American Bar Association
www.supremecourtpreview.org

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

CORRECTED BRIEF FOR PETITIONER

Michael A. Cox
Michigan Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Timothy K. McMorrow
Special Assistant Attorney General
Appellate Chief
Kent County Prosecutor's Office

Attorneys for Petitioner

QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair-cross-section requirement under *Duren v. Missouri,* 439 U.S. 357 (1979) where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community compared to the venires), which this Court has never applied and which four circuits have specifically rejected.

PARTIES TO THE PROCEEDING

Petitioner is Mary Berghuis, Warden of the West Shoreline Correctional Facility in Michigan. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit. This brief refers to Petitioner as the State of Michigan, because the State represents the interests of the warden here.

Respondent is Diapolis Smith, a prisoner in a State correctional facility in Michigan. Respondent was the petitioner-appellant in the Sixth Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (continued)

Cases (continued)

Cases (continued)

Cases (continued)

Statutes

Other Authorities

Other Authorities (continued)

OPINIONS BELOW

The decision of the Sixth Circuit, *Smith v. Berghuis,* reversing the district court's denial of habeas corpus relief is reported at 543 F.3d 326 (6th Cir. 2008). Pet. App. 1a-36a. The decision of the Michigan Supreme Court in *Michigan v. Smith* is reported at 463 Mich. 199; 615 N.W.2d 1 (2000). Pet. App. 144a-173a.

JURISDICTION

On February 9, 2009, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that Michigan asked the Sixth Circuit to rehear was entered on September 24, 2008. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, including the relevant provisions under the Antiterrorism and Effective Death Penalty Act (AEDPA), are reproduced in an appendix to this brief. J.A. 1a-2a.

STATEMENT OF THE CASE

Diapolis Smith was convicted of second-degree murder after a jury trial that occurred in Kent County, Michigan in September and October 1993. Smith was sentenced to life imprisonment with the opportunity for parole. He filed a post-trial motion in which he challenged the fairness of the composition of his venire under the Sixth Amendment. The Michigan Supreme Court rejected this claim, but in federal habeas corpus the Sixth Circuit determined that this decision was an unreasonable application of existing United States Supreme Court precedent, reversed the district court's denial of habeas corpus relief, and remanded the matter to the district court to issue an order directing the State to either release Smith or retry him within 180 days.

The factual claims in the case and the lower court decisions are predicated on an understanding of *Duren v. Missouri*, which established the controlling standard for determining whether the fair-cross-section requirement is met under the Sixth Amendment.[1] In *Duren*, this Court established a three-pronged test:

> 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;

[1] *Duren v. Missouri*, 439 U.S. 357 (1979).

> (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.[2]

Under the second prong, the review requires "a comparison of the makeup of jury venires" with the "makeup of the community."[3]

In reviewing fair-cross-section claims, the federal appellate courts have adopted three separate tests for evaluating the significance of the disparity at issue under the second prong: (1) the absolute-disparity test; (2) the comparative-disparity test; and (3) the standard-deviation test.

The absolute-disparity test measures this value by subtracting the percentage of adult members of the distinct group in the venires during the time period at issue from the percentage of members of the distinct group in the community.[4]

By contrast, the comparative-disparity test seeks to measure the "diminished likelihood" that a member of a distinct group will be a member of the jury pool due to the underrepresentation.[5] It is calculated by dividing the percentage of absolute

---

[2] *Duren*, 439 U.S. at 364.
[3] *Duren,* 439 U.S. at 365 n. 23.
[4] *See*, e.g., *Ramseur v. Beyer*, 983 F.2d 1215, 1231-1232 (3d Cir. 1992)(describing all three tests).
[5] *Ramseur*, 983 F.2d at 1231-1232.

disparity by the percentage of the distinct group in the community.[6] In other words, it captures what fraction of the distinct group was missing from the venires.

Finally, regarding the standard-deviation standard, this Court provided a description of this standard in its decision in *Castaneda v. Partida*, when examining the claim of purposeful exclusion from the venire under the Equal Protection Clause.[7] The calculation is complex, but it is based on the idea that there will be normal fluctuations above and below the number of jurors of a distinct group that one would expect to draw if the pool drawn reflected the broader community. This is the standard deviation. Where the variation exceeds the standard deviation by more than a factor of two or three, the magnitude of the variation suggests that the difference is non-random.[8]

1. The Crime and the Trial

Christopher Rumbly was murdered when he was shot in the chest at a bar on November 7, 1991 in Grand Rapids, Michigan. In 1993, Diapolis Smith was charged with the crime and his three-week trial was conducted in September and October of 1993. Pet. App. 55a.

There were a total of 37 witnesses who testified at trial. According to one of the eyewitnesses to the shooting, Katherine Brown, a fight broke out between Smith's friend and the victim, and Smith then grabbed the victim by the collar and shot him. Pet. App. 57a. A

---

[6] *See Ramseur*, 983 F.2d at 1231-1232.
[7] *Castaneda v. Partida,* 430 U.S. 482, 486 n. 17 (1977).
[8] *See Castaneda,* 430 U.S. at 486 n. 17.

second witness, Dorothy Brown, heard the shot and saw Smith "standing right over [the victim]." Pet. App. 59a. A third witness, Laura Dean, had seen Smith draw a gun and explained that the shot came from Smith's direction. Pet. App. 60a. The victim died from a single gunshot wound to the chest. Pet. App. 66a.

The jury deliberated for four days before reaching its verdict, finding Smith guilty of second-degree murder. Smith was then sentenced to life imprisonment.

2. The Jury Composition and Post-Trial Motion

a. The Selection Process

During voir dire, Smith's attorney noted that there were very few African Americans in the venire and after the jury had been selected, counsel for Smith asked for additional peremptory challenges. J.A. 6a. The request was denied. A total of 37 jurors were considered during voir dire, 14 of whom were seated for the jury. All of those 37 were white. Pet. App. 86a. The attorney estimated that only two or three of the jury venire were African Americans, and guessed that there may have been as many as 100 persons in the jury venire. J.A. 6a. In contrast, the trial court indicated that it had only requested 60 prospective jurors for the jury venire, but the court believed that there were three African Americans in the jury venire. J.A. 7a. Smith's attorney challenged the venire based on constitutional grounds. J.A. 7a.

Smith then raised this claim in a post-trial motion, claiming that his jury was not drawn from a

fair cross section of the community in violation of his rights under the Sixth and Fourteenth Amendments. The Michigan Court of Appeals remanded the matter to the State trial court, which held an evidentiary hearing over two days.

Because the trial here was conducted in September and October 1993, the relevant jury-selection processes were those in place during the court's October 1992 through October 1993 term (the "October 1992 term"). At the evidentiary hearing, the Kent County Court Administrator, Kim Foster, outlined the process by which the county selected prospective jurors from October 1993 through October 1994 (the "October 1993 term"). J.A. 13a, 20a. This description governed the process for the selection of the jurors for the previous term except where Foster indicated that the procedure had changed between the two terms.

In the October 1992 term, the Secretary of State drew a "master list" of 350,000 prospective jurors from the driver's license list and Michigan identification cards. J.A. 10a-11a. This is consistent with Mich. Comp. Law. § 600.1304. The Secretary of State then reduced that number randomly to 50,000, transmitting this list to the county.[9] Neither this list, nor the master list, included a person's race. J.A. 29a. The 50,000 figure was based on the number of prospective jurors the Court Administrator anticipated would be needed to cover all of the courts in the county, both

[9] Starting in the October 1993 term, the county would receive the master list of 350,000 and would reduce the list randomly to 50,000 on its own. J.A. 22a.

circuit courts (county felony courts) and district courts (city misdemeanor courts). J.A. 29a.

The county then sent out a questionnaire by regular mail to all the names on the list of 50,000, which the prospective jurors were requested to fill out and return to the county. Four to five percent of these questionnaires typically would be returned as "undeliverable." J.A. 12a-13a. The county took no further action on these questionnaires. Another 15 to 20 percent of these questionnaires elicited no response from the prospective juror. J.A. 13a. In reaction to this "no response," the county would send a second letter containing "another qualifying questionnaire" and a letter from the chief judge encouraging a response and identifying the penalties for failing to respond. J.A. 13a-14a. There was a 50% return rate from this follow-up letter.[10]

From the returned questionnaires, the county established a "qualified juror list." J.A. 15a. "If a person responding to a questionnaire claimed a statutory exemption, the person was not placed on the [qualified] juror list. The county did some checking of exemption claims, depending on resources, but for the most part relied on the person's word." Pet. App. 87a. A person was statutorily exempt if that person was not a resident of the county, could not speak English, was unable to physically or mentally carry out the functions of a juror, had been a juror within the last

[10] For the "no responses" for which the second letter did not elicit a response, the county would set a "show-cause hearing" and a show-cause order would be sent. But law enforcement would not serve any warrants that arose from these show-cause hearings for those who failed to appear because there was inadequate identifying information for the police. J.A. 14a.

twelve months, or was currently under sentence for a felony. J.A. 14a-15a. A prospective juror could also avoid juror service if that person was over the age of 70 years and claimed the exemption. J.A. 15a. This was consistent with Mich. Comp. Law. § 600.1307a, which provides the qualifications of a juror.[11]

The county then reduced the qualified juror list randomly to 12,000, and this was known as the "second list." J.A. 17a. With this list, the county then sent out a summons along with a personal-history questionnaire six or eight weeks before the county would ask that prospective juror to report for service. In response to this questionnaire, these prospective jurors could raise excuses for being unable to serve based on considerations other than those provided by statute, including child care, transportation, and work considerations. J.A. 21a.

In attempting to explain why prospective African American jurors might be more likely to request non-statutory excuses, Smith called Kurt Metzger, the director of the Michigan Metropolitan Information Center at Wayne State University. Metzger provided information from the U.S. census data for Kent County from 1990 that 64% of African American families were headed by a single parent as compared to only 19% of white families. J.A. 80a. Related to work considerations, he testified that the poverty rate for African Americans was 31.5%, while it

---

[11] This statute was amended in 2002 and 2004. The only significant substantive change was to expand the exclusion of felons from those "under sentence" to anyone "convicted of a felony." Mich. Comp. Law § 600.1307a, as amended by Public Act 2002, No. 738, effective October 1, 2003.

was 6.7% for whites. And with regard to transportation, he said that 30% of African American households reported not having a vehicle compared to 6% of white households. J.A. 81a-82a.

The State trial court also heard testimony regarding the assignment of jurors between the circuit courts and the district courts. There were two changes made in the process for selecting prospective jurors in the October 1993 term from the previous term. The Court administrator, Kim Foster, explained that the county began to receive all 350,000 names from the Secretary of State. J.A. 22a. Foster said that the county also discontinued its practice of allowing the prospective jurors to be selected by the district courts first but rather selected the prospective jurors for the circuit courts first. J.A. 20a. Foster noted that this decision was rooted in the perception that the assignment to the district courts had disproportionately reduced the number of minority jurors left for service for the circuit courts:

> The belief was that the respective districts essentially swallowed up most of the minority jurors, and the Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just – it represented certain portions of the county. [J.A. 22a.]

Similarly, on this point, Richard Hillary, the director of the Kent County Public Defender's Office testified that he had co-chaired the Jury Minority Representation Committee formed in 1992 or early 1993 to investigate the reason for the "lack of minorities" on jury venires. J.A. 60a. Hillary stated

that the committee "made a determination that we were losing minorities by choosing the District Court jurors first and not returning the unused ones . . . to the pool that the Circuit Court was taken from." J.A. 64a-65a. Hillary did not, however, explain how this determination was made.

b. The Claim of Disparity

Michael Stoline, a statistician employed by Western Michigan University, presented testimony regarding the statistical information underlying Smith's claim of disparity. At the first day of the hearing, Stoline testified exclusively about the juror pools from October 1993 through October 1994. J.A. 35a. He was provided a list of 2,252 juror names for that time period. J.A. 35a. Using the 1990 Kent County census figures, the county was divided into 112 census tracts. Each tract included the numbers of African Americans, white Americans, and the number of others that are neither African American nor white. J.A. 38a.

According to the 1990 census information, Kent County was comprised of 89.8% white citizens between the ages of 18 and 69 (289,704) and 7.28% African American citizens between the ages of 18 and 69 (23,476). J.A. 172a. The total numbers of adults in that age range was 322,383. J.A. 172a. The City of Grand Rapids is the largest city in Kent County, comprising about one-third of the county's population. According to 1990 census figures, the City of Grand Rapids was 18.5% African American and comprised 85% of the total number of African Americans who lived in the county. J.A. 197a; Pet. App. 29a.

Stoline had no information about the race of the 2,252 prospective jurors that were summoned by Kent County for the October 1993 term. J.A. 43a. Rather, Stoline used calculations from the numbers of prospective jurors summoned from each of the 112 census tracts predicated on the premise that they were representative of the racial proportions of each tract. He explained the point:

> [I]f a census tract has five percent blacks and 95 percent non-blacks, that if you have 20 people being selected from that census tract, okay, that are on the jury list, you'd expect five percent of those people to be black, so that would be five percent of 20 [is] one, you'd expect one black on that list. [J.A. 43a-44a.]

Relying on the 1990 census information that 7.28% of the adult population in Kent County was African American, Stoline concluded that one would have expected to have 164 African American prospective jurors from October 1993 to October 1994 (7.28% of 2,252 prospective jurors summoned). Then, using the racial percentages from each of the 112 census tracts, Stoline estimated that there would have been only 139 African American prospective jurors, assuming that the prospective jurors reflected the racial composition of the tract from which each was selected. J.A. 42a.

In this way, he determined that there was an "under-representation" of 15% during the October 1993 term. This was calculated by subtracting the estimated 139 prospective African American jurors (using the individual census tract figures) from the estimated 164 prospective African Americans jurors

(7.28% of 2,252 prospective jurors), and then dividing the result of 25 by 164. J.A. 37a, 41a-42a.[12] He explained that this difference results from an "over-representation" of prospective jurors from census tracts with small percentages of African Americans and from an "underrepresentation" of prospective jurors from census tracts with larger percentages of African Americans. J.A. 39a-40a, 42a.

Stoline provided the same analysis for the time period of April 1993 to October 1993, the time period during which Smith's trial occurred. He estimated that there was an 18% comparative disparity for this six-month period. J.A. 112a-113a. Using the same "techniques of estimation," he contended that of the 929 prospective jurors summoned during this time period, he estimated that 55.4 were African American (relying on the census tract information), when there should have been 67.6 African American prospective jurors (7.28% of 929 total prospective jurors). J.A. 112a-115a, 181a. The 18% figure was calculated by dividing the difference between the projected African American jurors from the census tracts (12.2) by the expected African American (67.6).[13]

This same information would yield a 1.28% absolute disparity for the time period. This is determined by using the absolute percentages: it is the difference yielded from subtracting 6%, which is the percentage of estimated African Americans in the

---

[12] Specifically, the numbers from Stoline's report were 164.1 expected African American prospective jurors and 139.4 estimated African American jurors, with a difference of 24.7. This calculation results in a 15.1% comparative disparity. J.A 102a.

[13] 12.2 is the difference between 67.6 and 55.4.

venire (55.4 is 6% of 929) from 7.28% (total percentage of African Americans in the adult population.

Stoline divided this six-month time period into six four-week samplings for the April 1993 through October 1993 time period. The final time period corresponded to the month in which this trial was conducted (listed as item #12):

	Expected Numbers	Estimated Actual Numbers	Difference	Comparative Disparity
7.	10.6	7.7	-2.9	-27.4
8.	11.4	12.3	0.9	+7.9
9.	10.9	6.3	-4.6	-42.2
10.	11.2	10.7	-0.5	-4.4
11.	12.0	10.9	-1.1	-9.2
12.	*11.5*	*7.5*	*-4.0*	*-34.8*
Totals:				
	67.6	55.4	-12.2	-18.0

[J.A. 181a (emphasis added).]

In other words, based on his calculations, there should have been 11.5 African American prospective jurors during this final month, but there were only 7.5, a shortfall of 4 African American jurors for this four-week period. The total number of jurors for that month would then have been 158 jurors (as rounded). J.A. 121a. Stoline calculated this as a disparity of 34.8%, by dividing 4 by 11.5 (4 is the difference between 11.5 and 7.5). J.A. 181a.

The only statistical information presented at the hearing that corresponded to the conclusion that the assignment to district court reduced the number of African American prospective jurors in Kent County indicated that there was an 18% comparative disparity of African American jurors for the time period of April 1993 through October 1993 when the district courts were filled first, and a 15% comparative disparity of African American jurors from October 1993 through October 1994 when the circuit courts were the first to select prospective jurors. J.A. 102a, 181a.

3. The State Courts

The State trial court rejected the claim that the Kent County prospective jury was not drawn from a fair cross section of the community. Although the trial court determined that African Americans were a distinct group and that there was a constitutionally-significant disparity, it found that Smith had failed to show that the reason for the underrepresentation was based on the sending of prospective jurors to the district courts first. J.A. 200a. Rather, the trial court determined that the disparity might have resulted from factors outside the system itself – the economic and social factors given by Kurt Metzger – but that these would relate to problems "outside the system itself" of the jury-selection process. J.A. 200a.

In a 2-to-1 decision, the Michigan Court of Appeals reversed, concluding that there was significant underrepresentation of African American jurors and this underrepresentation was the result of systematic exclusion inherent in the process. Pet. App. 174a-201a.

The Michigan Supreme Court then unanimously reversed the Court of Appeals in majority and concurring opinions. Pet. App. 144a-173a.

In its decision, the Michigan Supreme Court held that Smith had not shown "systematic exclusion" but "granted him the benefit of the doubt on unfair and unreasonable underrepresentation." Pet. App. 144a-145a. The Court explained that it decided to "give the benefit of the doubt on underrepresentation" in order to avoid "leaving the possibility of systematic exclusion unreviewed." Pet. App. 146a-147a.

Addressing the second prong of *Duren,* the Michigan Supreme Court considered all three tests for measuring whether there was fair and reasonable representation and found that there was no legally significant disparity. Pet. App. 146a. After noting that each method had been criticized, the Michigan Supreme Court determined that "no individual method should be used exclusive of the others," and adopted a case-by-case approach. Pet. App. 146a. Because there was inadequate evidence on the standard-deviation test, the Michigan Supreme Court addressed only the absolute and comparative disparity tests, determining that there was no legally significant disparity. Pet. App. 146a.

With regard to the third prong of *Duren*, the Michigan Supreme Court rejected the claim of systematic exclusion by determining that Smith had failed to show how the alleged "siphoning" of jurors to the district courts affected the circuit court jury pool. Pet. App. 147a. The Court also concluded that the influence of economic and social factors did not demonstrate a systematic exclusion. Finally, in

addressing the question whether statistics alone can make a requisite showing, the Court again stated that Smith had not demonstrated "unfair and unreasonable underrepresentation under the disparity analyses." Pet. App. 148a. Thus, the Michigan Supreme Court "concluded that defendant has not established a prima facie violation of the Sixth Amendment fair-cross-section requirement." Pet. App. 148a-149a.

4. The Federal Courts

On habeas corpus review, the federal magistrate entered a report and recommendation that recommended that the writ for habeas corpus be denied. Pet. App. 52a-143a. The district court adopted this recommendation. Pet. App. 39a-51a.

On appeal, the Sixth Circuit reversed, concluding that the Michigan Supreme Court's application of *Duren* was objectively unreasonable. Pet. App. 17a. The Sixth Circuit addressed the Michigan Supreme Court's conclusions on the second and third prongs of *Duren* separately.

For the second prong, the Sixth Circuit noted that the Michigan Supreme Court applied a number of different measures of underrepresentation and then "rejected these disparities as constitutionally insignificant." Pet. App. 18a. The Sixth Circuit further stated that under the absolute-disparity test the underrepresentation was "negligible" but found that such a test was "questionable" when measuring a small minority population. Pet. App. 19a-20a. Relying on the comparative-disparity test, the Sixth Circuit determined that the representation of African American veniremen "at the time of [Smith's] trial was

unfair and unreasonable." Pet. App. 21a. On this basis, the Sixth Circuit determined that Smith had "established that African Americans were underrepresented on Kent County venire panels." Pet. App. 21a.

The Sixth Circuit then stated that under AEDPA, the Michigan Supreme Court's analysis would have to be more than just "incorrect"; it would have to be "unreasonable." Pet. App. 21a. After noting again that the Michigan Supreme Court found that Smith's statistical figures did not demonstrate significant underrepresentation, the Sixth Circuit determined that "none of the applicable tests can appropriately measure the underrepresentation" in Kent County because of the relatively small size of the African American population. Pet. App. 22a. Rather, the Sixth Circuit concluded that the Michigan Supreme Court "properly" reached the third prong of *Duren* since there was "significant underrepresentation" that would not otherwise meet the *Duren* test but for the fact that there were "non-benign factors" operating to produce them." Pet. App. 22a.

With regard to the third prong of *Duren,* the Sixth Circuit concluded that the Michigan Supreme Court "unreasonably" applied federal law on this issue of systematic exclusion. Pet. App. 25a. The Court determined that the "persistent disparity" combined with Smith's evidence that the disparity was not random was "sufficient to establish systematic exclusion" under *Duren*. Pet. App. 25a. The Sixth Circuit accepted that there were two non-random factors.

First, the Sixth Circuit determined that the "opt out" of jury services for excuses based on child care, transportation, or work considerations were "inherent in the particular jury-selection process." Pet. App. 26a-27a. This conclusion was predicated on the fact that the Sixth Amendment is "concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list" and ultimately called for service. Pet. App. 28a.

Second, with regard to the process by which jurors were first selected for district court and then assigned to circuit court, the Sixth Circuit noted the anecdotal testimony of Richard Hillary, Director of the Public Defender's Office, and Kim Foster, the Kent County Court Administrator, that the perception was that this process caused the loss of minority jurors for the circuit court. The Sixth Circuit found this evidence combined with the duration of underrepresentation "demonstrates that such underrepresentation came as a consequence of a factor that was inherent in the jury assignment system." Pet. App. 30a.

After concluding that the Michigan Supreme Court unreasonably failed to determine that Smith had established his prima facie case, the Sixth Circuit then applied the test to determine that there was a significant State interest that supports the process resulting in the exclusion. The Sixth Circuit determined that there was a significant interest of the State in allowing excuses for hardships, but that there was no significant interest in assigning prospective jurors to the State district courts first. Consequently, it concluded that Smith had shown a violation of the Sixth Amendment and granted Smith habeas relief.

SUMMARY OF ARGUMENT

The Sixth Circuit was wrong in reversing the Michigan Supreme Court decision under AEDPA because the Michigan Supreme Court's ruling was not unreasonable in its application of the second or the third prong of the *Duren* test.

Under the second prong of *Duren*, the Michigan Supreme Court's ruling was not unreasonable that there was no unconstitutional underrepresentation of African American jurors. While *Duren* did not identify any particular test for measuring the disparity between the number of distinct persons in the venires and the number of such persons in the community, it appeared to apply the absolute-disparity test. And the absolute disparity at issue here was only 1.28% during the six months at issue between African Americans in the community (7.28%) and the jury venires (6%). As even the Sixth Circuit itself noted, this was negligible. In fact, seven circuits that have reviewed this issue have rejected Sixth Amendment claims based on similar disparities on direct review. Thus, the Michigan Supreme Court's determination that there was no legally significant disparity was not an unreasonable application of clearly established Supreme Court precedent.

Even if this Court reviews the issue without regard to AEDPA, the Sixth Circuit's decision was still wrong. The facts in this case demonstrate that the application of the comparative-disparity standard is unworkable. It exaggerates small disparities. And it calls into question reasonable, neutral means of drawing jurors. If such a standard were adopted, the only way a State could avoid subjecting its processes to

challenge would be to use a system that requires the identification of every person's race and ethnicity to ensure that the venires match the percentages for distinct groups in the community. The Constitution does not require this. Even applying the comparative-disparity test here, the small disparities did not violate the fair-cross-section requirement because they did not undermine the paramount principle at issue under the Sixth Amendment – the right to an impartial jury. The venires were not comprised only of special segments, but were adequately representative of the community. Smith's right to an impartial jury was not violated.

Moreover, under the third prong of *Duren,* the Michigan Supreme Court's determination that Smith had failed to show systematic exclusion under the third prong of *Duren* was not objectively unreasonable. There is no clearly established Supreme Court precedent that indicates the processes at issue here – allowing excuses for hardship or selecting jurors for local courts first – are inherently exclusionary processes. The system that Kent County employed here was facially neutral and reasonable. The Sixth Circuit's conclusion – by allowing prospective jurors to claim hardship to be excused from jury service inherently excludes certain jurors – is wrong and is not required by *Duren*. With regard to the assignment of the jurors to the local courts first, the Michigan Supreme Court's finding that Smith had failed to carry his burden was supported by the record. The Sixth Circuit's overturning of findings of fact by the trial court based on competing anecdotal testimony is not consistent with this Court's jurisprudence. The jury selection process here did not systematically exclude any distinct groups. It was not improper.

ARGUMENT

I. There was no unconstitutional underrepresentation under the second prong of *Duren*, and the Michigan Supreme Court's determination on this point was not unreasonable.

The Michigan Supreme Court determined that the underrepresentation of African Americans on Smith's jury venire was 1.28% as measured by absolute disparity, and 18% as measured by comparative disparity. That Court then concluded that neither measurement showed that African Americans' representation on the venire was "not fair and reasonable in relation to the number of such persons in the community," as required by *Duren*'s second prong. The Sixth Circuit erred in rejecting that holding.

First, a federal court may not grant habeas relief under AEDPA on a State-court merits ruling unless that ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court]" under 28 U.S.C. § 2254(d)(1). The Michigan Supreme Court ruled on the merits of the second prong, even though it went on to give Smith "the benefit of the doubt" on that issue so that it could also reach *Duren*'s third prong. And given the limited guidance this Court has provided on the proper test for measuring underrepresentation and what disparities meet the second prong, the Michigan Supreme Court's ruling cannot be said to have contravened clearly established Supreme Court precedent.

Second, even if the Michigan Supreme Court's ruling on the second prong is reviewed without AEDPA deference, the Sixth Circuit's decision was wrong. Smith did not establish his prima facie case based on the small disparities at issue here. There is no ground upon which to conclude that Smith was deprived of an impartial jury under the Sixth Amendment. He was fairly convicted of murder.

A. The Michigan Supreme Court's ruling that there was no legally significant disparity was not an unreasonable application of clearly established United States Supreme Court precedent under 28 U.S.C. § 2254(d).

No one disputes that the absolute disparity found here – only 1.28% — was negligible and would not satisfy the second prong of *Duren* if the absolute-disparity test is the proper test. But the decisions from this Court providing guidance on unfair and unreasonable representation are *Duren* and *Taylor v. Louisiana*,[14] neither of which specified the standard for measuring what constitutes unfair and unreasonable representation. In fact, *Duren* appeared to apply the absolute-disparity test. The Michigan Supreme Court's holding on the second prong therefore could not have conflicted with clearly established Supreme Court precedent, as no decision of this Court clearly establishes that the absolute-disparity test should not be used.

Nor does any "clearly established" law from this Court establish that an 18% comparative disparity

[14] *Taylor v. Louisiana,* 419 U.S. 522 (1975)

meets the second prong of *Duren*, even if that test were required. In fact, seven circuits have reviewed similar disparities for small distinct groups and rejected these claims under the second prong of *Duren* on direct review. Because the Michigan Supreme Court's rejection of Smith's second-prong argument did not conflict with, or unreasonably apply, "clearly established" Supreme Court precedent, AEDPA required the Sixth Circuit to defer to that ruling.

1. The Michigan Supreme Court decision resolved the second prong of Duren on its merits and was entitled to deference under AEDPA.

Under 28 U.S.C. § 2254(d), once a State court reaches the merits of a constitutional question, a federal court may grant relief only when that decision is contrary to or involved an unreasonable application of clearly established Supreme Court precedent. This rule applies even where the State court evaluates a question on the merits on an alternative analysis.[15] That is what occurred here.

The Michigan Supreme Court held that there was no showing of systematic exclusion, but gave

---

[15] *See Hammond v. Hall,* No. 08-11108, 2009 U.S. App. LEXIS 24209, at *98-104 (11th Cir. Nov. 4, 2009)(State court adjudication of ineffective assistance of counsel claim entitled to deference on both prongs where State trial court rejected claim on performance prong and State Supreme Court left that finding undisturbed and affirmed by rejecting claim on only prejudice prong). This contrasts with the circumstance where the State court only addresses the merits on one of the prongs of the test. *See Wiggins v. Smith,* 539 U.S. 510, 534 (2003).

Smith the benefit of the doubt on the second prong. The Court made clear, however, that it only granted Smith this benefit in order to avoid leaving the third prong "unreviewed." Pet. App. 146a-147a. Substantively, the Michigan Supreme Court directly addressed the issue on the second prong and rejected the claim:

> [D]efendant presented some evidence of a disparity between the number of jury-eligible African-Americans and the actual number of African-American prospective jurors selected to the Kent County Circuit Court jury pool list. However, defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests. [Pet. App. 146a.]

The conclusion that the State court relied substantively on its finding regarding disparity as an alternative basis is borne out by the Michigan Supreme Court's reliance on this analysis in the third prong of *Duren*. The Michigan Supreme Court expressly rejected the statistical claim of systematic exclusion based on Smith's failure to make a showing of unfair and unreasonable representation under *Duren*. Pet. App. 148a. The Court then went on to the third prong only "assuming" that the other prongs had been met. Pet. App. 147a. That does not nullify the fact that the Michigan Supreme Court rejected Smith's second-prong arguments on its merits.

The Sixth Circuit also appeared to have agreed that the Michigan Supreme Court's decision rejecting the second prong claim was a merits decision entitled

to deference under AEDPA. The Sixth Circuit initially noted that the Michigan Supreme Court after relying on different measures of underrepresentation including absolute and comparative disparity "rejected these disparities as constitutionally insignificant." Pet. App. 18a. In the section addressing the decision of the Michigan Supreme Court under the second prong, the Sixth Circuit explained that it must review the Michigan court decision under AEDPA again stating that the Michigan Supreme Court determined that there was no significant underrepresentation:

> To prevail under AEDPA, Petitioner must demonstrate not only that the Michigan Supreme Court was incorrect, but that its application of federal law was unreasonable. The Michigan Supreme Court found that Petitioner's figures did not demonstrate that African Americans were significantly underrepresented on Kent County venire panels. After a cursory discussion of the absolute and comparative disparity tests, the supreme court concluded that "defendant's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests." [Pet. App. 21a-22a.]

The indication therefore was that the State-court finding that there was no constitutional disparity was a decision entitled to this deference. Before stating that the Michigan Supreme "properly" reviewed the third prong of *Duren,* the Sixth Circuit had already concluded that "none of the applicable tests can appropriately measure the underrepresentation that occurred on Kent County venire panels." Pet. App. 22a.

A fair reading of the Sixth Circuit opinion indicates that it rejected the Michigan Supreme Court's determination. Yet, there was no clearly established precedent from this Court that required the Michigan Supreme Court to reach a contrary conclusion.

2. This Court did not identify any specific method of calculating disparity in Duren but appeared to apply an absolute-disparity test.

AEDPA limits federal court review of State court convictions. Under 28 U.S.C. § 2254(d)(1), the federal courts may only grant relief with respect to any State claim adjudicated on the merits if the State adjudication was contrary to or an unreasonable application of clearly established Supreme Court precedent. And the decision regarding what constitutes "clearly established" Supreme Court precedent is derived from the holdings of the Supreme Court at the time of the relevant State adjudication, rather than from obiter dictum.[16] The decision of the Court must not be just "incorrect," it must also be "objectively unreasonable."[17]

The Sixth Amendment provides the right to a jury trial in criminal proceedings. U.S. Const. amend. VI. This Court has held that the fair-cross-section requirement is fundamental to the right to a jury trial in *Taylor v. Louisiana*.[18] In doing so, this Court noted

---

[16] *Williams v. Taylor,* 529 U.S. 362, 412 (2000).

[17] *Williams,* 529 U.S. at 409.

[18] *Taylor v. Louisiana,* 419 U.S. at 531. *See also Duncan v. Louisiana,* 391 U.S. 145, 149 (1968)(holding that the Sixth Amendment right to jury trial applies to the States through the Fourteenth Amendment).

that a person does not have a right to have the specific petit jury actually "mirror the community" and reflect the various distinctive groups.[19] Even though a defendant is not entitled to a jury of any particular composition, the panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative of the community.[20]

In *Duren,* this Court established the three-prong test for determining whether the fair-cross-section venire requirement of the Sixth Amendment is met, including the test for the second prong that the representation of the distinct group in the venires must be fair and reasonable in relation to the number of such persons in the community.[21]

The question at issue in *Duren* was whether the process in Jackson County, Missouri violated this fair-cross-section test where there was an underrepresentation of women in the venires. The Jackson County system of selecting jurors for their venires expressly distinguished between the service of men and women in two different steps in the process. At the questionnaire stage in sending out inquiries to all prospective jurors drawn from the voter registration list, there was a prominent paragraph that indicated that "[a]ny woman who elects not to serve will fill out this paragraph and mail this questionnaire to the jury commission at once."[22] This same provision governed men over the age of 65. Thus,

---

[19] *Taylor v. Louisiana,* 419 U.S. at 538.
[20] *Taylor v. Louisiana,* 419 U.S. at 538.
[21] *Duren*, 439 U.S. at 364.
[22] *Duren,* 439 U.S. at 361-362.

the process categorically distinguished the standards for exemption for men and women.

Likewise, after the questionnaires were returned, Jackson County then sent out its summonses, which included "special direction" providing for an automatic exemption if it was selected for women and for men over the age of 65.[23] In other words, the system again expressly treated men and women differently for purposes of their eligibility for an exemption.

The time period at issue in *Duren* covered a ten-month period in 1975 and 1976, excluding November and December. As a consequence of its categorical distinctions between women and men, although 54% of the adults of that county were women, only 26.7% of the prospective jurors summoned were women, and only 14.5% of the venires were women during the time period.[24]

The analysis of this Court determined that this disparity established a prima facie violation of the second prong. Although it did not refer to it as an "absolute disparity," this Court's analysis was apparently based on the conceptual underpinning of the absolute-disparity test, which measures the difference between the percentage in the relevant population and the percentage in the venires by subtracting one from the other:

> Such a *gross discrepancy* between the percentage of women in jury venires and

---

[23] *Duren,* 439 U.S. at 362.
[24] *Duren,* 439 U.S. at 362-363.

> the percentage of women in the community requires the conclusion that women were not fairly represented in the source from which petit juries were drawn in Jackson County.[25]

In context, the meaning of "gross discrepancy" would appear to be the total difference between the two percentages. Thus, it suggests the same meaning as absolute disparity. Other federal appellate courts have noted this same point.[26] Nevertheless, this Court did not expressly specify a method of measuring the disparity.

Relying on 54% in the community and 14.5% in the venires, a calculation of the disparities at issue in *Duren* demonstrates that they were significantly higher than those at issue here. Under the absolute disparity test, the disparity in *Duren* was 39.5% (54% minus 14.5%). The comparative disparity was 73% (39.5% divided by 54%). The corresponding figures in this case were 1.28% absolute disparity and 18% comparative disparity for the six-month period during which the processes at issue were evaluated. In brief, there is nothing in the disparities that would indicate a clear basis for the conclusion that the disparities at

---

[25] *Duren,* 439 U.S. at 366 (emphasis added).

[26] *U.S. v. Weaver,* 267 F.3d 231, 242 (3rd Cir. 2001)("absolute disparity . . . was the method employed in *Duren*"). *See also U.S. v. Royal,* 174 F.3d 1, 8 (1st Cir. 1999), quoting Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 Yale L.J. 1913, 1917-18 (1994)("While not explicitly endorsing any of the mathematical tests, the [*Duren*] Court seems to have considered only absolute disparity").

issue here constituted a prima facie showing of underrepresentation.

3. The federal circuits have rejected disparities similar to those at issue here under the second prong of Duren *on direct review.*

In order to determine whether a State-court decision is reasonable, this Court has examined what other courts have done in applying Supreme Court precedent to examine what is clearly established.[27] The application of *Duren* by the other federal circuits supports the conclusion that the Michigan Supreme Court finding was not unreasonable. In fact, at least seven federal circuits on direct review have reached the same conclusion in examining similar disparities.

The majority of the circuits have relied on the absolute-disparity standard in evaluating whether there is a constitutional disparity under the second prong of *Duren*, at least where the distinct group comprised a substantial portion of the community as women did in the *Duren* case.[28] By comparison, the

---

[27] *Price v. Vincent,* 538 U.S. 634, 643 (2003)("[N]umerous other courts have refused to find double jeopardy violations under similar circumstances. Even if we agreed with the Court of Appeals that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise.")(footnote omitted).

[28] *U.S. v. Royal,* 174 F.3d at 10-11 (1st Cir. 1999); *U.S. v. Rioux,* 97 F.3d 648, 656 (2d Cir. 1996); *U.S. v. Butler,* 611 F.2d 1066, 1070 (5th Cir. 1980); *U.S. v. Ashley*, 54 F.3d 311, 313-314 (7th Cir. 1995); *U.S. v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996), citing *U.S. v. Clifford,* 640 F.2d 150, 155 (8th Cir. 1981); *U.S. v.*

comparative-disparity test has been evaluated in conjunction with the absolute-disparity test by several of the circuits under *Duren*, particularly where the distinct group comprised less than 10% of the community.[29] Significantly, several circuits that adopted the absolute-disparity standard, i.e., the First, Second, Eighth, and Ninth circuits, specifically rejected the comparative standard, even where examining smaller distinct groups.[30]

Sanchez-Lopez, 879 F.2d 541, 548-549 (9th Cir. 1989); and *U.S. v. Carmichael*, 560 F.3d 1270, 1280 (11th Cir. 2009).

[29] *U.S. v. Weaver,* 267 F.3d at 242-243 (3d Cir. 2001); *see also Ramseur,* 983 F.2d at 1232; *Mosley v. Dretke,* 370 F.3d 467, 479 n. 5 (5th Cir. 2004); *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996); and *U.S. v. Orange*, 447 F.3d 792, 798-799 (10th Cir. 2006).

[30] *U.S. v. Royal,* 174 F.3d at 10-11, citing *U.S. v. Hafen,* 726 F.2d 21, 24 (1st Cir. 1984)("Indeed, the *Hafen* court directly acknowledged that complete exclusion of a small distinctive group will result in only a small absolute disparity, and nevertheless chose to apply the absolute disparity test to the case before it. We accordingly employ the absolute disparity test to assess Royal's fair-cross-section claim under the second prong of the test under the Sixth Amendment and the Act.")(citation omitted; footnote omitted); *Rioux,* 97 F.3d at 656 ("While the central flaw of the absolute disparity/absolute numbers is admittedly present here, it is equally true that a small minority population alone is not enough to preclude the absolute numbers method. . . . We are satisfied that the absolute disparity approach is most appropriate for analyzing the underrepresentation claims in this case."); *Rogers*, 73 F.3d at 777, citing *Clifford,* 640 F.2d at 155, and stating that "our court has declined to adopt the comparative disparity concept as a better means of calculating underrepresentation" where the distinct group comprised less than 2% of the population); and *Sanchez-Lopez*, 879 F.2d at 547 ("In determining the underrepresentation of a particular group in jury venires, we have consistently favored an absolute disparity analysis and have rejected a comparative disparity analysis.").

The basic criticism of the absolute-disparity test is that it does not effectively measure underrepresentation when the distinct group comprises only a small percentage of the community. But the circuits – apparently without exception – have rejected a claim that there was significant constitutional disparity like those at issue here even for small distinct groups. A brief survey of decisions with similar disparities demonstrates the point (with the calculation in brackets for the courts that did not themselves perform the comparative-disparity calculation):

TABLE

Circuit	Community	Jury Pool	Absolute Disparity	Comp. Disparity
1st	4.86%	1.89%	2.97%	[61%][31]
2d	7.08%	5.0%	2.08%	[29%]
	4.24%	2.10%	2.14%	[50%][32]
3d	3.07%	1.84%	1.23%	40.01%
	0.97%	0.26%	0.71%	72.98%[33]
7th	3%	0%	3%	[100%][34]
8th	1.87%	1.29%	0.579%	30.96%[35]

[31] *U.S. v. Royal*, 174 F.3d at 10 (African Americans).
[32] *U.S. v. Rioux,* 97 F.3d at 657-658 (African Americans and Latinos).
[33] *U.S. v. Weaver,* 267 F.3d at 241, 243 (African Americans and Latinos).
[34] *U.S. v. Ashley*, 54 F.3d at 313-314 (African Americans).
[35] *U.S. v. Rogers,* 73 F.3d at 776-777 (finding no constitutional disparity for African Americans because the panel was constrained to follow prior precedent).

TABLE (Continued)

Circuit	Community	Jury Pool	Absolute Disparity	Comp. Disparity
9th	3.87%	1.82%	2.05%	52.9%
	5.59%	2.79%	2.8%	50.0%[36]
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%[37]

In this list, all of the cases were on direct review, and all the courts rejected the claim that there was a significant constitutional disparity, either relying on the absolute-disparity test alone or also evaluating the comparative-disparity test. As a comparison to these figures, the Sixth Circuit determined that the absolute disparity during the six-month time period at issue for Smith was 1.28% (7.28% minus 6%), and found that the comparative disparity was 18% during the same time period, while the comparative disparity was 34% for the particular month in which Smith's trial was conducted. Pet. App. 21a. As this table shows, seven circuits would have rejected Smith's claim under the second prong of *Duren*.

---

[36] *U.S. v. Sanchez-Lopez*, 879 F.2d at 547-549 (Latinos in Southern Division and Northern Division).

[37] *U.S. v. Orange,* 447 F.3d at 798-799 (African Americans, Native Americans, Asian Americans, and Latino Americans).

4. The Michigan Supreme Court's ruling did not conflict with clearly established Supreme Court precedent.

No law clearly established by this Court required a contrary conclusion to that reached by the Michigan Supreme Court. This is clear for several reasons.

First, there is no clearly established Supreme Court precedent that provides how to measure the underrepresentation. *Duren* did not establish a test. Moreover, *Duren* plainly does not require the application of the comparative-disparity standard for small distinct groups. The Sixth Circuit candidly acknowledged that this Court did not require this standard:

> [I]n the years since *Duren*, the [Supreme] Court has not mandated that a particular method be used to measure underrepresentation in Sixth Amendment challenges. [Pet. App. 18a.]

This is a concession that there is no clearly established Supreme Court precedent on this point. There was no requirement for the Michigan Supreme Court to apply the comparative-disparity test.

Second, and more importantly, there is no clearly established Supreme Court precedent that the disparities at issue here established a prima facie case of the second prong of *Duren*. The disparities at issue in *Duren* and *Taylor* were substantially higher. The fact that seven other circuits that reviewed similar

disparities have rejected the claim under the second prong – *on direct review* – demonstrates that there was no clearly established Supreme Court precedent that the Michigan Supreme Court failed to follow. This is true regardless of the test applied. See Table, pp. 32-33.

The Sixth Circuit failed to limit its review to clearly established Supreme Court precedent. As already noted above, the AEDPA standard requires not just that the decision be an unreasonable application of "federal law," but federal law "as determined by the Supreme Court" under 28 U.S.C. § 2254(d).[38]

In its application, the Sixth Circuit, however, engaged in a de novo review. It compared the Michigan Supreme Court's decision to that of other circuits, preferring the analysis of some over others both (1) in determining that the wisdom of applying the absolute disparity standard was "questionable" when applying it to a distinct group that is a small percentage of the population and (2) in determining that the comparative disparity here should give rise to a finding that there was a constitutional disparity. Pet. App. 20a. This is not the function of a federal court in habeas that is reviewing a merits decision from a State court.

In the last few years, this Court has reiterated the point that the rule at issue must be one that was

---

[38] The Sixth Circuit noted that "[t]o prevail under AEDPA, Petitioner must demonstrate not only that the Michigan Supreme Court was incorrect, but that its application of federal law was unreasonable," but did not state that its application of *Supreme Court* precedent must be unreasonable. Pet. App. 21a.

specifically established by this Court and has narrowly drawn what is "clearly established" under 28 U.S.C. § 2254(d). In *Wright v. Van Patten,* for example, this Court examined the question whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.[39] The State courts had denied relief, but the Seventh Circuit determined this was a structural error under *United States v. Cronic* and granted habeas relief.[40] This Court reversed because there was no established Supreme Court precedent on this point – "No decision of this Court, however, squarely addresses the issue in this case."[41] *Wright* required that there be a "clear[] hold[ing]" from this Court on the question at issue.[42]

Similarly, in *Carey v. Musladin*, another habeas case, this Court examined whether the displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.[43] This Court initially noted that it had examined the question about possible error in the conduct of trials based on State-sponsored conduct. It then noted that the lower federal courts had diverged in their decisions in applying this precedent, some applying it to the conduct of spectators, and others not. In light of this divergence, this Court concluded that there was no clearly established Supreme Court law for the State court to apply.[44] The same point is applicable here.

---

[39] *Wright v. Van Patten,* 552 U.S. 120, 121 (2008).
[40] *Wright,* 552 U.S. at 122, citing *U.S. v. Cronic*, 466 U.S. 648, (1984).
[41] *Wright,* 552 U.S. at 125.
[42] *Wright,* 552 U.S. at 125.
[43] *Carey v. Musladin,* 549 U.S. 70 (2006).
[44] *Carey,* 549 U.S. at 77.

The Sixth Circuit also predicated its decision on other critical mistakes.

The time period at issue for Smith's trial ran from April 1993 through October 1993, a six-month period. The adult population of African Americans was 7.28% for Kent County, and the extrapolations from Michael Stoline's factual analysis determined that there were 55.4 African American jurors, which is 6%, when there should have been 67.6. J.A. 112a-115a, 181a. Consequently, the absolute disparity was 1.28% for this six-month period, and the comparative disparity was 18%. The Sixth Circuit, however, singled out the particular month in which the trial was conducted – 34% – to then measure against other comparative disparities from other jurisdictions.

In contrast, this Court in *Duren* did not isolate the month in which trial was held. Rather, this Court relied on the figure 14.5% as the percentage of women on the venires even though this Court had information on the percentages of women from the weekly venires during the month at issue there (15.5%) and also identified the number of women in the panel from which Duren's jury was selected (5 women on a 53-person panel). This use of the disparity from throughout the period followed from this Court's requirement that any discrepancy be systematic, and not just "a large discrepancy" that occurred "occasionally."[45] By isolating a single month's figures to measure against other disparities that occurred over a long period in other jurisdictions, the Sixth Circuit effectively allowed one month to serve as the mark of the discrepancy at issue in this case.

---

[45] *Duren,* 439 U.S. at 366.

Moreover, the Sixth Circuit then compounded its error by relying on *United States. v. Rogers*, in which the Sixth Circuit stated that a circuit found a smaller comparative disparity on which to justify a finding of a violation of *Duren*. But the ultimate holding of the Eighth Circuit in *Rogers* was to reject the claim under the Sixth Amendment because the Eighth Circuit was constrained to follow the prior holding of an earlier panel of the Eighth Circuit, which rejected the comparative-disparity method in *United States v. Clifford*.[46] The error of the Sixth Circuit was significant because it was the only case with a smaller percentage of comparative disparity to justify its conclusion.[47]

B. Evaluating the merits of this issue de novo, there was no constitutional violation based on the small disparity here.

If this Court concludes that the Michigan Supreme Court is not entitled to deference on the second prong of *Duren* under AEDPA, this Court is left to engage in a de novo review of this question.

---

[46] *Rogers,* 73 F.3d at 777, citing *Clifford,* 640 F.2d at 155.

[47] Furthermore, the Sixth Circuit's reliance on *Ramseur* was misplaced since that case is distinguishable. In *Ramseur,* the absolute disparity was more than 14%, which other circuits have found to be constitutionally significant. *See*, e.g., *U.S. v. Rodriguez-Lara,* 421 F.3d 932, 943-944 (9th Cir. 2005)(absolute disparity of 14.55%); *Gibson v. Zant,* 705 F.2d 1543, 1547 (11th Cir. 1983)(absolute disparity of 20.8%); *Stephens v. Cox,* 449 F.2d 657, 659-660 (4th Cir. 1971)(absolute disparity of 15%).

1. The limitation of the fair-cross-section requirement to larger, distinct groups is consistent with the purposes underlying the Sixth Amendment requirement of an impartial jury.

In *Taylor v. Louisiana,* this Court held that the fair-cross-section requirement "is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." The Court identified three more specific purposes underlying the fair-cross-section requirement:

(1) "to guard against the exercise of arbitrary power" by relying on the "commonsense judgment of the community;"

(2) to instill "public confidence in the fairness of the criminal justice system;" and

(3) "sharing in the administration of justice [as a] phase of civic responsibility."[48]

Given that the value to be protected is the right to an impartial jury under the Sixth Amendment, the paramount purpose is the first one, the shield for the community against the power of the government ("the overzealous or mistaken prosecutor").

---

[48] *Taylor v. Louisiana,* 419 U.S. at 530-531. *See also Lockhart v. McCree,* 476 U.S. 162, 174-175 (1986)(identifying the three purposes of the fair-cross-section requirement).

In rejecting the extension of the fair-cross-section requirement to peremptory challenges for the petit jury, this Court in *Holland v. Illinois* further elaborated on how the fair-cross-section venire requirement ensures an impartial jury.[49] The core of the protection does not ensure that the petit jury itself is "representative" but rather that the pool from which it is selected is not devised by the State to be "ill disposed towards one or all classes of defendants[.]"[50] *The key is the impartiality of the jury*. This analysis confirms the point identified in *Taylor v. Louisiana* that the jury will only serve the function of shielding against "arbitrary power" where the jury venire is not just comprised of "special segments" and where "*large*, distinctive groups" are not excluded.[51]

The recognition in *Taylor v. Louisiana* that excluding *large* distinctive groups from the jury pool may frustrate the Sixth Amendment suggests by contrast that the failure to include small distinctive groups in the jury pool would not present the same danger. This is so because a small distinctive group would not significantly affect the jurors that actually sit on the petit jury.

The facts of this case bear this out. The expert, Michael Stoline, explained that for the four-week period in the month in which Smith's trial occurred, one would have expected 11.5 African American prospective jurors out of the total of 158 jurors for that time period (11.5 is 7.28% of 158). Based on the tracts from the census, he projected that there were likely

---

[49] *Holland v. Illinois,* 493 U.S. 474, 480 (1990).
[50] *Holland v. Illinois,* 493 U.S. at 480-481.
[51] *Taylor v. Louisiana,* 419 U.S. at 530 (emphasis added).

only 7.5 African American jurors, i.e., that the venires were four African American jurors short for that month. J.A. 181a. Accepting the State trial court's estimate for the particular panel in Smith's trial, there were three African Americans among the panel of 60 prospective jurors, J.A. 7a, which is 5%. Thus, relying on the 7.28%, there should have been one or perhaps two more African Americans for this particular panel.[52]

Given the size of this panel – 60 prospective jurors – the random likelihood that any one juror would sit in the petit jury was only one in five or 20%. Therefore, the failure to include the one or two more African American prospective jurors likely had no effect on the specific petit jury selected. In this way, the paramount purpose underlying the fair-cross-section requirement was not violated. The petit jury would likely have been the same regardless of the small disparity.

Applying the fair-cross-section venire test to small absolute disparities does not further the end of ensuring impartial juries. This is because small disparities – like the ones here – do not indicate that the venires were comprised of only "special segments,"[53] or only of jurors "disproportionately ill

---

[52] Four African American jurors is 6.67% and five African American jurors is 8.3%. *Cf. U.S. v. Jenkins*, 496 F.2d 57, 65 (2d Cir. 1974)("a 6% to 3% disparity between the census figures and the voter registration figures for the community would add to an average array of 50 to 60 veniremen only one (1) additional [African American], which [the court] found not to be substantial enough to deprive appellants of their constitutional or statutory rights. We agree.").

[53] *Taylor v. Louisiana,* 419 U.S. at 530.

disposed towards one or all classes."[54] The venires here were not contrived – they were not rigged. The petit jury was impartial.

2. As noted by several of the other circuits, the comparative-disparity test is unworkable for such small disparities.

This point also underscores the limited value of the comparative-disparity test. The circuits that specifically rejected or criticized this approach generally did so because of the fact that it exaggerates or distorts the significance of disparities for small groups.[55] The smaller the distinct group, the larger the percentage a discrepancy may create even where it has little if any likelihood of affecting the ultimate composition of the petit jury:

> Carried to its logical conclusion appellants' argument would require that if the adult [member of a distinct group] in a community constituted 1% of the population, but only 1/4 of 1% were registered voters, the 4 to 1 disparity would deny a [person] a fair trial.[56]

At the farthest extreme, for a distinct group of only a single member, the failure to include that member would be a 100% comparative disparity, but would not

---

[54] *Holland v. Illinois,* 493 U.S. at 480.
[55] *See,* e.g., *U.S. v. Hafen,* 726 F.2d at 24; *U.S. v. Jenkins,* 496 F.2d at 65; and *U.S. v. Sanchez-Lopez*, 879 F.2d at 548.
[56] *U.S. v. Jenkins,* 496 F.2d at 65-66.

have any bearing on the real cross-section of the community at issue.[57]

If this Court does not discount the value of the comparative-disparity test for evaluating small disparities such as these, the only evident way to avoid a fair-cross-section challenge based on small discrepancies would be to create a self-conscious process based on race and ethnicity to ensure that the venires match the relevant population percentages. The use of the comparative-disparity test as here would effectively require a quota system to avert the prima-facie challenge. And the only way to ensure that the venires mirror the percentages in the population would be to identify the race and ethnicity of every prospective juror. Kent County does not obtain this information. In fact, the report generated by the expert Michael Stoline had to rely on projections based on the racial identity of the census tracts.

The circuits that have promoted the comparative-disparity analysis note that without this analysis, there may be a complete exclusion of a distinct group that comprises less than 10% of the population. The Sixth Circuit made that point here, relying on *Foster v. Sparks*:

> [A]n intractable use of the absolute measure may, in certain circumstances also produce distorted results. For example, if a district with 10% non-white population has 0.5% non-whites in the wheel, the 9.5% disparity may not evoke disapproval under an absolute measure

---

[57] *See U.S. v. Hafen*, 726 F.2d at 24.

> but may require it under a comparative measure. [Pet. App. 20a.][58]

One of the considerations that might underlie this analysis is not the failure to include all distinct groups in the venire from the community, but rather the suspicion that this exclusion is intentional. Yet these considerations are addressed by an intentional exclusion claim brought under the Equal Protection Clause.

The Sixth Circuit relied on *United States v. Jackman*, which evidenced this same concern.[59] In *Jackman,* the Second Circuit had concluded that the limited magnitude of the disparities created a close question but that the fact that they resulted from less than "benign" factors in the selection process led the Second Circuit to conclude that there was a prima facie violation of the second prong of *Duren*.[60] Yet, such analysis conflated the second and third prongs of *Duren* and manifested the Second Circuit's concern that the government had knowingly failed to correct a constitutional deficiency in its selection process.[61] The intentional exclusion of prospective jurors who are members of distinct groups, however, is governed by the Equal Protection Clause, not the Sixth

---

[58] *Foster v. Sparks,* 506 F.2d 805 (5th Cir. 1975).

[59] *U.S. v. Jackman,* 46 F.3d 1240 (2d Cir. 1995).

[60] *U.S. v. Jackman,* 46 F.3d at 1247.

[61] *U.S. v. Jackman,* 46 F.3d at 1247 ("The underrepresentation of Hartford and New Britain residents continued for more than a year after disclosure of constitutional infirmities in the selection process. The procedure adopted in the aftermath of *Osorio* was not designed to assure fair representation of either the populations of those cities or the significant minority populations living there").

Amendment. The paramount purpose of the fair-cross-section requirement of the Sixth Amendment is ultimately to ensure an impartial jury.

Even if this Court concludes that the comparative-disparity test is appropriate in some circumstances, the small disparities at issue here do not establish a prima facie case of unfair and unreasonable representation. As already noted, the Sixth Amendment establishes the right to an impartial jury trial, which is protected by ensuring that the venires are not comprised of only "special segments" or of prospective jurors "ill-disposed" toward the defendant.[62] There is no basis on which to believe that a 1.28% absolute disparity or an 18% comparative disparity is sufficient to render the venires here unrepresentative or contrived. This is the reason that apparently all of the circuits have rejected similar disparities – whether measured by absolute disparity or comparative disparity – as establishing a prima facie case. See Table, pp. 32-33. The venires here were adequately representative of the community. Smith's right to an impartial jury under the Sixth Amendment was not violated.

3. This Court should adopt a general threshold requirement of a 10% absolute disparity.

In order to provide guidance to the bench and bar on these issues, this Court should expressly adopt the absolute-disparity standard for measuring fair and reasonable representation, requiring proof that the

---

[62] *Taylor v. Louisiana,* 419 U.S. at 530 ("special segments"); *Holland v. Illinois,* 493 U.S. at 480-481 ("ill disposed").

absolute disparity exceeds 10% before there has been a prima facie showing of a violation of the second prong of *Duren*.

This standard corresponds to this Court's acknowledgement in *Taylor v. Louisiana* that it is "large, distinctive groups" that must not be excluded from the jury pools.[63] The primary point underlying the right to a fair-cross section is that the jury lists cannot ultimately be contrived so that the venires are "more likely to yield petit juries" who are ill-disposed to one or all defendants.[64] Because the core value is the Sixth Amendment right to an impartial jury, a legitimate – indeed a controlling – consideration under the Sixth Amendment is that small absolute disparities will not significantly affect the ultimate petit jury composition.

There does not appear to be a single case from the federal courts under the Sixth Amendment in which a court found that an absolute disparity of less than 10% was constitutionally significant.[65] Therefore, this rule would reflect the actual practice of the federal courts of appeals.

In fact, several of the circuits have relied on the 10% standard.[66] Such a rule would be consistent with

---

[63] *Taylor v. Louisiana,* 419 U.S. at 530.

[64] *Holland v. Illinois,* 493 U.S. at 480-481.

[65] *See* 25 J. Moore et. al., Moore's Federal Practice, Criminal Procedure § 624.03[2][c] (3d ed. 2009) ("Although there are no precise mathematical standards, in practice, if the absolute disparity is less than about 12%, the courts will find that there is not statistical underrepresentation of the group.").

[66] *See U.S. v. Butler*, 611 F.2d at 1070 (5th Cir.)(stating that "None of the disparities urged by the appellants are as great as

the need to draw a "clear line" in protecting the right to an impartial jury under the Sixth Amendment.[67] The courts that have relied on this standard have done so based on *Swain v. Alabama*, which evaluated a prima facie case of intentional exclusion of prospective jurors under the Equal Protection Clause.[68] For

---

the 10% disparity found not to present a case of purposeful discrimination in *Swain*" in rejecting absolute disparities of 9.14%, 8.69%, and 5.71%), *U.S. v. Butler (On Rehearing),* 615 F.2d 685, 686 (1980)("We did not wish to imply that the absolute disparity method is the sole means of establishing unlawful jury discrimination"); *U.S. v. Ashley*, 54 F.3d at 314 (7th Cir.)("[A] discrepancy of less than ten percent alone is not enough to demonstrate unfair or unreasonable representation"); *see also U.S. v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990)(describing as "de minimis" the absolute disparity of 8% for a situation in which African Americans were 20% of the population but 12% of the venire); and *U.S. v. Carmichael*, 560 F.3d at 1280-1281 (11th Cir. 2009)(following Eleventh Circuit precedent that an absolute disparity of ten percent or less fails to satisfy *Duren*'s second prong).

[67] *See Ballew v. Georgia,* 435 U.S. 223, 239 (1978)(the Sixth Amendment requires at least six jurors).

[68] *See,* e.g., *U.S. v. McAnderson*, 914 F.2d at 941 ("As the Supreme Court has noted, discrepancies of less than ten percent, standing alone, cannot support a claim of underrepresentation."), citing *Swain v. Alabama*, 380 U.S. 202 (1965), overruled in part on other grounds, *Batson v. Kentucky,* 476 U.S. 79 (1986). In *Swain,* this Court stated that "[w]e cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%." Later, this Court in *Alexander v. Louisiana* noted, however, that it has "never announced mathematical standards for the demonstration of 'systematic' exclusion." *Alexander v. Louisiana,* 405 U.S. 625, 630 (1972). *See also Vasquez v. Hillery,* 474 U.S. 254, 263-264 (1986)(finding intentional discrimination of African Americans for their total exclusion where African Americans comprised 4.7% of the population without evaluating the magnitude of the disparity).

distinct groups that comprise a small percentage of the population, the equal protection safeguards would remain to protect against intentional exclusion from the jury selection process under *Castaneda v. Partida.*[69]

Of course, this Court need not adopt this standard in order for the State of Michigan to prevail. The suggestion is offered to provide further clarity to the law and to give the lower courts and the State courts an identifiable standard to apply. Here, the Michigan Supreme Court applied two standards, the absolute-disparity test and the comparative-disparity test, in evaluating the claim. Pet. App. 146a. The concurrence also evaluated the standard-deviation test. Pet. App. 163a-165a. Rather than applying three separate, incompatible tests, the establishing of the absolute-disparity test would provide a sure norm for the lower courts to follow.

---

[69] *Castaneda,* 430 U.S. at 494 (establishing a three-part test for a prima facie case of jury discrimination amounting to a denial of equal protection: [1] a distinct group; [2] that is substantially underrepresented; and [3] a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing).

II. The Michigan Supreme Court's decision that there was no systematic exclusion under the third prong of Duren was not objectively unreasonable.

Under the third prong of *Duren*, Smith claimed that the small disparities at issue here were the result of Kent County's systematic exclusion of African American jurors from its venires. The Sixth Circuit agreed in two areas, concluding that the Michigan Supreme Court was objectively unreasonable, because (1) the allowance for excuses based on hardship and (2) the "siphoning" of prospective jurors to the local courts before serving in the county courts resulted in systematic exclusion of African American jurors. Although the Sixth Circuit determined that the State of Michigan had rebutted the claim on hardship excusals because there was a significant State interest there, the Sixth Circuit was wrong on both counts in concluding that the Michigan Supreme Court was objectively unreasonable in rejecting the prima facie case in the first instance.

Regarding the hardship excusals, there is no clearly established Supreme Court precedent that required the conclusion that the allowance of excusals for hardship would constitute systematic exclusion if it resulted in significant disparities. *Duren* and *Taylor v. Louisiana* examined processes in which Missouri and Louisiana categorically treated distinct groups differently. That did not occur here. Kent County did not discriminate between distinct groups. Rather, the processes it applied were facially neutral.

Regarding the assignment of prospective jurors to district court before circuit, again there is no clearly

established precedent from this Court to indicate that such facially neutral processes are improper. Moreover, the Sixth Circuit improperly relied on anecdotal information to rebut the Michigan Supreme Court's factual finding that Smith had failed to meet his burden. Furthermore, in finding that the State had rebutted the showing of a violation on the hardship excusals, the Sixth Circuit found that the underrepresentation was due solely to the assignment process. Yet, there was no record support for the finding that this assignment process caused sufficient underrepresentation by itself to cause a violation of the second prong of *Duren*. That is dispositive because the third prong of *Duren* requires a showing that the "underrepresentation is due to the systematic exclusion" in the jury-selection process.[70]

A. This Court has not clearly established what types of practices constitute systematic exclusion other than the categorical distinctions applied in *Duren* and *Taylor v. Louisiana*.

In *Duren,* this Court established that the defendant must show that the underrepresentation was a result of systematic exclusion. This Court noted that the "large discrepancy" cannot be merely "occasional" after evaluating the duration and persistence of the underrepresentation at issue there.[71] The exclusion must be "inherent" in the processes used.[72]

---

[70] *Duren,* 439 U.S. at 364.
[71] *Duren,* 439 U.S. at 366.
[72] *Duren,* 439 U.S. at 366.

The two cases that examined this concept of systematic exclusion – *Duren* and *Taylor* – evaluated processes in which the State categorically treated distinct groups differently. In *Duren*, Missouri provided an automatic exemption to all women and only men older than 65 years old for all who requested the exemption. And it provided the same exemption if requested in its summonses – Missouri decided that the women who did not respond were "presumed to have claimed [an] exemption[.]"[73] Likewise, in *Taylor,* Louisiana automatically excluded women from service unless a woman had filed a declaration with the clerk indicating her desire to serve.[74]

In its application of the third prong of *Duren*, this Court noted that the defendant had shown that the exclusion of women was due to "the system by which juries were selected," specifically the underrepresentation was "due to the operation of Missouri's exemption criteria."[75] There were no such categorical distinctions at issue here.

---

[73] *Duren,* 439 U.S. at 367.
[74] *Taylor v. Louisiana,* 419 U.S. at 523.
[75] *Duren,* 439 U.S. at 367.

B. The Michigan Supreme Court did not unreasonably apply clearly established law when it concluded jury hardship excuses did not demonstrate systematic exclusion under Duren's third prong.

1. The hardship excusals did not constitute a systematic exclusion.

In rejecting the Michigan Supreme Court's analysis and concluding that it had unreasonably applied clearly established Supreme Court precedent regarding the excuses, the Sixth Circuit erred by imposing a new federal requirement, where none existed previously, in determining that Smith had established the prima facie case of systematic exclusion based on the hardship excusals. In reaching this conclusion, the Sixth Circuit ignored the AEDPA standards and contrived a new constitutional requirement. The excusals are a reasonable measure and not expressly limited to any group. And without the excusals, many jurors – whether members of a distinct group or not – would face a Hobson's choice: either appear for jury duty in the face of neglecting their children or losing their jobs or disregard their jury service and ultimately face a hearing for contempt for failing to appear.

Smith claimed that Kent County systematically excluded prospective African American jurors because it allowed for exemptions based on personal reasons. The Circuit Court Administrator, Kim Foster, testified that the county provided for excuses based on considerations of child-care, transportation, and conflicts with work. J.A. 21a. Related to these exemptions, Smith provided testimony at the

evidentiary hearing to show that there were significantly higher percentages of single-parent households in the African American community (64% to 19%), higher poverty rate in the African-American community (31.5% to 6.7%), and that there were significantly more African American households without vehicles (30% to 6%). J.A. 80a, 81a-82a. There was no testimony about whether African American jurors selected these excuses in greater numbers than others because this information was not recorded by the county.

The Michigan Supreme Court rejected this claim because the "influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." Pet. App. 147a. Also as a factual matter, the concurrence (joined by the majority on this point) noted that there was no concrete evidence that these exemptions in fact resulted in "fewer black prospective jurors" because the evidence was only supported by "generalized" testimony. Pet. App. 171a.

In rejecting these conclusions as unreasonable, the Sixth Circuit determined that the Sixth Amendment is "concerned with social and economic factors":

> Contrary to the conclusion reached by the Michigan Supreme Court, the Sixth Amendment is concerned with social or economic factors when the particular system of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately

> called to or excused from service on a venire panel. [Pet. App. 27a-28a.]

The Sixth Circuit then determined that because the social and economic factors "disproportionately" affected African Americans, they are inherent in the particular jury selection used. Pet. App. 29a.

But there is no clearly established Supreme Court precedent that supports this conclusion. The processes at issue in *Duren* categorically treated women differently from men in the jury selection process. There was nothing comparable here in the Kent County system. The allowance by Kent County for an excuse based on hardship was uniformly available to all prospective jurors without regard to race, ethnicity, or sex. There was no targeting of distinct groups – Kent County does not determine which prospective jurors will seek an excuse from service.

The fallacy underlying the Sixth Circuit's analysis is its conclusion that a neutral process that disproportionately affects distinct groups because of social or economic factors is *inherent* in the process and is exclusionary. There is no Sixth Amendment case law from this Court to support that conclusion. This is because systematic exclusion inheres in the process when the process itself distinguishes between the distinct groups. That was the point in *Duren*.

In contrast, a reasonable standard that affects distinct groups differently based on the independent actions or decisions of the members of the group is external to the process. As confirmation of this point, the circuits have rejected on direct review the claim of

systematic exclusion regarding disparities that arise from the use of voter registration lists.[76] As noted by the circuits, the United States relies on voter registration lists for its "presumptive" statutory list of prospective jurors under 18 U.S.C. § 1863(b).[77]

In rejecting claims of systematic exclusion under the third prong of *Duren* based on disparities from the use of voter registration lists, the analysis of some of the federal appellate courts have been based on the fact that the independent decisions of prospective jurors do not represent systematic exclusion under *Duren*'s third prong. For example, in *United States v. Orange*, the defendant claimed that there were disparities that arose from (1) the failure to update mailing addresses; (2) the failure to follow up on undelivered questionnaires; and (3) from the use of voter registration where minorities were less likely to vote. In rejecting that any disparities were systematic, the Tenth Circuit noted that "[n]one of these purported

---

[76] *See U.S. v. Biaggi,* 909 F.2d 662, 677-678 (2d Cir. 1990); *U.S. v. Cecil,* 836 F.2d 1431, 1446-1455 (4th Cir. 1988)(en banc); *U.S. v. Odeneal*, 517 F.3d 406, 412 (6th Cir. 2008); *U.S. v. Smallwood*, 188 F.3d 905, 914-915 (7th Cir. 1999); *U.S. v. Morin*, 338 F.3d 838, 843-844 (8th Cir. 2003); *U.S. v. Orange,* 447 F.3d at 800, citing *U.S. v. Test*, 550 F.2d 577, 586-587 (10th Cir. 1976)(en banc). *Cf. U.S. v. Weaver,* 267 F.3d at 244-245 ("we note that if the use of voter registration lists over time did have the effect of sizeably underrepresenting a particular class or group on the jury venire, then under some circumstances, this could constitute a violation of a defendant's fair-cross-section rights under the Sixth Amendment.")(internal quotes omitted; citation omitted); and *U.S. v. Lewis,* 10 F.3d 1086, 1090 (4th Cir. 1993)("the disparity between the proportion of eligible whites selected for master jury wheel and proportion of eligible minority persons selected must not exceed twenty percent")(internal quotes omitted; citation omitted).

[77] *See*, e.g., *U.S. v. Orange,* 447 F.3d at 800.

causes for under-representation constitute systematic exclusion. Discrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*."[78] The same is true for the failure to follow up on questionnaires that were not returned by the prospective juror.[79] The Michigan Supreme Court's conclusion that Smith had failed to establish a prima facie case based on hardship excuses was not objectively unreasonable.

Moreover, if such a neutral system may give rise to systematic exclusion based on the economic or social condition of a distinct group, then any neutral means devised for selecting jurors must also be supplemented by a self-conscious system to ensure that there has been no underrepresentation. Kent County does not keep figures on the race and ethnicity of its prospective jurors. If the Sixth Circuit is correct, then Kent County would be obliged to do so to ensure that the venires mirror the latest census figures.

Even if this Court concludes that a system of juror selection that is neutral – like the granting of excuses – is inherent in the process for the purposes of *Duren*, there is no clearly established Supreme Court precedent that provides this resolution. *Duren* and *Taylor* do not provide sufficient specificity to the State courts to guide them on this point, in the same way as this Court explained in *Wright* and *Musladin*.

---

[78] *U.S. v. Orange*, 447 F.3d at 800.

[79] *See*, e.g., *U.S. v. Rioux,* 97 F.3d at 658 ("The inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to outside forces, such as demographic changes").

Finally, as an independent basis of error, the Sixth Circuit never addressed the analysis from the Michigan Supreme Court's concurrence – adopted by the majority – that there was no specific evidence to support the claim of systematic exclusion based on the granting of excusals. Pet. App. 23a-35a. There was no direct evidence that African Americans sought excusals at a higher rate.

2. As the Sixth Circuit correctly found, the State has a substantial interest in allowing excusals based on hardship.

The Sixth Circuit ultimately found that the prima facie violation for the Kent County provision for hardships had been rebutted by the State because of the "significant interest" in avoiding these burdens on jurors. Pet. App. 34a-35a. Although the State contests the conclusion that any disparities arising from the hardships were inherent in the process, the Sixth Circuit was right that allowing excuses for hardship serves a significant State interest.

In *Taylor v. Louisiana,* this Court noted that "States are free to grant exemptions from jury service to individuals in case of special hardship[.]"[80] In *Duren,* this Court reiterated that reasonable exemptions based on "special hardship" or "community needs" would not likely pose a threat to leaving the remaining pool of prospective jurors unrepresentative.[81] The exemptions at issue here fit squarely within the definition of "special hardship."

---

[80] *Taylor v. Louisiana,* 419 U.S. at 534.
[81] *Duren*, 439 U.S. at 370.

C. The Michigan Supreme Court did not unreasonably apply clearly established Supreme Court law when it concluded that Smith failed to carry his burden of establishing that the "siphoning" of jurors resulted in systematic exclusion under *Duren's* third prong.

In the same way as the hardship excuses, the selection of the jurors for the local courts first and the county courts afterward did not categorize distinct groups differently. The processes were neutral.[82] There was nothing inherent in the system as defined by *Duren* that was systematically exclusionary. The third prong of *Duren* is more than just persistent statistical disparity; otherwise the second prong would then supplant the third prong of *Duren*.[83] This Court's analysis in *Duren* requires an additional showing, that is, that the disparities were inherent in the selection process as they were in that case.

Smith claimed that the Kent County process of selecting prospective jurors for the local courts first and then the county courts "siphoned" African American jurors from the venires for the county. At the evidentiary hearing, Kim Foster explained that

---

[82] *See*, e.g., *U.S. v. Bullock,* 550 F.3d 247, 252 (2d Cir. 2008)("The motor vehicle roll was included specifically 'to make sure that [the] jury pool [wa]s balanced.' That the district court failed in its attempt to achieve such balance does not detract from the court's demonstrably race-neutral approach to juror selection.").

[83] *See Paredes v. Quarterman*, 574 F.3d 281, 290 (5th Cir. 2009)("If any discrepancy sufficient to satisfy the second prong would also satisfy the third, the third inquiry would be superfluous.").

this process was discontinued in October 1993. J.A. 22a.

The Michigan Supreme Court found that Smith had failed to carry his burden of showing systemic underrepresentation:

> The record does not disclose whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool. Defendant has simply failed to carry his burden of proof in this regard. [Pet. App. 147a.]

This factual determination was underscored by the concurring opinion in the Michigan Supreme Court, which noted that after Kent County discontinued this practice of allowing prospective jurors to be first selected by local courts, the change in the number of African Americans available in State circuit court was "small." Pet. App. 169a n. 15.

On this point, the Michigan Supreme Court was right that Smith had not provided an explanation about why the selection of the local district courts first – when done for all the districts in the county – would result in fewer African Americans in greater proportion to other prospective jurors when all of the districts were subject to this assignment process. J.A. 21a.[84] What the Sixth Circuit ignored was that all district courts obtained jurors first. There was no

---

[84] Foster testified that "[a]ll the [jury] panels went out to the District Courts, the Circuit Court panel list for the year was selected by the time I arrived[.]" J.A. 21a.

showing that the percentage of residents from the City of Grand Rapids assigned to district courts was greater than the percentage of the overwhelmingly non-African American residents from other areas of the county. There was thus no specific evidence that the practice of assigning jurors first to district court had any effect on the percentage of African-American jurors in the circuit court for Kent County.

In rejecting these factual findings, the Sixth Circuit effectively usurped the role of the State judiciary. Under the AEDPA, 28 U.S.C. § 2254(e), the factual findings of the State courts are presumed to be correct. On this point, the Sixth Circuit relied on testimony from two witnesses from the State evidentiary hearing that did not include any concrete data regarding the numerical effect of this process. The testimony was merely anecdotal.[85]

In the absence of direct evidence to rebut the factual conclusion of the Michigan courts, the Sixth Circuit was foreclosed under 28 U.S.C. § 2254(e) from making this finding. The Sixth Circuit's rejection of the Michigan Supreme Court's factual conclusions and the substitution of its own factual inferences regarding the evidence is at odds with the statutory presumption of correctness accorded State courts' factual findings.

---

[85] The Sixth Circuit quoted Richard Hillary, director of the Defender's Office, who said that he "routinely observed few" African Americans on Kent County venire panels and that the Jury Minority Representation Committee had "studied" the matter and found that it was caused by losing minorities to the local courts; and Kim Foster, the Kent County Court Administrator, who said that the system was revised based on "the belief" that the local courts had "swallowed up" the African American jurors. Pet. App. 29a-30a.

By not granting the Michigan Supreme Court finding the presumption of correctness under AEDPA, the Sixth Circuit failed to perform the proper review in habeas.

Nevertheless, the Sixth Circuit concluded that because 85% of the African American population resided in Grand Rapids, it then found that this assignment process to the local Grand Rapid courts "essentially omits" the Grand Rapids jurors. Pet. App. 33a. But this conclusion is not supported by the record.

At best, Smith showed a small correlation. At the evidentiary hearing, Smith provided testimony that there was an 18% comparative disparity from April 1993 through October 1993 (when the juror assignment process was in place) and then a 15% comparative disparity from October 1993 through October 1994 (after it was discontinued). J.A. 112a-115a, 181a. In actual numbers, the strongest case that Smith can make is that this claim of "siphoning" affected the jury venires by a 3% comparative disparity. This would mean that there were two fewer African American jurors for the entire six-month period of time from April 1993 through October 1993 where there were 929 prospective jurors in total.[86] But the Sixth Circuit determined that there was no

---

[86] This is calculated by computing a 15% comparative disparity for April 1993 through October 1993 that presumably would have occurred absent the "siphoning." Stoline determined the 18% by dividing the disparity (12.2) by the expected African American jurors (67.6), where there were a projected 55.4 African American jurors. J.A. 181a. Thus, there would be a 15% for this same time period if a disparity of 10.1 (two fewer African American jurors) was divided by the expected African American jurors (67.6), creating a new projected number of 57.4 African American jurors.

unconstitutional underrepresentation that resulted from the excusals based on its finding of a significant State interest. Thus, the Sixth Circuit determination of underrepresentation resulted solely from the juror assignment. Accepting the correlation, the comparative disparity that resulted from the assignment process was only 3%. As a consequence, Smith failed to show that any significant underrepresentation was "due to the operation" of Kent County's assignment system as required by the third prong of *Duren*.[87] This is not a constitutionally significant number. There is no basis on which to conclude that Smith was deprived of a fair trial based on an impartial jury based on the assignment system. This Court should reverse.

[87] *Duren,* 439 U.S. at 367.

CONCLUSION

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

Respectfully submitted,

Michael A. Cox
Michigan Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record

Joel D. McGormley
Division Chief
Appellate Division
State of Michigan

Timothy K. McMorrow
Special Assistant Attorney General
Appellate Chief
Kent County Prosecutor's Office

Attorneys for Petitioner

Dated: November 2009