CASE NO. _____
IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH HOWELL,

Petitioner,

v.

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

Respondents.

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: February 11, 2020

Petitioner Joseph Howell respectfully requests a sixty (60) day extension of time in which to file his Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit. In support of this request, he states as follows:

Petitioner is a Pennsylvania inmate serving a sentence of life without the possibility of parole who sought federal habeas corpus relief under 28 U.S.C. § 2254. The United States District Court for the Western District of Pennsylvania adopted the magistrate judge's report and recommendation, denied relief, and declined to issue a Certificate of Appealability (COA). *See Howell v. Lamas*, No. 2:12-cv-884, 2017 U.S. Dist. LEXIS 28571 (W.D. Pa. Mar. 1, 2017) (unpublished) (attached), *adopting Howell v. Lamas*, 2016 U.S. Dist. LEXIS 184644 (W.D. Pa. Jan. 25, 2016) (R&R) (attached).

On October 11, 2017, the United States Court of Appeals for the Third Circuit granted COA on Mr. Howell's fair cross-section claim and appointed counsel. After briefing and oral argument, a divided panel of the Third Circuit affirmed. *Howell v. Superintendent*, 939 F.3d 260 (3d Cir. 2019) (attached). On November 26, 2019, the Third Circuit denied Mr. Howell's petition for rehearing en banc in an unpublished order (attached).

Petitioner intends to seek certiorari review in this case.[1] Petitioner's certiorari petition is currently due on February 24, 2020. In accordance with

[1] Petitioner will move to proceed *in forma pauperis* in this Court in accordance with Supreme Court Rule 39. Petitioner has been granted leave to proceed *in forma pauperis* throughout the proceedings below.

Supreme Court Rule 13.5, this application is made at least ten days before the due date.

Petitioner requests additional time in which to file his petition in light of undersigned counsel's case-related obligations in his other cases. Counsel of record represents numerous death-sentenced prisoners in capital habeas corpus proceedings in Pennsylvania, California, and other jurisdictions. Counsel presently has an application for COA due in the Third Circuit on February 24, 2020 (Case No. 19-3739), and is assisting a colleague in preparation for oral argument of a capital case in the Fifth Circuit on February 24, 2020 (Case No. 18-70035).

Counsel therefore respectfully requests a sixty (60) day extension of time in which to prepare and file the petition for writ of certiorari. Undersigned counsel contacted counsel for Respondent who indicated that Respondent does not oppose the requested extension.

Respectfully Submitted,

/s/ Loren D. Stewart

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Counsel of Record for Petitioner, Joseph Howell

Dated: February 11, 2020

Order Denying Petition for Rehearing En Banc

Howell v. Superintendent,
No. 17-1758 (3d Cir. Nov. 26, 2019)

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.

Panel Opinion Affirming Denial of Petition for Writ of Habeas Corpus

Howell v. Superintendent,
939 F.3d 260 (3d Cir. 2019)

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

Attorneys and Law Firms

Leigh M. Skipper, Chief Federal Defender, Helen Marino, First Assistant Federal Defender, Arianna J. Freeman, Loren D. Stewart [ARGUED], Federal Community Defender

Eastern District of Pennsylvania, Federal Community Defender Office for the Eastern District of Pennsylvania, 601 Walnut Street, The Curtis Center, Suite 540 West, Philadelphia, PA 19106, Counsel for Appellant.

Stephen A. Zappala, Jr., District Attorney, Ronald M. Wabby, Jr., Deputy District Attorney, Rusheen R. Pettit [ARGUED], Allegheny County Office of District Attorney, 436 Grant Street, Pittsburgh, PA 15219, Counsel for Appellees.

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-%28lsac-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

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Order Adopting Magistrate R&R and Denying Petition for Writ of Habeas Corpus

Howell v. Lamas, No. 2:12-cv-884, 2017 U.S. Dist. LEXIS 28571 (W.D. Pa. Mar. 1, 2017)

Howell v. Lamas

United States District Court for the Western District of Pennsylvania

March 1, 2017, Decided; March 1, 2017, Filed

2:12cv884

Reporter
2017 U.S. Dist. LEXIS 28571 *; 2017 WL 782879

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.

Subsequent History: Affirmed by *Howell v. Superintendent Rockview SCI, 2019 U.S. App. LEXIS 27939 (3d Cir. Pa., Sept. 17, 2019)*

Prior History: *Howell v. Lamas, 2016 U.S. Dist. LEXIS 184644 (W.D. Pa., Jan. 25, 2016)*

Core Terms

underrepresentation, statistical, report and recommendation, statistical evidence, habeas corpus, Sixth Amendment, fair-cross-section, certificate, concomitant, augmented

Counsel: **[*1]** ***JOSEPH HOWELL***, Petitioner, Pro se, Huntingdon, PA.

For 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: Rusheen R. Pettit, Office of the District Attorney, Pittsburgh, PA.

Judges: David Stewart Cercone, United States District Judge.

Opinion by: David Stewart Cercone

Opinion

MEMORANDUM ORDER

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. **[*2]** 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

/s/ David Stewart Cercone

David Stewart Cercone

United States District Judge

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Magistrate Judge's Report & Recommendation to Deny Petition for Writ of Habeas Corpus

Howell v. Lamas, No. 2:12-cv-884, 2016 U.S. Dist. LEXIS 184644 (W.D. Pa. Jan. 25, 2016)

Howell v. Lamas

United States District Court for the Western District of Pennsylvania

January 25, 2016, Decided; January 25, 2016, Filed

Civil Action No. 12-884

Reporter
2016 U.S. Dist. LEXIS 184644 *

JOSEPH HOWELL, Petitioner, vs. 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.

Subsequent History: Adopted by, Objection overruled by, Writ of habeas corpus dismissed, Certificate of appealability denied *Howell v. Lamas, 2017 U.S. Dist. LEXIS 28571 (W.D. Pa., Mar. 1, 2017)*

Prior History: *Howell v. Lamas, 2014 U.S. Dist. LEXIS 78953 (W.D. Pa., May 5, 2014)*

Core Terms

ineffective, state court, sentence, trial counsel, trial court, robbery, ineffective counsel, instructions, murder, state law, defaulted, Grounds, merits, proceedings, recommended, decisions, disparity, exhausted, clearly established federal law, lesser included offense, fail to object, malice, prosecutorial misconduct, instruction of a jury, accomplice liability, fair cross section, fail to raise, due process, apartment, involuntary manslaughter

Counsel: **[*1]** ***JOSEPH HOWELL***, Petitioner, Pro se, Huntingdon, PA.

For 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: Rusheen R. Pettit, Office of the District Attorney, Pittsburgh, PA.

Judges: MAUREEN P. KELLY, CHIEF UNITED STATES MAGISTRATE JUDGE. Judge David Stewart Cercone.

Opinion by: MAUREEN P. KELLY

Opinion

REPORT AND RECOMMENDATION

I. RECOMMENDATION

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 **[*2]** 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 **[*3]** 2:30 p.m., at which time he returned home.
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> 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.
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> 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 **[*4]** 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.
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> 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 **[*5]** a mutual friend, James Perrin. Burnham was supposed to purchase marijuana from Perrin.
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> 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]

B. Procedural History

The jury apparently discredited Petitioner's version and credited the prosecution's version as the jury convicted Petitioner **[*6]** 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.

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.

On August 28, 2007, **[*7]** 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 **[*8]** 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

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[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 __".

[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.

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 **[*9]** 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.

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 **[*10]** 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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (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 **[*11]** 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 **[*12]** 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, 99 S. Ct. 664, 58 L. Ed. 2d 579 (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).

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 **[*13]** 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. Van Natta, 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 U.S. Dist. LEXIS 117564, 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 **[*14]** 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, 99 S. Ct. 664, 58 L. Ed. 2d 579 (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 **[*15]** 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.

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 **[*16]** 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).

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 **[*17]** 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, **[*18]** the federal constitutional claim was not exhausted and, therefore, procedurally defaulted. See, e.g., *Duncan v. Henry, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (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

[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."

[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).

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.

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 **[*19]** 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.

Petitioner does argue that the Superior Court's decision is contrary to Sansone v. United States, 380 U.S. 343, 85 S. Ct. 1004, 13 L. Ed. 2d 882 (1965) and to Keeble v. United States, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (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 **[*20]** 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, 76 S. Ct. 685, 100 L. Ed. 1013, 1956-1 C.B. 644 (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, 76 S. Ct. 685, 100 L. Ed. 1013, 1956-1 C.B. 644 (1956) (another case construing the Fed.R.Crim.P. 31(c)) and Stevenson v. United States, 162 U.S. 313, 16 S. Ct. 839, 40 L. Ed. 980 (1896) (a federal common law decision).

Hence, as a decision that does not construe what the Constitution requires but what the Federal Rules of **[*21]** 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, 123 S. Ct. 362, 154 L. Ed. 2d 263 (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 F. App'x 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 AGF, 2015 U.S. Dist. LEXIS 39887, 2015 WL 1456977, at *4 (E.D. Mo. March 30, 2015) (holding that the Supreme Court **[*22]** 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 (HB), 2003 U.S. Dist. LEXIS 18921, 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, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (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]

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

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 **[*23]** 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, 515 Pa. 153, 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, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (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 **[*24]** 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 **[*25]** 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.

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

[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. *Vujosevic 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.

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. **[*26]** 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 **[*27]** 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 112, 129 S. Ct. at 1420*. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. *556 U.S. at 112 [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, 123, 131 S. Ct. 733, 740, 178 L. Ed. 2d 649 (2011) (quoting *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 788, 178 L. Ed. 2d 624 (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 **[*28]** 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.

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 **[*29]** 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, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)* (explaining differences between types of presumptions).

Petitioner's citation to *Connecticut v. Johnson 460 U.S. 73, 78, 103 S. Ct. 969, 74 L. Ed. 2d 823 (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, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985)* is similarly distinguishable as the United States Supreme Court characterized **[*30]** 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.

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 **[*31]** 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.

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 **[*32]** for failing to raise a meritless claim."). The Superior Court then went

[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.

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.

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, 566 U.S. 1, 132 S.Ct. 1309, 182 L. Ed. 2d 272 (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 **[*33]** 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, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000)*(holding that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted").

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-MOORE, 2015 U.S. Dist. LEXIS 98232, 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 **[*34]** 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. 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 **[*35]** said offense merged with the second-degree murder conviction for sentencing purposes.

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[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.").

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 **[*36]** counsel be overcome").

Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (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 **[*37]** 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).

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 **[*38]** 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]

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[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

III. CONCLUSION

[*40] 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.

Date: January 25, 2016

Respectfully submitted,

/s/ Maureen P. Kelly

MAUREEN P. KELLY

CHIEF UNITED STATES MAGISTRATE JUDGE

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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 **[*39]** 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, 112 S. Ct. 475, 116 L. Ed. 2d 385 (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, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (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.

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