

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HARLAN LEROY KELLY JR.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What showing is necessary under *Duren v. Missouri*, 439 U.S. 357 (1979) to prove that systemic exclusion of a group resulted in underrepresentation of a jury pool?

RELATED PROCEEDINGS

United States District Court (N.D. Cal.): *United States v, Harlan Leroy Kelly, Jr.*, No. 3:21-cr-00402-RS (N.D. Cal. Mar. 18, 2024).

United States Court of Appeals (9th Cir.): *United States v, Harlan Leroy Kelly, AKA Harlan Kelly*, No. 24-1825 (9th Cir. Aug. 15, 2025) (mem.)

PARTIES TO THE PROCEEDINGS

Petitioner is Harlan Kelly, defendant-appellant below. Respondent is the United States of America.

There are no parties to the proceeding other than those named in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED.....I
RELATED PROCEEDINGS..... II
PARTIES TO THE PROCEEDINGS..... II
PETITION FOR A WRIT OF CERTIORARI..... 1
OPINIONS BELOW 1
STATEMENT OF JURISDICTION..... 1
STATUTORY PROVISIONS 1
STATEMENT..... 2
REASONS FOR GRANTING THE WRIT..... 6
CONCLUSION..... 9
APPENDIX A 10
APPENDIX B 11

TABLE OF AUTHORITIES

Supreme Court Cases

<i>Berghuis v. Smith</i> , 559 U.S. 314 (2010).....	13
<i>Duren v. Missouri</i> , 439 U.S. 357 (1979)	i,10, 11

Federal Cases

<i>United States v. Harlan Leroy Kelly, Jr.</i> , 2025 WL 2375215 (9th Cir. Aug. 15, 2025) (mem.)	5
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Statutes

Jury Selection and Service Act, 28 U.S.C. § 1861	2
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PETITION FOR A WRIT OF CERTIORARI

Harlan Kelly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

The order of the United States district court denying Mr. Kelly's Motion to Dismiss the Indictment is unpublished. The order appears at Appendix A to the petition. It has been filed under seal.

The memorandum disposition of the Ninth Circuit Court of Appeals denying Mr. Kelly's appeal of the denial of the motion to dismiss is not reported. It is available at 2025 WL 2375215 (9th Cir. Aug. 15, 2025) (mem). This memorandum disposition appears at Appendix B to the petition.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 15, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Sixth Amendment of the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

The Jury Selection and Service Act, 28 U.S.C. § 1861 states, “It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.”

STATEMENT

In 2021, Kelly -- a black man -- was indicted by a federal grand jury for offenses related to bank fraud and “honest services” fraud. Not a single black person sat on this grand jury. This fact is not surprising, because the venire from which

that grand jury was constituted suffered from dramatic underrepresentation of black citizens.

With the assistance of an expert statistician, Kelly showed that black citizens were underrepresented in this grand jury venire by a shocking 49%. This was three standard deviations away from the expected composition of the venire. Kelly accordingly moved to dismiss the indictment under the Sixth Amendment, the Jury Selection and Service Act (“JSSA,”) and the Equal Protection clause of the Fifth Amendment. Kelly also demonstrated multiple ways in which the Northern District of California’s system of juror selection contributed to this underrepresentation.

In an analysis plagued by the addition of a heightened evidentiary showing, the district court denied Kelly’s challenge. *See Appendix A*. The district court’s error was compounded in a brief memorandum disposition from the Ninth Circuit Court of Appeals, that affirmed the denial of Mr. Kelly’s motion to dismiss. *See Appendix B*.

Mr. Kelly’s petition to this Court presents an important federal question: what is the showing necessary for a defendant to prove that the system by which a district selects grand jurors contributes to underrepresentation in a jury venire?

This Court should grant the writ, and hold that Mr. Kelly has met this showing in the instant case.

1. On October 19, 2021, Kelly and his co-defendant, Victor Makras, were charged in a seven-count indictment. The government secured a nine-count superseding indictment against Kelly on May 31, 2022.

2. The co-defendants were charged together in four “bank fraud” counts in the superseding indictment. Kelly alone was charged in five “honest services” counts, alleging conspiracy to commit honest services wire fraud in violation of 18 U.S.C. § 1349, and “honest services” wire fraud in violation of 18 U.S.C. § 1343, 1346.

3. The defendants’ cases were severed for trial.

4. On August 28, 2022, Kelly filed a motion to dismiss the indictment. This motion alleged underrepresentation of African Americans in the grand jury that had returned the superseding indictment.

5. In support of his motion Kelly submitted the declaration of a statistical expert. Using the “comparative disparity” test, the expert explained that nearly half of the expected African Americans in Kelly’s jury pool were missing. Using the standard deviation test, the expert proved that the grand jury composition differed from the percent of African Americans in the population by more than three standard deviations.

6. In his expert’s declaration, Kelly presented three examples of systemic action that impacted fair cross-representation. First, he showed that the jurors in his case were erroneously summonsed from the San Jose division, instead of the Oakland division (where the percentage of African American individuals is higher). Second, Kelly identified the district’s policy of readily excusing jurors who had COVID-19 concerns as a policy that would disproportionately impact black potential jurors (because blacks suffered higher rates of comorbid conditions than the general population). Finally, Kelly showed that the district court clerk erroneously failed to

execute a policy in the District's plan to secure replacement jurors (a policy specifically designed to minimize underrepresentation).

6. The government did not file any expert declaration or opinion in its response.

7. The district court did not conduct the evidentiary hearing requested by the defense. Instead, the court denied Mr. Kelly's motion to dismiss the indictment in a written order. *See Appendix A.*

8. Mr. Kelly went to a jury trial. He was convicted of all mail fraud counts, and of two of the honest services counts.

9. Kelly filed a timely notice of appeal on March 26, 2024. One of his challenges on appeal was the district court's denial of his motion to dismiss the indictment.

10. The Ninth Circuit did not grant oral argument. It denied Mr. Kelly's appeal in its entirety, in a short memorandum disposition filed August 15, 2025. *See Appendix B; 2025 WL 2375215, *1.*

REASONS FOR GRANTING THE WRIT

In a cursory discussion the Ninth Circuit upheld the district court's denial of Mr. Kelly's motion to dismiss the indictment under the Sixth Amendment and the JSSA. The Court relied on Kelly's alleged failure to show that the underrepresentation of Black persons in the grand jury venire was "due to the system by which" the Northern District of California (the District) selects grand juries." *Appendix B; 2025 WL 2375215 at *1* (internal quotations and citation

omitted). The Ninth Circuit erred by discounting Kelly's evidence that the Northern District's jury selection system created the environment that produced the underrepresentation.

Moreover, the Ninth Circuit completely ignored the district court's inexplicable heightening of the standard to which it held Mr. Kelly. In its order, the district court held that Kelly's failed to prove that three identified jury-selection events "*significantly affected*" the number of Black or African American individuals. *Appendix A* at 8; *compare Appendix B*; 2025 WL 2375215 at *1. The district court's manufactured "*significantly affected*" standard is unprecedented in this Court's (or the Ninth Circuit's) authority.

In *Duren v. Missouri*, 439 U.S. 357 (1979), this Court explained that the moving party bears the burden of showing a prima facie case. *Id.* at 364. There are three components to the *Duren* analysis:

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

Id.

In this petition Mr. Kelly focuses on the Ninth Circuit's decision regarding the third component of the *Duren* test: that the underrepresentation was "due to systemic exclusion of the group." *See Appendix B*, 2025 WL 2375215, *1.

Kelly met this Court's *Duren* requirement on three fronts. First, he showed (without government rebuttal) that jurors were erroneously summonsed from the San Jose division, instead of from the San Francisco-Oakland division (where the percentage of African American individuals is higher).

Second, the district court permitted summonsed prospective jurors to opt out of service if they raised COVID-19 concerns. Kelly showed that blacks suffered higher rates than the general population of co-morbid preexisting conditions that rendered COVID-19 more dangerous, potentially resulting in higher rates of infection and death. *Id.* Because COVID-19 was (and is) more dangerous for blacks, the automatic exclusion of potential jurors who expressed COVID-19 concerns increased the underrepresentation of this distinct group.

Finally, the district court clerk also erroneously failed to execute a policy in the District's plan to secure replacement jurors. Under the District's Jury Plan, if a mailed notice was returned as "undeliverable," or there was no timely response, the Clerk was supposed to randomly draw the name of another potential juror in the same zip code and mail a new notice. *Id.* As previous district court judges had explained, sending this notice to the same zip code is designed to minimize underrepresentation of minority groups in the district's jury pools.

In the present case, thirty-four summons and qualification forms were returned as "undeliverable." The Clerk correctly mailed out new forms to new potential jurors in the same zip code, but inexplicably did not mail them out until

after the grand jury was selected. Id. These tardy mailings completely nullified the intent of this policy to ensure fair minority cross-sections in the district’s jury pools.

Any one of these failures, standing alone, would be sufficient to show systemic exclusion and establish Kelly’s prima facie case. Combined, this trio of problems raised substantial concerns regarding the management of the district’s jury pools – and the impact on black representation in the grand jury. Without analysis, however, the district court summarily rejected these showings: “Kelly, however, has not shown how any of these events can be presumed to have significantly affected the number of Black or African American individuals in the jury pool or that they constitute systemic flaws sufficient to satisfy *Duren*’s third prong.” *Appendix A*. The Ninth Circuit affirmed the district court’s decision in an even more truncated analysis. *Appendix B*.

This case accordingly presents an important federal question that must be addressed and resolved by this Court: what showing is necessary under *Duren*’s third prong to show that systemic exclusion of a group resulted in underrepresentation of a jury pool? The present case is a particularly apt vehicle for that question, because here the district court inexplicably heightened the showing required – demanding that the systemic exclusion “substantially affect” the subject group. *Appendix A*.

The issue presented by Kelly in this petition arises frequently in challenges to the composition of federal and state juries. This Court has not yet given clear direction on this issue. For example, Petitioner in *Berghuis v. Smith*, 559 U.S. 314

(2010) sought precisely the guidance litigants need on this prong of the *Duren* analysis. This Court rejected that request, noting in the context of that AEDPA litigation that “This Court . . . has never ‘clearly established’ that jury-selection-process features of the kind on Smith’s list can give rise to a fair-cross-section claim.” 559 U.S. at 333 (2010).

Unlike the *Smith* case, the instant petition directly presents the issue of “systemic exclusion” in a direct appeal. This Court should accordingly grant Mr. Kelly’s petition, and give much-needed guidance to the courts and litigants on the showing required under *Duren*’s third prong.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Respectfully submitted,

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November 12, 2025

/s

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