Appeal No. 24-CM-0020

DISTRICT OF COLUMBIA COURT OF APPEALS

KEVIN MICHAEL BROWN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

At trial CJA attorney Brandon Burrell represented Kevin Michael Brown, and Assistant United States Attorneys Michael Dal Lago and Luke Albi represented the government. On appeal CJA attorney Russell Bikoff represents Mr. Brown.

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ISSUE PRESENTED

1. Whether this case must be remanded to the trial court under *Gause v. United States*, 6 A.3d 1247 (D.C. 2010 *en banc*), where the trial judge imposed an improper threshold requirement of proof of intentional or systematic discrimination, denying Appellant's trial counsel his right under the D.C. Jury System Act to examine Superior Court data to substantiate his claim of Constitutional and statutory violations of the guarantee of a fair cross- section of the community, where only three of the 54 members of the jury panel were African Americans?
2. Whether Appellant's conviction must be reversed where two witnesses to his alleged assault were unable to identify him in court and the police officer who arrested Appellant identified him only as the person detained coming out of a Metro station a stop away from the location of the assault a short time after the assault had occurred?

STATEMENT OF THE CASE

On October 7, 2020, the government charged Kevin Michael Brown in D.C. Superior Court, in case 2020 CMD 007728, with one count of Simple Assault under 22 D.C. Code section 404; one count of Assault on a Law Enforcement Office under 22 D.C. Code section 405(b); one count of Resisting Arrest under 22 D.C. Code section 405.01; and one count of Destroying Property, under 22 D.C. Code section 303. All four counts charged were misdemeanors. On March 17, 2021, the government moved to amend the information with a bias enhancement pursuant to 22 D.C. Code sections 3701 and 3703, which a Superior Court judge approved on June 22, 2021.

On December 5, 2023, Mr. Brown went to trial before the Honorable Jason Park, an Associate Judge of the D.C. Superior Court. Prior to jury selection, at the request of the government the court dismissed the APO, resisting arrest, and destruction of property counts, leaving only the simple assault with the bias enhancement. On December 12, at the end of the trial, the jury found Mr. Brown guilty of simple assault with a bias enhancement. On December 13, Judge Park sentenced Brown to 270 days in jail, straight time, with credit for time served. Mr. Brown timely appeals from that judgment.

STATEMENT OF FACTS

Defense Objections to the Jury Panel

On December 5, 2023, after the jury panel entered the courtroom, but before individual voir dire began, defense counsel approached the bench and raised an objection that the panel did not represent a fair cross section of the community. "This is probably one of the most underrepresented panels I've seen. I count a total of three African Americans. That's about 5 percent of 54." He pointed out that the African American population in Washington DC is about 40 or 45%. (TRII: 24)[1] The trial judge responded that defense counsel was failing to make the required showing that the disparity is the result of "some sort of policy on the court." He told counsel that he could make that argument "and any other argument you have after the jury selection is concluded. All right?" (TRII: 25)

After 12 jurors and two alternates were seated in the jury box, the judge invited defense counsel to make his record about the panel:

> "MR. BURRELL: So when the jury panel was brought in, I looked around the room. I noticed a total of three African Americans out of 54. I think that that is a number that substantially underrepresents the African American community inside of D.C.

[1] Citations in this section are to the transcripts of jury selection conducted on December 5, 2023, (TRII) and jury deliberations on December 12 (TRV).

> "I have no documentation of how the -- the jury selection process was conducted concerning getting a fair and reasonable representation. But I think what the – the numbers that were present considering the -- the number, 54 jury panel numbers, I don't think that that's a fair and reasonable cross section."

(TRII: 74)

Defense counsel continued with a motion:

> "Mr. Burrell: Without being able to either, A, look at the process of how the -- the jury was selected from the community, defense would object to the jury and move to strike the jury panel." *Id.*

Judge Park responded and denied the motion:

> "THE COURT: No. So in order to establish a prima facie violation of the fair cross section requirement, the defendant must show that the group alleged to be excluded is a distinctive group in the community, 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, number three, that this underrepresentation is due [to] systematic exclusion of the group from the jury selection process.

> Even accepting Mr. Burrell's numbers, which seem roughly accurate, there were some folks for whom it was not clear to me who we did not speak to what their -- what their race was. Even assuming that we are at under 10 percent of the [venire] having been African American, the fact is that the defense has made no showing that this underrepresentation is due to any systematic exclusion of the group from the jury selection process. There's no showing of that at all. And so, for those reasons, I will deny the motion.
>
> And is there any additional -- so that's preserved for the record. Is there any additional issue, Mr. Burrell?"

(TRII: 75) (emphasis added)

Defense counsel then requested access to records that he could study overnight, so that he could make further argument in court the next day:

> "MR. BURRELL: That defense would have to look at how the jury selection process was conducted in order for me to get adequate information and see if there was a systematic exclusion. I don't have access to that right now, so that would be the only way I could possibly make

that argument is if I get to look into the jury selection records and see, make a determination, if there was any systematic exclusion. So we request that the defense would be -- for the defense to -- to get the appropriate records so I can review them overnight and make my argument for tomorrow."

(TRII: 76)

Judge Park denied that request and ended this discussion, explaining:

"THE COURT: So there is, in fact, cross-section litigation that is happening in this courthouse that is being initiated by the Public Defender Service. It doesn't appear that this defendant has joined in that litigation, so that request is denied.

And so, Mr. Burrell, if -- I'm not sure what else to tell you at this juncture other than that there are certain requirements under the law that the defendant must wake -- must make. There are efforts that are being made by some defendants in other cases in order to get at these issues.

This case has proceeded to trial without those

efforts having been undertaken, and -- and I have no -- and so there is no prima facie showing of a systematic exclusion based on some sort of policy within the Superior Court of excluding one group or another. So on this record, I will deny the request at this juncture. All right? Thank you.

MR. BURRELL: Yes, Your Honor.

THE COURT: And -- and so sorry. Mr. Burrell, that's preserved for the record, but is there anything else that any -- was there any other issue that I needed to be aware of?

MR. BURRELL: Court's very brief --

THE COURT: Sure.

MR. BURRELL: -- indulgence.

(Pause in the proceedings.)

MR. BURRELL: No other issues.

(Pause in the proceedings.)

MR. BURRELL: No. No other issues."

(TRII: 76-77)

The judge then gave the jury further information on logistics, and after the jury exited the courtroom, the judge returned to this issue. Appellant Brown joined the discussion as well:

> "THE COURT: ***
>
> Just to finish out my findings, with respect to
>
> Mr. Burrell's challenge, I understand that, the challenging circumstance that you are in, but based on my review of the case law and the information that's in front of me, there is nothing on the record to indicate that these jurors were selected in any way that is different from any other panel members who are selected in the D.C. Superior Court. There is no record in front of me that -- anything about the timing of this trial or about any other procedures that the Court employed disproportionately impacted one racial group, one ethnic group, one gender, or any other --
>
> THE DEFENDANT: I'm from Ward Seven and I'm from Ward Eight. You can clearly see none of those jurors --
>
> THE COURT: From --
>
> THE DEFENDANT: -- from either.
>
> THE COURT: I know that you are not interrupting

me, right?

THE DEFENDANT: I was just --

THE COURT: Are you?

THE DEFENDANT: I apologize.

THE COURT: All right. So as I was saying that there's no indication that there was any policy or procedure that was employed by this Court that resulted in a systematic exclusion or underrepresentation of any particular group. And so for those reasons, I have denied that motion. It's preserved for the record. All right?"

(TRII: 81-82) (emphasis added)

On December 12, 2023, after the jury sent a note indicating that it had reached a verdict, Defense counsel once again raised the issue of the jury:

"MR. BURRELL: During voir dire, defense had an objection concerning the cross section of the panel that was brought in. And I just wanted to put on the record that ultimately, from at least what I have seen, we ultimately ended up with a jury of one African American.

THE COURT: How many Asian people; white people; Hispanic people and so forth? Can you put that on the record?

MR. BURRELL: I think two Asian, and I believe the remaining were white people. I have to look at my notes to see the makeup of the gender.

THE COURT: OK. That is on the record."

(TRV: 65-66) (emphasis added)

The Evidence

The Government's Case

Christopher Reyes had worked for three years in the pediatric intensive care unit Johns Hopkins Hospital in Baltimore. He had been married to **Manuel Cosme** for five years and the two have lived together for about seven years in Washington D.C. Cosme confirmed their marriage and that he worked as an accountant. In October 2020 Mr. Reyes's nephew Fabian, 15 years old at the time of trial and living in El Paso, Texas, visited Washington D.C. Reyes had gone to Texas for his grandmother's funeral, visited his sister there, and returned with her son Fabian to D.C. He wished to give the young man a break from family matters and travel was possible because Fabian was attending school remotely during the COVID pandemic. They were doing tourist activities in DC most afternoons after Fabian completed his schoolwork. (TRIII: 95-99, 126)[2]

[2] Citations are to the transcript of the trial conducted on December 5, 2023, with pre-trial matters (TRI) and jury selection (TRII); December 6, the trial and witness testimony (TRIII); December

On October 6, 2020, Mr. Reyes worked from home and helped Fabian with his schoolwork. The youngster said he wanted to ride the underground sections of the D.C. Metro subway. The three of them, Reyes, Cosme, and Fabian, planned to start at the Convention Center by taking the Yellow and Green lines to Fort Totten, where they would switch to the Red line and return to Union Station, then walk to the U.S. Capitol. They followed their plan and took the subway to Fort Totten, where they walked to the Red line platform to head back to Union Station. The three of them were talking about the Metro and taking selfies when a stranger approached. (TRIII: 99-102, 126-28) Neither Reyes nor Cosme had never met this person before and had not seen him since that date. (TRIII: 126, 133)

The stranger asked Reyes if he was gay, to which Reyes responded yes. The person then asked if the young man was Reyes's child, and for simplicity Reyes replied yes. Reyes, Cosme, and Fabian tried to turn away from this person as he began asking questions of Fabian: "Do you like girls? Are these guys touching you?" The man repeated these questions a few times. Reyes put his arm around Fabian to walk toward the other end of the platform, but the man followed and badgered them. He asked Fabian several times, "Do you want to come with me?" "I'll get you away from these faggots." The man blocked Reyes and Fabian from

11, further trial testimony (TRIV); and December 12, jury deliberations (TRV). Sentencing was on December 13, 2023 (TRVI).

taking the escalator down the platform. Suddenly he punched Reyes with a closed fist on the right side of Ray's face near his jaw and ear. Reyes was stunned. Fabian was still standing next to him as people gathered around. (TRIII: 103-107, 129-31)

The stranger said to an older woman, "these guys are fucking this little boy." Reyes responded, "We don't know what you're talking about." The man suddenly punched Reyes in the face again in the same place, causing Reyes to drop his cell phone onto the train tracks. Reyes, Cosme, and Fabian tried four more times to walk off the platform but the man prevented them from leaving. (TRIII: 107) A woman dressed in nurse's scrubs approached to talk to Fabian and reassure him. The male stranger then hit Reyes a third time on the right side of his face.

Bystanders intervened to put distance between the man and Reyes's group. Reyes thought the incident lasted about 10 to 15 minutes, until the stranger got on another train and departed. In the meantime, Cosme had taken the escalator down from the platform to get to the station manager and he called 911. Fabian was frightened by this incident and he turned to Reyes to make sure Reyes was alright. (TRIII: 107-08, 131-33) Reyes suffered swelling and pain on the right side of his face and within a day or two was evaluated at the emergency room at the hospital where he works in Baltimore. He suffered the effects for about two months. (TRIII: 119-20)

The government offered into evidence a video from the surveillance camera at the Fort Totten metro station and two still frames from the video. (Government Exhibits 1, 2, and 3) Mr. Reyes identified himself, Cosme, and Fabian on the video, and as it was played to the jury Reyes repeated his narrative of his testimony.

Neither Reyes nor Cosme was able to recognize the assailant from that day to make an identification in the courtroom. (TRIII: 115) As a result, the trial judge struck Reyes's use of appellant's name ("Mr. Brown") and instructed the jury not to consider that testimony. Mr. Reyes testified, referring to the two still photos (Government Exhibits 2 and 3), that the man wearing a red bandana was the person who had struck him. (TRIII: 109-19) Reyes also testified that the police had not used a photo array nor a lineup; when asked if he "ever had to identify a suspect before," Reyes replied that he had done so "[a] long time ago." (TRIII: 123-24)

Jason Dixon had been an officer for the Metro Transit Police for 18 years. On October 6, 2020, at about 6:15 PM, he responded to a call at the Brookland Metro station in Washington D.C. There he placed under arrest the Appellant, Kevin Brown, whom he identified in court. The officer noted that the man he had arrested had a beard, which not as full then as it was at trial. (TRIV: 13-14, 47)

During the October 6 events Officer Dixon received a radio run from his dispatcher about an "assault in progress" at the Fort Totten station. The officer and

his partner went to Brookland instead of Fort Totten, because the dispatcher had told them that the "subject" had boarded a Red line train in the direction of Shady Grove and that operators would hold the train at the Brookland station. That station is one stop away from Fort Totten on the Red line. (TRIV: 19-20)

When he and his partner arrived at Brookland, the officers went to the "bus bay" side of the station and parked their car in front of the station near the escalator and steps. At the escalator the dispatcher told them that the "subject" was coming up the steps. The officer had received a description of the assailant as a black male with dreadlocks, wearing dark clothes and blue jeans. According to Officer Dixon, the dispatcher was able to follow this man on camera, so the officer was getting information in real time about the person's movements at the Brookland station. (TRIV: 21-24) It had taken about five minutes from when the officers had received the radio run until they saw the Appellant at the top of the escalator. They expected him there because the dispatcher told them that the suspect was riding up the escalator. Appellant was the only person "fitting that description" who was leaving the Brookland station. (TRIV: 53)

When the officers approached Appellant, they identified themselves and said that they wanted to talk to him. Officer Dixon took a few steps toward Appellant, who began to run toward a grassy area and the wall separating the train tracks from the bus bay. The officers chased him and eventually arrested him. Officer Dixon

was able to have a good view of the suspect's facial features, since he was two feet or closer to the suspect. (TRIV: 24-26, 40, 52)

The government introduced a series of video exhibits from the Brookland station cameras, which showed multiple views of the station. (Government's Exhibits 5 and 5A, 6, 6A, and 6B) When the video was played for the jury, Officer Dixon described the scenes it depicted. Among these were video of Appellant at the top of the escalator. (TRIV: 27-37)

The officer twisted his knee during this chase and arrest, which required hospital treatment. As a result, Officer Dixon left the arrest scene and did not identify the person he had confronted and chased at the Brookland station. The officer did not search the subject or book him and was not present for those steps. Nor did the person identify himself to the officer as Kevin Brown. (TRIV: 41-42, 51-52) Officer Dixon's knowledge of Appellant's name evidently came only from his review of police "paperwork" in preparation for trial. He conceded that he could not recognize Appellant's face on the video surveillance tapes. (TRIV: 47-48, 52)

The Defense Case

The defense did not present any evidence.

ARGUMENT

I.

THE TRIAL JUDGE VIOLATED APPELLANT BROWN'S STATUTORY AND CONSTITUTIONAL RIGHT TO A JURY OF HIS PEERS BY DENYING DEFENSE COUNSEL'S REQUEST FOR JURY DATA TO SUPPORT HIS CONTENTION THAT APPELLANT'S JURY PANEL DID NOT REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY AND BY REQUIRING THAT COUNSEL MAKE A "PRIMA FACIE" SHOWING OF INTENTIONAL OR SYSTEMATIC DISCRIMINATION BASED ON RACE OR ETHNICITY. APPELLANT'S CASE MUST BE REMANDED TO THE TRIAL COURT TO PERMIT DISCOVERY UNDER THE DCJSA.

The court below deprived Appellant of his 5th and 6th Amendment, and statutory, right to an impartial jury drawn from a fair cross section of the community, by imposing onerous and disallowed requirements—namely, a prima facie showing— on defense counsel's efforts to access jury system information to establish that the jury panel brought into the courtroom was impermissibly racially unbalanced. Appellant's case must be remanded for defense counsel to be given access to Superior Court jury data, so that he may move for a hearing under D.C. Code §11-1910(a) to prove a Constitutional violation.

When Defense Counsel observed that only three of the 54 people in the jury venire were apparently African American, he made an objection to Judge Park before individual voir dire began. Counsel renewed his objection after 14 jurors were seated in the box before peremptory strikes, noting the "substantial underrepresentation" of African Americans. Because he lacked "documentation" of

the "jury selection process," counsel moved to strike the entire panel. (TRII: 24-25; 74) The judge denied this motion on the ground that counsel " has made no showing that this underrepresentation is due to any systematic exclusion of the group from the jury selection process." (TRII: 75) When counsel asked to obtain "appropriate records" so he could review them overnight and make his arguments the next day, the judge denied this request as well. The judge again stated that "there is no prima facie showing of a systematic exclusion based on some sort of policy within the Superior Court[.]" (TRII: 76-77) Given that established law does not require a litigant to make a prima facie showing of illegal discrimination, the judge's ruling was error. This Court reviews such an error *de novo. Israel v. United States,* 109 A.3d 594, 602 n. 10 (D.C. 2014), *citing United States v. Orange,* 447 F.3d 792, 797 (10th Cir. 2006).

The D.C Jury System Act ("DCJSA"), found in section 11-1901, et. seq. of the D.C. Code, proclaims the policy that "all litigants entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the residents of the District of Columbia." Section 11-1910 provides in subsection (a):

> A party may challenge the composition of a jury by a motion for appropriate relief. A challenge shall be brought and decided before any individual juror is examined, unless the Court orders otherwise. The motion shall be in writing, supported by affidavit, and shall specify the facts constituting the grounds for the challenge. If the Court so determines, the motion may be decided on the basis of the affidavits

> filed with the challenge. If the Court orders trial of the challenge, witnesses may be examined on oath by the Court and may be so examined by either party.

D.C. Code §11-1910 (a)

Subsection (b) of this statute provides that where a court determines that there has been "a substantial failure to comply with this chapter" it shall, *inter alia*, "stay the proceedings pending the selection of a jury in conformity with this chapter." Subsection (c) provides in part:

> The procedures prescribed by this section are the exclusive means by which a person accused of a crime . . . may challenge a jury on the ground that the jury was not selected in conformity with this chapter. Nothing in this section shall preclude any person from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin, economic status, marital status, age, or physical handicap in the selection of individuals for service on grand or petit juries.

D.C. Code §11-1910 (c)

Upon seeing that the panel contained only three African Americans out of 54 viniremen and women, defense counsel immediately made a motion to obtain another panel and, when that was denied, moved to gain access to Superior Court jury data so he could renew his motion the following day. Given that the trial was underway, and counsel had just observed a jury panel that flashed a red light that it may have been the product of an unconstitutional selection system, counsel's motion to examine data should have been granted. Counsel would then have been in position

to comply with the statutory requirement for a motion in writing and with affidavits. Moreover, following the trial judge's comment about ongoing litigation brought by the D.C. Public Defender Service that the judge said involved other cases, defense counsel would have consulted with PDS attorneys and possibly acquired more information to present in a motion to Judge Park. Counsel also might have filed a motion to join the ongoing litigation, and possibly forestalled his trial before this jury drawn from such a "racially" unbalanced panel.

This Court's *en banc* decision in *Gause v. United States,* 6 A.3d 1247 (D.C. 2010), holds that the DCJSA does not require a defendant to make a "predicate or threshold showing" to gain access to Superior Court jury records, as provided in this statute. This precedent clearly demonstrates that the trial court below, in imposing what it termed a prima facie showing requirement on Appellant—identical to the kind of predicate or threshold showing disallowed in *Gause*—committed a serious legal error. In *Gause* the defendants' counsels made a pre-trial motion and request for discovery, pursuant to DCJSA, of jury selection records, which that statute requires Superior Court to maintain. *Id.* at 1249. The trial judge denied that motion, including counsel's request for discovery, "based upon his finding that [defendant] had failed to establish a *prima facie* case" that the Superior Court's jury selection system violated the Fifth and Sixth Amendments and the DCJSA. *Id.* at 1250.

The *en banc* decision in *Gause* explained that a defendant may inspect "certain materials that are used 'in connection with the jury selection process' without a threshold showing that there is reason to believe such discovery well ultimately substantiate a statutory or constitutional violation." *Id.* at 1257. "The only qualification is that the litigant's request must be 'in connection with the preparation or presentation' of such a motion. D.C. Code §11-1914(b)." *Id.* The Court cautioned trial judges not to undermine "the purpose of this statute by requiring proof of a 'substantial failure to comply with' the DCJSA even before litigants have an opportunity to inspect the records that might ultimately support such a finding." *Id.*

This Court therefore remanded the case of the defendants in *Gause* for the trial court to permit them to access relevant records of the Superior Court's jury selection process. Either defendant would then be free to file a motion under D.C. Code §11-1910 challenging the jury selection procedures that were in effect at the time of their trial. The trial court would then hear and decide the matter, and if it determined that "there has been a substantial failure to comply" with the DCJSA, under DC Code §11-1910(b), "it shall then grant a motion for a new trial." In the meantime, their convictions would stand. *Id.* at 1258.

Precedent of this Court also sets out the considerations for counsel and a trial court to collect and evaluate evidence, and subject it to articulated standards, when

a party has made an appropriate motion under the DCJSA. Either on affidavits or following an evidentiary hearing, the trial judge may require more than statistical evidence of Appellant for him to show that there was systematic exclusion of African Americans in the jury selection process. This Court requires that a defendant who alleges a violation of the 6th Amendment's fair cross section requirement bears the burden of showing:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664 (1979).

Israel, supra, 109 A.3d at 603. Looking at Supreme Court precedent and federal cases, this Court also observed that "the fair-cross-section principle must have much leeway in application," and "neither *Duren* nor any other decision of the Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools [.]" *Id.* The *Israel* Court continued:

> We think it plain, however, that a showing of constitutionally significant underrepresentation of a distinct group in either the Master Jury Wheel or the venires that were composed during a certain period can satisfy the second Duren prong. Further, a jury-selection mechanism that systematically operates to exclude a distinctive group from venires that are drawn from a representative master jury wheel would violate the Sixth Amendment guarantee no less than a system under which a distinctive group is systematically excluded from the master jury wheel.

Israel, supra, 109 A.3d at 603 (emphasis added).

In *Israel*, this Court rejected a challenge to the underrepresentation of African Americans on petit juries in D.C. Superior Court, because the appellants had failed to show at a hearing before a Superior Court judge that the low numbers—and crucial second factor under *Duren*—were the result of "systematic exclusion of African Americans in the jury-selection process." *Id.* at 603. This Court, relying on its own precedents, noted that "'a statistical showing alone, without some analysis of the particular system involved, is [in]sufficient to prove systematic exclusion.' *Diggs v. United States*, 906 A.2d 290, 297–98 (D.C. 2006) (quoting *Obregon*, 423 A.2d at 206) (rejecting argument that the third *Duren* prong was satisfied 'by merely showing that a high comparative disparity existed over a long period of time and that the underrepresentation probably did not happen by chance')." *Id.* at 604.

The *Israel* Court concluded that, despite statistical evidence of the "less-than-satisfactory representation of African Americans on jury venires over the period studied:"

> no evidence was presented to show that this was the result of any policy or practice that could be deemed to constitute systematic exclusion of African Americans from jury service within the meaning of *Duren* (or, analogous to the facts of *Duren*, [footnote omitted] a system-sanctioned opportunity for African Americans to exclude themselves from jury service).

Israel, supra, 109 A.3d at 604. The Court concluded that the underrepresentation was due to external factors, such as undeliverable mail or decisions of individuals

not to respond to summonses or appear for service, and not to systematic exclusion in the jury selection process. *Id.* at 705

Thus, Appellant may well face challenges in prevailing at a hearing in Superior Court. As the trial judge below emphasized, proof of systematic racial exclusion, whether intentional or as the result of the processes that bring jury panels into the courtroom, is required both by the U.S. Supreme Court in *Duren* and by this Court's precedents. *See, e.g., Diggs v. United States*, 906 A.2d 290, 299 (D.C. 2006) (rejecting challenge to heavily White venires in Superior Court on Mondays, due to earlier hardship deferrals, because challengers presented insufficient evidence that the racial disparity was systematic rather than random); *Obregon v. United States*, 423 A.2d 200, 205-08 (D.C. 1980) (rejecting challenge to Superior Court jury panels for relatively low percentage of Hispanic residents, because of insufficient evidence that challengers made out a prima facie case of systematic underrepresentation).

The trial court, however, conflated these standards for prevailing at a hearing with the minimal requirement for a defendant's demand for access under D.C. Code §11-1901, et seq., to Superior Court's jury records. Here, Appellant's counsel requested access so that he could potentially prepare a motion under §11-1910 to substantiate Appellant's possible argument that Superior Court petit juries, including at Appellant's own jury trial, were not constituted from a fair cross-section of the community in violation of his rights. The trial judge's insistence on a prima facie

showing was identical to the requirement of a "threshold showing" that this Court rejected in *Gause.*

Moreover, Judge Park's insistence that, 1) counsel should have made his motion long before the start of trial, and 2) he already have proof of intentional or system-wide racial discrimination, imposed requirements on Appellant that have no basis in law. The judge would place the cart before the horse, contravening the very purpose of the statute, as this Court remarked in *Gause*, *see* 6 A.3d at 1256. "[A] threshold requirement places the burden on the litigant to prove—or prove to a lesser degree—the merits of his or her constitutional claims in order to gain access to the nonpublic and confidential information necessary to prove the merits of his or her claim." *Id.* Judge Park's requirements were thus improper and unlawful.

The proper remedy is for this Court to remand Appellant's case to the trial judge to give Appellant's counsel access to the records he needs to prepare a possible motion, which may lead to a hearing on the substance of his argument about racial imbalance in the jury venire. Certainly, the presence of a mere three African Americans out of a venire of 54 people properly triggered counsel's justified concern that his client, Appellant Brown, may have been deprived of his Fifth and Sixth Amendment rights and rights under the DCJSA. Appellant's trial counsel has the right to access the Superior Court's jury data to give him a chance to show that this unbalanced panel deprived Appellant of his constitutional and statutory rights.

II.

THE FAILURES OF THE COMPLAINANT AND HIS HUSBAND TO IDENTIFY APPELLANT AS THE ASSAILANT REQUIRES APPELLANT'S CONVICTION TO BE REVERSED ON GROUNDS OF INSUFFICIENT EVIDENCE THAT APPELLANT WAS INVOLVED IN THE ASSAULT. MOREOVER, THE POLICE OFFICER WHO ARRESTED APPELLANT TESTIFIED THAT HE WAS NOT PRESENT WHEN AND WHERE THE CRIME WAS COMMITTED, HE LEFT FOR MEDICAL TREATMENT BEFORE SEARCHING, PROCESSING, AND IDENTITYING THE ARRESTEE, AND CONCEDED THAT VIDEO SURVEILLANCE FROM THE METRO STATION WHERE THE ASSAULT OCCURRED WAS NOT CLEAR ENOUGH TO LINK THE ASSAILANT THERE TO APPELLANT IN COURT.

There was no witness at Appellant's trial who identified him as the assailant who berated and struck Mr. Reyes in the face. Neither Mr. Reyes nor his testifying husband, Mr. Cosme, were able to recognize and identify Appellant in court. Officer Dixon merely identified Appellant as the man he had arrested, testifying that he had a good view of Appellant's face when grappling with him to subdue him and place him under arrest. Officer Dixon, however, did not witness the assault and made his arrest at a different Metro station and five or more minutes after the assault occurred. Without any testimony identifying Appellant as the person who engaged in criminal conduct against Mr. Reyes, Appellant's conviction rests upon insufficient evidence and must be reversed.

Trial counsel for Mr. Brown preserved the "full range of challenges" to the sufficiency of the evidence by entering a general plea of not guilty and through his motions for a judgment of acquittal. (TRIV: 54-55, 62) *See Carrell v. United States,*

165 A.3d 314, 326 (D.C. 2017, *en banc*). This Court's review of sufficiency claims is *de novo. Hughes v. United States*, 150 A.3d 289, 305 (D.C. 2016). A sufficiency challenge encompasses challenges to the requisite elements of the crime. *See, e.g., Sutton v. United States*, 988 A.2d 478, 482 (D.C. 2010). "This Court . . . reviews de novo the elements of the crime which the prosecution must prove and against which sufficiency of the evidence is assessed." *Id.* In a review for sufficiency of the evidence this Court considers the evidence in the light most favorable to the government, and draws all inferences in favor of the prosecution, provided they are supported under any view of the evidence. *See, e.g., Vines v. United States*, 70 A.3d 1170 (D.C. 2013). On appeal, [this Court] will not disturb a conviction on grounds of insufficient evidence unless "the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt." *Ashby v. United States*, 199 A.3d 634, 663 (D.C. 2019) (internal citations omitted).

It may well be that "cases in which reversals are required because the identification evidence was insufficient are `very rare.'" *United States v. Bamiduro*, 718 A.2d 547, 550 (D.C. 1998), *citing Gethers v. United States*, 684 A.2d 1266, 1275 (D.C.1996) (*quoting In re R.H.M.*, 630 A.2d 705, 706 & n. 1 (D.C. 1993)). And, to be sure, "the identification testimony of a single eyewitness is sufficient to sustain a conviction." *In re R.H.M., supra*, 630 A.2d at 708. The District's jurisprudence, however, has seen such cases where this Court has reversed because

of the insufficiency of the identification. This is especially so when, as in Appellant's case, there is no in-court identification made at all.

In *Tornero v. United States,* 161 A.3d 675 (D.C. 2017), where the victim never made an out of court or identification of the defendant and there was no physical evidence tying the defendant to the crime, this Court concluded that "the evidence was insufficient for . . . any reasonable juror to find beyond a reasonable doubt that it was the appellant who kidnapped and sexually assaulted R.G." and reversed the defendant's convictions. *Id.* at 686. The *Tornero* Court heavily relied upon *In re R.H.M., supra,* 630 A.2d at 706–09, where the sole witness did not make an in-court identification but only described an inadequate photo array viewed months afterward. As a result, this Court reversed the conviction in the absence of other evidence linking the defendant to the fire-bombing that had been charged. *See also Beatty v. U.S.*, 544 A.2d 699, 703 (D.C. 1988) (reversal where no witness made an in-court identification of defendant); *Crawley v. United States*, 320 A.2d 309, 311 (D.C. 1974) (reversal where a show up identification, but no in-court identification and no other evidence connecting defendant to the crime).

Crawley sets out a good test for judging when cases with such weak identification evidence may go to the jury:

> [A trial] judge has the power to refuse to permit a criminal case to go to the jury even though the single eye witness testifies in positive terms as to identity. . . . In deciding whether to permit a criminal case to go to the jury, where identification rests upon the testimony of one

> witness, the [trial] judge ought to consider with respect to identification testimony the lapse of time between the occurrence of the crime and the first confrontation, the opportunity during the crime to identify . . . the reasons, if any, for failure to conduct a line-up or use similar techniques short of line-up, and the [trial] judge's own appraisal of the capacity of the identifying witness to observe and remember facial and other features. In short, the [trial] judge should concern himself as to whether the totality of circumstances "give[s] rise to a very substantial likelihood of irreparable misidentification." [Footnote and citations omitted.]

Crawley, *supra*, 320 A.2d at 311-12.

In Appellant's case, there were good reasons for Judge Park to prevent the case from going to the jury, because of the weakness of the identification. There was little other evidence at the trial identifying Appellant as Mr. Reyes's assailant. The only description of the assailant came when Mr. Reyes looked at several still frames from the Metro video (Government Exhibits 2 and 3) and said that the person with a red bandana was the man who had hit him. Nor does Officer Dixon's testimony amount to either identification testimony at all or to legally sufficient evidence tying Appellant to the crime.

According to Officer Dixon, he simply followed the instructions from a dispatcher within the Metro system who indicated that the "subject" had boarded a Red line train at Fort Totten station in the direction of Shady Grove and that Metro would hold the train one stop away at the Brookland station. The dispatcher told the officer, who had meanwhile arrived at Brookland, that the "subject" was coming up the steps of the escalator. Based on the dispatcher's statements, Officer Dixon was

looking for a black male with dreadlocks, wearing dark clothes and blue jeans whom he believed the dispatcher was following on the video cameras. (TRIV: 19-23)

Certainly, the dispatcher could have testified at trial about his live observations of the criminal activity and the appearance of the perpetrator through a remote set of cameras, but he did not. Nor was there any testimony that Mr. Reyes or Mr. Cosme made an identification by "show up" immediately after Appellant was arrested, which would have been confirmatory evidence that Officer Dixon had detained the correct person. The Government failed to explain why there was no show-up after Appellant was detained. Indeed, the only evidence at all linking Appellant to this assault was his presence on a train that came from Fort Totten station only a few minutes after someone (Mr. Cosme? the station manager?) had called a police dispatcher and evidently told the dispatcher to look on his cameras to track a Black male on the Red line train that had just departed Fort Totten.

In sum, the identification evidence in this trial was lacking in quality, quantity, and reliability. The verdict seems to have followed only from jurors watching a set of videos showing a Black man abusing Metro passengers. The jury made an unjustified leap convicting a Black man (Appellant) who, according to the arresting officer, simply matched the dispatcher's description of a man being tracked by remote video at both the station where the assault had occurred and the next station on the line. Neither can undersigned counsel nor this Court view the same set of

videos and make an independent judgment on whether the distant and grainy images of the assailant on the videos at all resemble Appellant—we have no image of how Appellant appeared at trial. With the jury composed of apparently one African American only (*see* Point I *supra*), this case presents a "very substantial likelihood of irreparable misidentification." Mr. Bown's conviction should be reversed.

CONCLUSION

For all the foregoing reasons, Appellant Kevin Michael Brown respectfully asks this Honorable Court to remand his case, convicting him on one count of simple assault with a bias enhancement, to Superior Court for trial counsel to research the lack of a community cross-section in his (and other contemporary) jury venires or to reverse his conviction for lack of sufficient evidence of identification.

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I certify that on July 9, 2024, I caused this Court's e-filing system to send a copy of the foregoing *Brief for Appellant* in the case of *Kevin Michael Brown v. United States*, Appeal Nos. 24-CM-0020 to the United *States* Attorney's email box and/ or the email box of AUSA Chrisellen Kolb, Esq., Chief of the Appellate Office.

/S/

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Russell A. Bikoff