Howell. The verdict is not to defense's liking, but it would be a tragedy to the Commonwealth and to the victim's family to allow Mr. Howell to now get a second chance to go to trial.

MS. MIDDLEMAN: Judge, if I could, I would just point out that it appears that Mr. Dugan's remarks are just that which I expected and asked this Court to guard against or to be very wary of in that we seem to be valuing the system or the process above individual rights.

THE COURT: Okay. Well, I'll decline your invitation to be proactive.

I see my job as one to enforce the

law. I don't see any inherent unfairness to your client.

I'm amazed to hear some of what you had to say. I mean, the intellectual undertone of your argument is that people are different, you can't trust a certain class of people to be fair and no matter what we do or say, you're never going to be satisfied.

To accept your argument, to accept your reason for granting Mr. Howell a new trial on this basis would be to accept what amounts to an emotional ad hoc, not a legally-based argument, and I think it would result in dire and unpredictable consequences to the criminal justice system to operate as you suggest, Ms. Middleman.

So we will decline your invitation and deny your motion.

Now, what would you like to say on behalf of Mr. Howell?

MS. MIDDLEMAN: Your Honor, I would just ask you to consider that the verdict of the jury in this particular case appears to -- and their questions during their deliberation appears to indicate that they do not believe

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CC Nos. 200211830, 200213879
v.	:	Superior Ct. No. 686 WDA 2004
JOSEPH HOWELL, JR. Defendant	:	

STIPULATION

AND NOW, comes the Defendant, Joseph Howell, Jr., by his counsel, Michael J. Machen, Public Defender of Allegheny County; Suzanne M. Swan, Chief-Appellate Division, and Victoria H. Vidt, Appellate Counsel, and the Commonwealth of Pennsylvania by its attorneys, Stephen A. Zappala, Jr., District Attorney of Allegheny County, and Michael W. Streily, Deputy District Attorney, and, pursuant to Rule 1926 of the Pennsylvania Rules of Appellate Procedure, stipulate that the following attached items shall be made part of the certified record to be transmitted to the Superior Court of Pennsylvania in the appeal currently docketed at No. 686 WDA 2004 as a supplement to the docket entries:

A. One transcript excerpt of testimony from the case of *Commonwealth v. Sean Maurice Bush and Laurence Harlem Bush, a/k/a Laurence Harlem Benton*, CC Nos. 200213175 and 200214185, Excerpted Transcript of Hearing on Pretrial Motions (Defense Challenge to the Jury Pool Composition and the Court's Ruling), dated July 15-16, 2003.

B. One sample copy of County of Allegheny Commission for the Selection of Jurors Juror Questionnaire.

The above items are pertinent to matters raised on appeal and are necessary to the resolution of this matter. Appellate counsel and counsel for the Commonwealth hereby agree and stipulate that these three items being submitted should be made a part of the certified record. The stipulation of the parties is evidenced by the signatures of counsel below.

Michael W. Streily
Deputy District Attorney
PA I.D. No 43593

Victoria H. Vidt
Appellate Counsel

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	CC Nos. 200211830, 200213879
v.	:	Superior Ct. No. 686 WDA 2004
JOSEPH HOWELL, JR., Defendant	:	

ORDER BY STIPULATION

AND NOW, to wit, this 13 day of OCT, 2004, it is hereby ORDERED, ADJUDGED, AND DECREED that the following two items hereby attached shall be made part of the certified record to be transmitted to the Superior Court in the above appeal currently docketed at Superior Court Docket Number 686 WDA 2004 pursuant to the stipulation executed by counsel for the appellant and the Commonwealth:

A. One transcript excerpt of testimony from the case of *Commonwealth v. Sean Maruice Bush and Laurence Harlem Bush, a/k/a Laurence Harlem Benton*, CC Nos. 200213175 and 200214185, Excerpted Transcript of Hearing on Pretrial Motions (Defense Challenge to the Jury Pool Composition and the Court's Ruling), dated July 15-16, 2003.

B. One sample copy of County of Allegheny Commission for the Selection of Jurors Juror Questionnaire.

BY THE COURT:

_____, J.
Lawrence J. O'Toole, Judge

CC: Victoria Vidt, Esq.
Michael W. Streily, Esq.

(9)

HON. JEAN A. MILKO
Jury Commissioner

HON. ALLAN C. KIRSCHMAN
Jury Commissioner

COMMISSION FOR THE SELECTION OF JURORS
County of Allegheny
201 COUNTY OFFICE BUILDING
PITTSBURGH, PA 15219-2904
412-350-5336
www.pittsburghcourts.us/jury

Dear Citizen:

The right to a jury is one of the fundamental rights that our founding fathers provided to us and is a vital part of our guaranteed liberties. It includes the right to trial by jury before our peers, in both civil and criminal matters, and the corresponding right and duty to act as jurors in the cases of other citizens. Without the participation of each of us, this very basic right would be diminished, depriving all of us of its benefits and protection.

A Juror Qualification Questionnaire assists the Commission for the Selection of Jurors of Allegheny County in determining eligibility for juror service. To meet the needs of all citizens, two options are available for completing the questionnaire:

1. A Juror Qualification Questionnaire is enclosed. Read the instructions on the reverse side of the Questionnaire before completion, and return the questionnaire in the enclosed, addressed envelope within ten (10) days of receipt. If additional information is needed, you may telephone (412) 350-5336.

OR

2. We encourage you to visit our website at **www.pittsburghcourts.us/jury** to complete your Juror Qualification Questionnaire online within ten (10) days of the date of receipt of this letter. Completing the questionnaire online is the most convenient method for citizens and the Jury Commission. The questionnaire is easily accessed by following the instructions below:

   (1) On your internet browser, type in **www.pittsburghcourts.us/jury**
   (2) On the menu bar on the left side of the page, click on "**online questionnaire**."
   (3) Follow the online instructions for completing the questionnaire.
   (4) Questions concerning completion of the online questionnaire may be directed to (412)350-5071.

While you are required by law to truthfully complete the Juror Qualification Questionnaire either by mail or online, you have not been selected for jury service nor are you being summoned to serve as a juror at this time. We realize that jury service may be a hardship for some of our citizens. If you are summoned for jury service, you will be provided with the opportunity to submit information which may entitle you to be either temporarily or permanently excused from jury service. Application for undue hardship or extreme inconvenience exemption is not appropriate at this time.

Thank you for completing the Juror Questionnaire.

Sincerely,

Jean A. Milko

Jean A. Milko, Jury Commissioner

Allan C. Kirschman

Allan C. Kirschman, Jury Commissioner

Enclosures

Instructions for Completing Juror Qualification Questionnaire

Read the Questionnaire, truthfully provide all of the information requested, and answer all of the questions by completely filling in the appropriate circle.

(Example) ● January

Your answers to the Questionnaire will be used for the jury qualification process only and will otherwise be treated as confidential. The numbers on these instructions correspond and refer to the numbers on the Questionnaire.

1. If the addressee is deceased, completely fill in the circle to the left of the word "Deceased," sign the form on Line 16, state your relationship to the deceased on line 16, and return the Questionnaire in the self-addressed envelope.

2. Date of Birth – Completely fill in the circles to the left of the numbers that state your month, day, and year of birth.

3. Social Security Number – Completely fill in the circles to the left of the numbers that state your Social Security Number. NOTE: Social Security Numbers will be used only to verify your answer to Question 11 through a criminal record search. Disclosure of your Social Security number is voluntary.

4. Home Telephone Number – Completely fill in the circles to the left of the numbers that state your area code and home telephone number.

5. Occupation – Completely fill in the circle to the left of the item that best describes your occupation.

6.–13. Questions – Answer truthfully questions 6 through 13 by completely filling in the circle to the left of each answer.

14. Race - Completely fill in the circle to the left of all that apply. Your response is voluntary.

15. Address or Name Changes – Print legibly your current address or name if different from that shown at the top left of the Questionnaire.

16. Signature – Read and review the information and answers you have made on the Questionnaire to be sure that they are accurate and true, and if so, sign the Questionnaire.

IF YOU ARE UNABLE TO COMPLETE THE JUROR QUALIFICATION QUESTIONNAIRE, HAVE ANOTHER PERSON COMPLETE THE FORM ON YOUR BEHALF, SIGN THE QUESTIONNAIRE, AND INDICATE A CONCISE REASON FOR THE ASSISTANCE.

If all of the information on the Questionnaire is accurate and true, return it in the self-addressed envelope within ten (10) days of its receipt. You will be required to provide postage on the envelope. If you have any questions or require further assistance in completing the Juror Qualification Questionnaire, you may telephone 412-350-5336. You have not been selected for jury service nor are you being summoned to jury service at this time.

RETURN TO:
COMMISSION FOR THE SELECTION OF JURORS
201 COUNTY OFFICE BUILDING
542 FORBES AVENUE
PITTSBURGH, PA 15219

CANDACE CAIN
334 LAFAYETTE AVE.
PITTSBURGH, PA 15214-3640

Juror Qualification Questionnaire

Before completing this Questionnaire, carefully read the instructions on the reverse side of this form. If you wish to complete this form online, please see the instructions provided in the cover letter.

1. 0 **DECEASED**

2. **DATE OF BIRTH**

MONTH	DAY			YEAR
0 January	0 0	0 0	19	0 0 0 0
0 February	0 1	0 1		0 1 0 1
0 March	0 2	0 2		0 2 0 2
0 April	0 3	0 3		0 3 0 3
0 May		0 4		0 4 0 4
0 June		0 5		0 5 0 5
0 July		0 6		0 6 0 6
0 August		0 7		0 7 0 7
0 September		0 8		0 8 0 8
0 October		0 9		0 9 0 9
0 November				
0 December				

3. **SOCIAL SECURITY NUMBER**

0 1 0 1 0 1	- 0 1 0 1	- 0 1 0 1	0 1 0 1
0 2 0 2 0 2	- 0 2 0 2	- 0 2 0 2	0 2 0 2
0 3 0 3 0 3	- 0 3 0 3	- 0 3 0 3	0 3 0 3
0 4 0 4 0 4	- 0 4 0 4	- 0 4 0 4	0 4 0 4
0 5 0 5 0 5	- 0 5 0 5	- 0 5 0 5	0 5 0 5
0 6 0 6 0 6	- 0 6 0 6	- 0 6 0 6	0 6 0 6
0 7 0 7 0 7	- 0 7 0 7	- 0 7 0 7	0 7 0 7
0 8 0 8 0 8	- 0 8 0 8	- 0 8 0 8	0 8 0 8
0 9 0 9 0 9	- 0 9 0 9	- 0 9 0 9	0 9 0 9
0 0 0 0 0 0	- 0 0 0 0	- 0 0 0 0	0 0 0 0

4. **AREA CODE** **HOME TELEPHONE NUMBER**

0 1 0 1 0 1	- 0 1 0 1	- 0 1 0 1	0 1 0 1
0 2 0 2 0 2	- 0 2 0 2	- 0 2 0 2	0 2 0 2
0 3 0 3 0 3	- 0 3 0 3	- 0 3 0 3	0 3 0 3
0 4 0 4 0 4	- 0 4 0 4	- 0 4 0 4	0 4 0 4
0 5 0 5 0 5	- 0 5 0 5	- 0 5 0 5	0 5 0 5
0 6 0 6 0 6	- 0 6 0 6	- 0 6 0 6	0 6 0 6
0 7 0 7 0 7	- 0 7 0 7	- 0 7 0 7	0 7 0 7
0 8 0 8 0 8	- 0 8 0 8	- 0 8 0 8	0 8 0 8
0 9 0 9 0 9	- 0 9 0 9	- 0 9 0 9	0 9 0 9
0 0 0 0 0 0	- 0 0 0 0	- 0 0 0 0	0 0 0 0

5. **OCCUPATION**

0 Clerical
0 Currently Unemployed
0 Homemaker
0 Laborer
0 Management
0 Medical
0 Professional
0 Retired
0 Sales
0 Student
0 Other

6. Are you a resident of Allegheny County? 0 Yes 0 No

7. Are you a United States Citizen? 0 Yes 0 No

8. Can you read, write, speak and understand the English language? 0 Yes 0 No

9. Are you 18 years of age or older? 0 Yes 0 No

10. Are you in the active military service? 0 Yes 0 No

11. Have you ever been convicted of a crime punishable by imprisonment for more than one year and have not been granted a pardon or amnesty? **Note:** This refers to the maximum permissible sentence for such a crime and not the actual sentence received. 0 Yes 0 No

12. Do you have a physical or mental infirmity that would prohibit you from rendering efficient jury service? 0 Yes 0 No

13. **GENDER** 0 Male 0 Female

14. **RACE**

Note: This answer is used solely to avoid discrimination in the juror selection process and has no bearing on your qualifications to serve. By answering this question, you will help the Jury Commission evaluate the inclusion of all eligible individuals in the process. Your response is voluntary.

0 Caucasian
0 African-American
0 Hispanic
0 Asian
0 Native American
0 Other _____
Please Specify

15. Please make corrections to Name or Address

_____

_____

_____

I DECLARE, UNDER PENALTY OF PERJURY PURSUANT TO THE PENNSYLVANIA CRIMINAL CODE, 18 PA C.S.A. §4909, THE ANSWERS GIVEN ABOVE ARE TRUE AND CORRECT.

16. _____
Signature of prospective juror or person completing this form.

Reason for assistance: _____