

No. 08-1402

In The
Supreme Court of the United States

MARY BERGHUIS
Petitioner,

v.

DIAPOLIS SMITH
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

REPLY BRIEF

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INTRODUCTION

The Michigan Supreme Court did not unreasonably apply clearly established precedent in applying the fair-cross-section test of *Duren*. The disparities at issue – a 1.28% absolute disparity or an 18% comparative disparity – are not constitutionally significant. Even if measured as a 34% comparative disparity, no other federal court in habeas corpus or on direct review has found such a disparity to violate *Duren* where the absolute disparity was so small. In allowing for excuses for hardships and in allowing local courts to select their jurors first, there was no systematic exclusion. *Duren* does not require the conclusion that any underrepresentation that arose was inherent in the juror-selection process.

Smith's claim that the small disparities at issue from these neutral processes would violate the Constitution calls into question scores of decisions by the lower courts around the country. These courts concluded that similar small disparities did not qualify as unconstitutional underrepresentation or determined that the mechanism used by the government was facially neutral and that the underrepresentation arose from the independent actions of the citizens. A decision that requires the State to counter any persistent small disparity would effectively mandate the identification by race and ethnicity of prospective jurors, and then the matching of their relevant percentages. It would impose a *de facto* quota system.

In this reply brief, the State will address in order the arguments raised in Smith's brief.

First, Smith contends that the question whether there was underrepresentation is not "genuinely material" to this case because, he asserts, the Michigan Supreme Court issued no holding that there was no underrepresentation. Smith's Brief, p. 17. The Michigan Supreme Court effectively provided an alternative analysis – it specifically addressed the merits of the issue and ruled that there was no unconstitutional underrepresentation. But this Court must still decide this question even if the State court did not rely on this basis. The federal courts would still have to determine whether Smith was being held in violation of his constitutional rights. The analysis would be de novo on the merits if there was no ruling.

Second, in his next two headings, Smith argues that the absolute-disparity test does not validly measure the underrepresentation of small distinct groups, and argues in favor of the comparative-disparity test. But Smith fails to acknowledge that the comparative-disparity test exaggerates the significance of disparities for small distinct groups. And the comparative-disparity test does not address the fact that small absolute disparities – as here – will not likely affect the petit jury if the petit jury is selected at random. The Michigan Supreme Court was not unreasonable in rejecting the claim. In fact, even if reviewed de novo on its merits, the jury pool was adequately representative of the community to protect Smith's right to a fair jury trial. The jury pool was not composed of only special segments of the community.

Third, Smith asserts that a system that produces persistent underrepresentation or one that results in disparities without correcting for the social

and economic reasons that underlie the reasons for the underrepresentation is a system that has systematically excluded the distinct group. *Duren* does not require this conclusion. Rather, the federal courts have rejected this approach on direct review because it suggests that the federal reliance on voter registration lists for selecting prospective jurors might be constitutionally infirm if it results in disparities. Such neutral systems are not improper. The Michigan Supreme Court did not unreasonably apply *Duren*. Moreover, any underrepresentation that resulted from the juror assignment to the local courts first was constitutionally insignificant (3% comparative). Smith has not rebutted this point.

Fourth, Smith claims that in habeas corpus review the federal courts may review de novo the question whether the jury was drawn from a fair cross section under the Sixth Amendment. This is not the standard. Instead, the State court decision must be contrary to or an unreasonable application of clearly established Supreme Court precedent. Smith mistakenly cites the concurring part of Justice Stevens's opinion in *Williams v. Taylor*. Smith's Brief, p. 55. But Justice O'Connor's analysis that a petitioner must establish that the State decision was more than just incorrect, that it must be objectively erroneous in order to merit relief is the controlling law from this Court.

ARGUMENT

I. This Court should resolve the question whether there was an unconstitutional underrepresentation under the second prong of *Duren*.

Smith contends that the Michigan Supreme Court did not issue a holding on whether there was an unconstitutional underrepresentation of a distinct group here and therefore this issue is not "genuinely material" to this case. See Smith's Brief, p. 17. Although the State contends that the Michigan Supreme Court *did* rule on the second prong of *Duren* and that this decision is entitled to deference under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, even if this Court disagrees, the question whether Smith has satisfied the second prong of *Duren* is still at issue.

The petitioner has the burden of establishing a constitutional violation. Under 28 U.S.C. § 2254(a), a federal court may entertain a claim that a person is held in custody pursuant to a State court judgment on the ground that he is being held "in violation of the Constitution or laws or treaties of the United States." The burden is on the person in custody to demonstrate that he is entitled to habeas relief.¹

In adopting a three-part test for the fair-cross-section standard, this Court noted that it was the defendant's burden to prove each of the three elements.² The defendant must prove each of the

¹ See *Engle v. Isaac*, 456 U.S. 107, 134-135 (1982).

² *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

elements in order to warrant relief. In a habeas corpus proceeding, where there is no decision from the State court on one of the elements of a test, the federal court is able to review that element of the test de novo on the merits without the intervening AEDPA standard of deference.³

The issue at stake regarding whether the Michigan Supreme Court ruled against Smith under the second prong of *Duren* is therefore only one of deference. If the Michigan Supreme Court ruled on the merits that there was no unconstitutional underrepresentation, then this decision is entitled to AEDPA deference under 28 U.S.C. § 2254(d). Smith would have to show that the State court decision was either contrary to or an unreasonable application of clearly established Supreme Court precedent. Otherwise, the question whether there was a violation of the second prong of *Duren* is a question that Smith must prove de novo on the merits to show that he is entitled to habeas relief.

Smith also suggests that the comment by the State's counsel at oral argument in the Sixth Circuit supports his contention. The Sixth Circuit did not, however, rely on any concession by the State in its decision and therefore this comment was legally irrelevant. The reliance on spontaneous comments of

³ See *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.").

counsel at oral argument is disfavored by this Court in any event.⁴

In claiming that the Michigan Supreme Court issued no holding on the second prong, Smith argues that this case is not an "appropriate vehicle" to adopt a new test for measuring underrepresentation. Smith's Brief, p. 18. This argument misapprehends the nature of review in habeas corpus cases. If the Michigan Supreme Court's ruling on the second prong that there was no violation of *Duren* is entitled to deference under AEDPA, it would be unnecessary for this Court to further develop the standards of the fair-cross-section test. This Court could reverse the Sixth Circuit without further developing the law in this area. Ironically, if this Court accepts Smith's claim that there was no merits decision, the issue regarding the standard for measuring underrepresentation would then be squarely presented on the merits (unless the Court relied on the third prong of *Duren* in rejecting the Sixth Circuit decision).

Moreover, regarding the State court decision, Smith's contention that the Michigan Supreme Court did not rule against him on the second prong of *Duren* fails to recognize that this was effectively an alternative holding. The point is an unremarkable one that a State court decision would be entitled to deference on each of the grounds on which it based its decision. Smith relies on the fact that the Michigan Supreme Court indicated that it would give Smith "the

⁴ See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972) ("We are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument.").

benefit of the doubt on underrepresentation."⁵ But the Michigan Supreme Court made clear it did so only in order to reach the third prong and provide guidance to the bench and bar on that issue:

[D]efendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests. Nevertheless, rather than leaving the possibility of systematic exclusion unreviewed solely on the basis of defendant's failure to establish underrepresentation, we give the benefit of the doubt on underrepresentation and proceed to the third prong of the *Duren* analysis.⁶

In substance, this is an alternative holding.

Indeed, even the amicus curiae NAACP Legal Defense & Educational Fund in support of Smith agrees with the State on this point:

Although this ruling is not a model of clarity, AEDPA controls here because the Michigan Supreme Court held that Mr. Smith failed to meet his prima facie burden under *Duren's* second prong.

[Amicus Brief for NAACP Legal Defense & Educational Fund, p. 25.]

⁵ *People v. Smith*, 463 Mich. 199; 615 N.W.2d 1, 3 (2000); Pet. App. 147a.

⁶ *People v. Smith*, 615 N.W.2d at 3 (footnote omitted); Pet. App. 146a-147a.

This is the proper conclusion, particularly where the Michigan Supreme Court reiterated the same legal point in rejecting Smith's claim based on statistics under the third prong of *Duren*.⁷ The point was not obiter dictum.

⁷ See *People v. Smith*, 615 N.W.2d at 4 ("Here . . . the disparities over that time fell far short of those in *Duren*. Defendant did not demonstrate unfair and unreasonable underrepresentation under the disparity analyses. We therefore conclude that defendant has not shown a systematic exclusion of African Americans for the Kent County Circuit Court jury pool."); Pet. App. 148a-149a.

II. The Michigan Supreme Court's ruling that there was no constitutionally significant underrepresentation of African Americans in the Kent County venires was not unreasonable.

In addressing the second prong of *Duren* in the second and third headings of his merits brief, Smith effectively provided a de novo merits analysis of the question and only in passing refers to the Michigan Supreme Court's decision as "unreasonable." Smith's Brief, p. 31. Smith does not contest the fact that all of the other federal circuits that have addressed a similar disparity have concluded that there is no unconstitutional underrepresentation. See State of Michigan's Merits Brief, Table on pp. 32-33.⁸ The point bears repeating that the Michigan Supreme Court's decision was not an unreasonable application of clearly established Supreme Court precedent on the second prong of *Duren* as evidenced by the fact that seven federal circuits rejected the same argument on direct review in examining similar statistical claims.

A. The Michigan Supreme Court's decision was not unreasonable.

As Smith's amici acknowledge, "[t]his Court has never required a single or exclusive method for evaluating a fair-cross-section claim," and the "[l]ower federal and state courts have adopted a range of statistical methods[.]" Amicus Brief, Social Scientists *et al*, p. 9. Also, this Court has not clearly established what results constitute

⁸ The State has reproduced this table as an attachment to this reply brief for the convenience of the Court. See p. 1A.

underrepresentation under these different methods. Accordingly, the Michigan Supreme Court's conclusion that a jury pool with a 1.28% absolute disparity and 18% comparative disparity was not unconstitutional underrepresentation did not unreasonably apply clearly established Supreme Court law.

Smith's analysis provides no guidance on what threshold would constitute a violation under either the absolute-disparity test or the comparative-disparity test. The disparity at issue here was 1.28% absolute and 18% comparative for the six-month time period in which the challenged-selection process was measured. J.A. 181a. For the specific month in which the jury trial was held, the comparative disparity was 34.8%, J.A. 181a; and, as noted by the amicus for the Social Scientists *et al*, the absolute disparity for the specific month at issue was 2.5%. See Amicus for Social Scientists *et al*, p. 13.⁹

If these kinds of small disparities are sufficient to establish a *prima facie* violation of the second prong of *Duren*, this conclusion calls into question the validity of precedent from the federal circuits that examined similar questions on direct review. Among the scores of cases that address the fair-cross-section test under the Sixth Amendment in the lower courts, Smith and the amici cannot cite to a single case with a similar absolute disparity or comparative disparity that served as a basis for a finding that there was a

⁹ The absolute disparity for this month is calculated by subtracting the percentage that Michael Stoline projected were present, 4.75% (7.5 African American projected jurors divided by 158 prospective jurors), from the percentage in the relevant population, 7.28%. See J.A. 121a, 181a.

prima facie showing of unconstitutional underrepresentation.¹⁰ The argument that this Court should adopt a "case-by-case" approach relying on both the absolute disparity and comparative disparity test, see Smith's Brief, p. 26, does not address the issue about what is a "fair and reasonable" representation of the community under *Duren*. The Michigan Supreme Court did as Smith suggests here, ruling "we adopt a case-by-case approach" noting each of the three methods of measuring representation.¹¹

In specifically arguing that the Michigan Supreme Court was unreasonable in its application of *Duren*, the amicus for the NAACP Legal Defense & Educational Fund argues that the State court should have recognized that it was unreasonable to apply the absolute-disparity test in evaluating a small distinct group. See NAACP Amicus, p. 26. But *Duren* did not specify a particular measure, nor is it clear that the absolute-disparity test is valueless for measuring disparities for small distinct groups. All the circuits evaluating similar disparities for distinct groups on direct review considered the absolute-disparity test

¹⁰ In this case, the Sixth Circuit relied on *United States v. Rogers*, 73 F.3d 774 (8th Cir. 1996) and *Ramseur v. Beyer*, 983 F.2d 1215 (3d Cir. 1992). *Smith v. Berghuis*, 543 F.3d 326, 338 (6th Cir. 2008); Pet. App. 21a. But these cases cited by the Sixth Circuit did not support its conclusion. *Rogers* held that there was no constitutional underrepresentation. See State's Merits Brief, p. 38. *Ramseur* also found there to be no unconstitutional underrepresentation. *Ramseur*, 983 F.3d at 1232, 1235 (the Third Circuit noted while a 40% comparative disparity was "borderline," the court concluded that "the evidence does not convincingly demonstrate that the representation of African-Americans on jury pools was unfair or unreasonable.").

¹¹ *People v. Smith*, 615 N.W.2d at 3; Pet. App. 146a.

even if acknowledging its limitations. See Attachment, p. 1A; State's Merits Brief, Table, pp. 32-33. Examining the actions of the federal courts is useful in evaluating the reasonableness of the State's decision.¹² They show that the Michigan Supreme Court's reliance on this test was not unreasonable here.

The NAACP amicus brief also argues that the Michigan Supreme Court was unreasonable for concluding that a 34.8% comparative disparity was not an unconstitutional underrepresentation. Like Smith, the NAACP amicus brief does not explain why under *Duren* it is proper to single out a single month's figure for evaluation. This Court did not examine only a single month in *Duren*. And, as already noted, there is nothing in *Duren* that would make clear that a 34.8% comparative disparity would be sufficient to establish a prima facie case.¹³ All the circuits have found such a disparity to be inadequate on direct review. See Attachment, p. 1A; State's Merits Brief, Table, pp. 32-33.

B. Even if reviewed on the merits, the venire here was adequately representative of the community.

Smith does not address the State's point that this Court need not adopt either the absolute disparity test, or the threshold of a 10% disparity, in order for the State to prevail. This is true whether the issue is reviewed under AEDPA or de novo on the merits. The prospective juror pool here was adequately representative of the community to safeguard the

¹² See *Price v. Vincent*, 538 U.S. 634, 643 (2003).

¹³ The comparative disparity in *Duren* was 73%.

purposes of the Sixth Amendment fair-cross section test. The mechanisms used by Kent County to draw in prospective jurors were neutral, did not result in significant disparities, and did not systematically exclude any distinct groups. There was nothing contrived or exclusive about the composition of the venires in Kent County during the time at issue.

The State has nonetheless urged this Court to adopt the absolute-disparity test and the 10% threshold in order to provide guidance to the bench and bar for future cases in habeas, or if this Court reviews the merits of the issue de novo.

The virtue of the absolute-disparity test is that it uniformly measures the disparity at issue for the distinct group, regardless of the size of the distinct group. Thus, the absolute-disparity test is better suited for Sixth Amendment analysis by serving the purposes of the Sixth Amendment fair-cross-section test. As noted by this Court in *Holland v. Illinois*, the traditional understanding of a fair jury is that it is assembled from a venire that is "drawn from a fair cross section of the community[.]"¹⁴ The right to an impartial jury must be protected from the government contriving an unrepresentative venire from which the petit jury is selected:

The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not

¹⁴ *Holland v. Illinois*, 493 U.S. 474, 480 (1990), quoting *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975).

demand), but an impartial one (which it does). Without that requirement, *the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition.*¹⁵

In brief, the fair-cross-section requirement ensures that the pool from which the petit jury is selected is not unfairly prejudiced against the defendant.

The representative character of the venire, of course, relates to the ultimate selection of the petit jury. This is the apparent reason that this Court limited the fair-cross-section test to "large, distinct groups" in *Taylor v. Louisiana*,¹⁶ because discrepancies for small distinct groups in the venire will not necessarily affect the actual composition of the petit jury as a matter of probability. The core Sixth Amendment value is the impartiality of the petit jury.

In this way, the absolute-disparity test is the proper measure for the representativeness of the venires because it uniformly captures information about the likelihood of a disparity affecting the actual composition of the petit jury. Assuming a random draw

¹⁵ *Holland*, 493 U.S. 480-481 (emphasis added). See also *Taylor*, 419 U.S. at 530 ("This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace[.]")

¹⁶ *Taylor*, 419 U.S. at 530. See also *Ballew v. Georgia*, 435 U.S. 223, 237 (1978) ("the opportunity for meaningful and appropriate representation does decrease with the size of the [petit jury] panels.").

of jurors for the petit jury, a 10% absolute disparity of a distinct group for a venire will mean that there is a 10% reduction in the members of that distinct group from the venire regardless of the size of the distinct group. Thus, it closely correlates to the likelihood that the disparity will affect the actual composition of the petit jury. By contrast, the comparative-disparity test only measures the likelihood that a distinct group will appear in the venire, and this percentage may bear little relationship to the likelihood that the distinct group will serve on the petit jury.

Smith did not effectively rebut the point that the comparative-disparity test exaggerates the effect of small disparities. In measuring the relative change for the particular distinct group, the comparative-disparity does not capture the likelihood that this change would affect the petit jury. As a consequence, it amplifies the significance of small variations for small distinct groups. For example, Smith's statistical expert, Michael Stoline, concluded here that there were four African Americans too few for the month's worth of prospective jurors, 7.5 as against 11.5 for the 158 prospective jurors. J.A. 121a, 181a. This small change yielded a 34.8% comparative disparity.

If this Court accepted 35% comparative disparity as the benchmark for a prima facie violation of the second prong of *Duren* for any particular month, then small variations would subject the State to fair-cross-section challenges. In specific, according to the 1990 census figures cited in this case, Kent County was comprised of 2.9% Latino-Americans, 1.1% Asian-Americans, and 0.6% Native Americans. Sixth Circuit Joint Appendix, p. 177 (1990 Census). And the State of

Michigan under Mich. Comp. Law § 600.1307a(b), like the United States Government under 28 U.S.C. § 1865(b)(2), (3), excludes from service those citizens who cannot understand or speak English. A single member of a distinct group who is excluded on this basis could trigger a violation. Relying on 158 prospective jurors for the month of trial, one would expect 4.6 Latino American, 1.7 Asian American, and 0.9 Native American prospective jurors. A reduction by two Latinos, one Asian American, or one Native American would constitute more than a 35% comparative disparity. Such a standard is unworkable.

The adoption of the standards being advanced by Smith and the amici would require the State of Michigan and all of its counties to fundamentally alter the way they select jurors to comply with this understanding of the fair-cross-section test. Each county would have to document the race, ethnicity, and sex of all of its prospective jurors and then ensure that the actual venires drawn correspond to the census figures for the distinct populations as modified to reflect the jury-eligible population. This would effectively eliminate or require the substantial modification of each step in the current process:

1. Select prospective juror names from the State's reliance on driver's licenses and State identifications; [J.A. 10a-11a]
2. Send out questionnaire to the prospective jurors by regular mail; [J.A. 12a, 29a]

3. Send second letter to the addresses for which it received no response; [J.A. 13a, 14a]
4. Eliminate the responses that claimed a statutory exemption, including an inability to understand English; [J.A. 15a] and
5. Send summons with a second questionnaire requesting personal history and allowing for excuses based on hardship. [J.A. 17a, 21a]

At each step, the neutral process might disparately affect small distinct groups differently, affecting by a few the numbers of prospective jurors drawn in. As a consequence, the State would be required to use a race-conscious method to identify the race and ethnicity of those qualified prospective jurors and ensure an identical representation of each distinct group, however small, to avoid a constitutional challenge.¹⁷ The State of Georgia has adopted a similar system to this, terming it one of "forced balancing."¹⁸ This Court

¹⁷ This process, of course, would have to comport with the Equal Protection Clause. The Sixth Circuit rejected as discriminatory against Latino Americans a plan in which the Eastern District of Michigan culled out one out of every five non-African Americans from the qualified jury wheel because of the underrepresentation of African Americans. *United States v. Ovalle*, 136 F.3d 1092, 1107 (6th Cir. 1998).

¹⁸ *Ramirez v. State*, 276 Ga. 158; 575 S.E.2d 462, 465 (2003). See also 6 W. LaFave, J. Israel, N. King & O. Kerr, *Criminal Procedure*, § 22.2(d), (3d 2007) ("[C]ounty officials in Georgia use census data to set quotas for various cognizable groups based on

did not require this process in *Duren*. This is precisely the reason why this Court has prudently limited the fair-cross-section requirement to "large" distinct groups.¹⁹ Such small disparities do not call into question the impartiality of the venire and do not implicate the interest of safeguarding a defendant's right to a fair trial.

C. Establishing 10% as a threshold under the absolute-disparity test for proving a violation under the second prong of Duren would constitute a reasonable rule.

Regarding the State's position that this Court should establish a threshold of 10% absolute disparity before a party can establish a prima facie showing of underrepresentation under *Duren*, the three arguments advanced by the State in its initial brief remain valid.

First, Smith and the amici have not cited a single case in which a lower court found a violation of the fair-cross-section requirement where the absolute

race, age and gender, and then rely on a computer to randomly select members of the jury wheel from within each group.").

¹⁹ *Taylor v. Louisiana*, 419 U.S. at 530.

disparity was less than 10%.²⁰ Thus, this standard reflects the reality of practice.²¹

Second, Smith and the amici concede that several circuits have relied on this measure. See State's Merits Brief, pp. 46-47 n. 66.²²

Third, and most importantly, the standard corresponds to the core value of the Sixth Amendment, which is to protect the impartiality of the jury. Smith contends that the threshold will provide no remedies for absolute disparities for small distinct groups. But a defendant will still be able to bring challenges against these disparities based on the Equal Protection Clause.²³ Moreover, a small absolute disparity will not significantly affect the ultimate composition of the petit jury. This case is a perfect example of that point.

²⁰ There are at least two cases in which this Court found a total exclusion of a distinct group that comprised less than 10% of the population to be a violation of the Equal Protection Clause. See *Vasquez v. Hillery*, 474 U.S. 254, 263-264, 267 n.2 (1986) (4.7%); *Norris v. Alabama*, 294 U.S. 587, 590, 599 (1935) (2688 persons in population of 36,881 or 7.2%). The total exclusion demonstrated an intentional exclusion of African Americans.

²¹ See 6 LaFave *et al*, Criminal Procedure, § 22.2(d), p. 60 ("An absolute disparity of 10% . . . is typically sufficient to show underrepresentation.").

²² In addition to the Fifth, Seventh, and Eleventh Circuits cited, the Eighth Circuit has also relied on this standard. See *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981) ("This court has stated that in the absence of any evidence indicating an opportunity to discriminate in selection procedures, the 10% figure approved in [*Swain v. Alabama*, 380 U.S. 202 (1965)] is an appropriate standard for finding underrepresentation.").

²³ See n. 20 above.

A very small absolute disparity in the venire is not likely to affect the actual composition of the petit jury if the petit jury is randomly selected. That is true for the month at issue here. Smith's expert, Michael Stoline, explained that there were four fewer African Americans as projected from the census tract figures. J.A. 181a. This is a 2.5% absolute disparity. Applying these figures to Smith's specific venire of 60 prospective jurors (the number that the State trial court indicated it called, J.A. 7a), this was a loss of 1.5 jurors (60 multiplied by 0.0250). Since each prospective juror has only a one in five likelihood (20%) of being selected for the petit jury (60 prospective jurors for 12 slots), the loss of one or two jurors would not have likely affected the actual composition of the petit jury.

Of course, regardless whether this Court adopts the 10% threshold, a 1.28% absolute disparity would not satisfy the underrepresentation prong of *Duren*. The same is true if this Court adopts the comparative-disparity test. There was no violation here.

As long as the methods of selecting the venire were neutral and reasonable – as they were here – the fact that there are small disparities does not show that the venire has been contrived with "special segments"²⁴ or of prospective jurors "ill disposed" to defendants.²⁵ Smith was not deprived of an impartial jury.

²⁴ *Taylor v. Louisiana*, 419 U.S. at 530.

²⁵ *Holland v. Illinois*, 493 U.S. at 480.

III. The Michigan Supreme Court ruling that there was no systematic exclusion of African Americans was not unreasonable.

In Smith's brief, his primary claim is that the standard for determining whether there is "systematic exclusion" of a distinct group under *Duren* should be either that the underrepresentation occurs regularly ("persistent") or that the underrepresentation is produced by the system used to select prospective jurors. Smith's Brief, pp. 38-46. The primary flaw of this argument is that it does not acknowledge the limited nature of the review in habeas. This Court may only grant relief if the Michigan Supreme Court decision was an unreasonable application of clearly established Supreme Court precedent under 28 U.S.C. § 2254(d). *Duren* did not require the definitions of systematic exclusion advanced here.

Rather, the standard of law for establishing systematic exclusion in *Duren* was that the underrepresentation must be "inherent in the particular jury-selection process utilized."²⁶ And the fact that the process included a categorical distinction, treating women different from men, was integral to this Court's analysis.

This Court noted that the underrepresentation occurred "not just occasionally" but in nearly every week for a year.²⁷ But this Court then explained that the defendant there demonstrated that the underrepresentation was "due to the operation of

²⁶ *Duren*, 439 U.S. at 366.

²⁷ *Duren*, 439 U.S. at 366.

Missouri's exemption criteria" after evaluating the discrepancies at the different stages of the process.²⁸ It was essential to this Court's analysis that the defendant demonstrated that the "automatic exemption for women"²⁹ – which is a categorical distinction – caused the underrepresentation. This Court has made it clear that it is the holdings of this Court that bind the State courts in habeas.³⁰

In brief, *Duren* did not hold that a jury system that yields consistent underrepresentation is sufficient to establish a prima facie case of systematic exclusion. This conclusion is supported by the analysis of the federal courts on direct review in examining whether the federal government's reliance on voter registration lists violated the fair-cross-section test. The lower courts have, apparently without exception, rejected the claim that underrepresentation that is produced by use of voter registration lists is "systematic exclusion." See State's Merit's Brief, p. 55 n. 76. The analysis is predicated on the point that citizens who decide not to register to vote have effectively removed themselves from the jury process and any disparity that arises does not inhere in the selection process:

Not only has the use of the voter registration lists been uniformly approved by the Court of Appeals as the basic source for the jury selection process and will not be invalidated because a

²⁸ *Duren*, 439 U.S. at 367.

²⁹ *Duren*, 439 U.S. at 367.

³⁰ *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., speaking for a majority of the Court).

group chooses not to avail itself of the right to register without any discrimination of any kind, but 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.³¹

The circuits have likewise reasoned that the failure to follow up on the undelivered questionnaires or failure to update mail addresses does not represent systematic exclusion that inheres in the jury-selection process.³²

These decisions provide support for the point that the rule advocated by Smith is not currently required by the *Duren* decision. This Court has recognized that the decisions of the federal circuits on direct review are evidence to determine whether a State court's decision was reasonable in reaching the same result in applying the same law.³³

The claims of systematic exclusion in the registration cases are analogous to the claims here. The Sixth Circuit determined that the allowance by Kent County for excuses for hardship based on child care, transportation, and work considerations constituted systematic exclusion because these factors "disproportionately impact[ed]" African Americans.³⁴

³¹ *United States v. Cecil*, 836 F.2d 1431, 1448 (4th Cir. 1988)(en banc).

³² *See, e.g., United States v. Orange*, 447 F.3d 792, 800 (10th Cir. 2006).

³³ *See Price*, 538 U.S. at 643.

³⁴ *Smith v. Berghuis*, 543 F.3d at 342; Pet. App. 29a.

The Sixth Circuit also concluded that the assignment of jurors to the local courts was systematic exclusion.³⁵ Like the reliance on voter registration lists, the allowance for excuses based on hardship and assigning jurors to the local courts first are facially neutral mechanisms. And like the use of registration lists, the fact that distinct groups may be affected differently than other citizens is based on factors that are independent from the system itself of selecting the prospective jurors. Any disparate impact does not inhere in the system.

If anything, the claim that the underrepresentation inheres in the system is stronger against the use of voter registration lists than the allowance for hardships or assigning jurors to local courts first. The jury-selection process that establishes its initial base of prospective jurors from an unrepresentative pool should be more vulnerable than one that draws from a representative pool and creates fair, neutral mechanisms for service but that might affect distinct groups differently. But the federal courts have rejected the claims against the voter registration lists. The Michigan Supreme Court cannot be unreasonable in reaching the same conclusion in this case.

Smith also wrongly suggests that the State has the initial burden of proof of countering the cause of underrepresentation. Smith's Brief, p. 40 ("The second is that the state did not prove what caused the underrepresentation"). But *Duren* is clear that the burden of demonstrating the cause of the

³⁵ *Smith v. Berghuis*, 543 F.3d at 342; Pet. App. 29a-30a.

underrepresentation is the defendant's in the first instance in order to establish a prima facie case.³⁶ This inadvertent shifting of the burden of proof is significant, particularly where there are other factors, including neutral statutory ones, which might explain any underrepresentation.³⁷

The other primary flaw in Smith's argument is his failure to address the point that even accepting the claim that any underrepresentation caused by the assignment process was inherent in the system, Smith did not show that it caused any significant disparity. The comparative disparity from the 1993 jury term was 18% and for the 1994 jury term was 15%. It is unrebutted that this would be a 3% comparative disparity, or two prospective jurors out of 929 total prospective jurors over a six-month period of time. See State's Merits Brief, pp. 61-62. The Michigan Supreme Court cannot have been objectively unreasonable in rejecting a claim predicated on this showing.

Smith's assertion that "a thorough examination of the data indicates that the end of siphoning did not affect the system until several months after October 1993" (See Smith's Brief, p. 48) is unsupported by the record. There is no basis on which to believe that there would be any delay in the effect that it would yield once the jury assignment process was discontinued.

³⁶ *Duren*, 439 U.S. at 364 (defendant must prove that "this underrepresentation is due to systematic exclusion").

³⁷ Michigan law excludes from service those who cannot understand English and, at the time of trial, those under sentence for a felony. Mich. Comp. Law § 600.1307a.

Finally, Smith lists nine different aspects of the jury-selection process in which he claims that it systematically excluded African Americans: (1) allowance for excuses; (2) failure to require proof for the excuse; (3) excusing those who failed to appear; (4) reliance on the use of mail; (5) failure to follow up on non-responses; (6) the irregularity of the follow up that did occur; (7) failure to follow up on no-shows; (8) use of 15-month old addresses; and (9) the assignment of the jurors to the local courts first. See Smith's Brief, p. 53. These processes were all neutral. These types of claims can be brought against virtually every jury-selection process. The point merely reaffirms the conclusion that if Smith's claim prevails, the only way to avoid a challenge will be to ensure that every venire matches identically the relevant jury-eligible percentages in the population. *Duren* does not require this.

IV. Contrary to his brief, Smith must demonstrate that the Michigan Supreme Court's decision was objectively unreasonable, not just that it was merely "incorrect."

In Smith's short section evaluating the AEDPA standards, Smith cites the wrong standard for evaluating habeas claims in two critical respects.

First, Smith cites *Williams v. Taylor*, quoting from Justice Stevens's analysis in section II of his opinion, suggesting that the Court may reject a State court decision if it merely disagrees with the decision. See Smith's Brief, p. 55. But this is not the right standard. The controlling law for AEDPA on reasonableness comes from Justice O'Connor's opinion in *Williams*, which noted that the State court decision cannot be merely "incorrect," but that it must also be objectively "unreasonable."³⁸ This proposition was joined by a majority of the Court in *Williams*. This rule has since been reiterated numerous times by this Court.³⁹

³⁸ *Williams*, 529 U.S. at 411 (O'Connor, J.) ("[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.")

³⁹ See, e.g., *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold"); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("That is, 'the state court's decision must have been [not only] incorrect or erroneous [but] objectively unreasonable.'"), quoting *Wiggins v. Smith*, 539 U.S. at 520-521 (internal quotation marks omitted).

Second, Smith asserts that AEDPA "calls for de novo review of mixed questions of law and fact" on this type of claim. See Smith's Brief, p. 57. Smith cites *United States v. Allen* in support of his position, which was a Sixth Circuit decision.⁴⁰ This is not the right standard. *Allen* was decided on direct review. Rather, the standard was articulated by this Court in Justice O'Connor's opinion in *Williams v. Taylor*. Justice O'Connor was evaluating the significance of "unreasonable application" from 28 U.S.C. § 2254(d)(1) in evaluating a mixed question of law and fact of ineffective assistance of counsel.

In that opinion, Justice O'Connor concluded for the Court that the application of clearly established Supreme Court precedent cannot be merely "incorrect" but must be "objectively unreasonable."⁴¹ This opinion rejected – as an "erroneous interpretation"⁴² – the position cited by Smith.

This is significant because the same error pervades the decision of the Sixth Circuit – the failure to determine whether the Michigan Supreme Court was objectively unreasonable in applying clearly established Supreme Court precedent. *Duren* did not require the decision here. Kent County did not systematically exclude African Americans from its jury pools. This Court should reverse.

⁴⁰ *United States v. Allen*, 160 F.3d 1096, 1101 (6th Cir. 1998).

⁴¹ See *Williams*, 529 U.S. at 409 ("Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.").

⁴² *Williams*, 529 U.S. at 404.

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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ATTACHMENT

TABLE

<u>Circuit</u>	<u>Community</u>	<u>Jury Pool</u>	<u>Absolute Disparity</u>	<u>Comp. Disparity</u>
1st	4.86%	1.89%	2.97%	[61%] ⁴³
2d	7.08%	5.0%	2.08%	[29%]
	4.24%	2.10%	2.14%	[50%] ⁴⁴
3d	3.07%	1.84%	1.23%	40.01%
	0.97%	0.26%	0.71%	72.98% ⁴⁵
7th	3%	0%	3%	[100%] ⁴⁶
8th	1.87%	1.29%	0.579%	30.96% ⁴⁷
9th	3.87%	1.82%	2.05%	52.9%
	5.59%	2.79%	2.8%	50.0% ⁴⁸
10th	7.40%	4.78%	2.62%	35.41%
	4.21%	2.66%	1.55%	36.82%
	1.47%	0.67%	0.80%	54.41%
	3.02%	1.36%	1.66%	54.97% ⁴⁹

⁴³ *United States v. Royal*, 174 F.3d 1, 10 (1st Cir. 1999).

⁴⁴ *United States v. Rioux*, 97 F.3d 648, 657-658 (2d Cir. 1996).

⁴⁵ *United States v. Weaver*, 267 F.3d 231, 241, 243 (3d Cir. 2001).

⁴⁶ *United States v. Ashley*, 54 F.3d 311, 313-314 (7th Cir. 1995).

⁴⁷ *United States v. Rogers*, 73 F.3d 774, 776-777 (8th Cir. 1996) (finding no constitutional disparity for African Americans because the panel was constrained to follow prior precedent).

⁴⁸ *United States v. Sanchez-Lopez*, 879 F.2d 541, 547-549 (9th Cir. 1989).

⁴⁹ *United States v. Orange*, 447 F.3d 792, 798-799 (10th Cir. 2006).