No. 08-1402

In The

Supreme Court Of The United States

MARY BERGHUIS, WARDEN
Petitioner,

v.

DIAPOLIS SMITH
Respondent.

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

BRIEF OF AMICI CURIAE CONNECTICUT AND SIX OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in ruling that the Michigan Supreme Court had applied "clearly established Federal law" unreasonably when it rejected a state prisoner's Sixth Amendment fair cross section claim because the prisoner had failed to demonstrate a constitutionally significant underrepresentation of a distinctive group and that any such underrepresentation was the result of the "systematic exclusion" of that group, and in granting the prisoner relief pursuant to 28 U.S.C. § 2254.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

COURT RULES

INTERESTS OF THE AMICI CURIAE

The State of Connecticut, and the six other states that join in this brief, have a compelling interest in defending the presumptively valid judgments of their courts against post conviction claims in federal court. Accordingly, the *amici* states have an equally compelling interest in ensuring that the lower federal courts properly apply the standard of review for federal habeas corpus claims proscribed by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In addition, because the *amici* states must defend the jury selection process employed by their courts against constitutional challenges raised by criminal defendants, they have a strong interest in ensuring that the lower federal courts properly apply the law governing the Sixth Amendment's guarantee of a jury drawn from a fair cross section of the community. The Sixth Circuit's decision in this case implicates all of these concerns. Allowing the decision to stand would have a detrimental impact on both the ability of the *amici* states to defend criminal convictions obtained in their courts against federal habeas corpus challenges and to defend the jury selection process employed in their court systems against fair cross section claims. The *amici* states, therefore, have a substantial interest in this Court's determination of whether to review the Sixth Circuit's decision.[1]

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[1] Article XXIII of the Amendments to the Constitution of the State of Connecticut established "within the executive department a division of criminal justice which shall be in charge of . . . prosecution of all criminal matters" and designated the chief state's attorney as the head of the division. Connecticut General

(continued...)

STATEMENT

The Respondent, Diapolis Smith, was convicted of second degree murder after a jury trial in the Circuit Court for Kent County, Michigan. In the trial court, the Respondent claimed that he was denied his Sixth Amendment right to a jury drawn from a fair cross section of the community under *Duren v. Missouri*, 439 U.S. 357 (1979). The Respondent contended that the systematic exclusion of African Americans during the jury selection process resulted in a constitutionally significant underrepresentation of African Americans in the venire from which his jury was drawn.

The evidence adduced in the trial court showed that 7.28 percent of the jury-eligible population of Kent County was African American. Between April 1993 and October 1993, the period during which the Respondent's trial took place, 929 prospective jurors were selected from the county. If prospective jurors were selected from the eligible population entirely at random, 68 of those selected would have been African American. The

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[1](...continued)
Statutes § 51-278(c) provides that the chief state's attorney is responsible for "all appellate . . . and postconviction proceedings arising out of . . . any criminal action whether . . . denominated civil or criminal for other purposes." Thus, under Connecticut law, the chief state's attorney serves as the equivalent of the attorney general for criminal matters. Therefore, Supreme Court Rule 37.4 permits the chief state's attorney of Connecticut, as well as the attorneys general for the other *amici* states, to file supporting briefs on behalf of their respective states without the permission of the parties. Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

evidence showed, however, that 56 of the prospective jurors selected were African American. *People v. Smith*, 463 Mich. 199, 211-12 (2000).

The evidence also showed that after prospective jurors were selected, some were assigned to serve as jurors in the district courts of the county. Prospective jurors who were not selected in the district courts were available to serve as jurors in circuit court. *People v. Smith*, 463 Mich. at 210-211. The City of Grand Rapids, which is located in Kent County, is served by the 61st District Court. Id., at 210. Under Michigan law, only residents of Grand Rapids could be selected for jury service in the 61st District Court. *Smith v. Berghuis*, 543 F.3d 326, 331-32 (6th Cir. 2008). The population of Grand Rapids was 18.5 percent African American; *People v. Smith*, supra, 211; and 85 percent of the African American population of Kent County resided in the city. *Smith v. Berghuis*, supra, 344. The record, however, included no evidence regarding the effect that the preliminary selection of district court jurors from the county jury pool had on the number of African American jurors ultimately available to serve in the circuit court.

The trial court rejected the Respondent's fair cross section claim and denied relief. The Respondent appealed and the state Court of Appeals reversed. The prosecution then sought leave to appeal which was granted by the Michigan Supreme Court. *People v. Smith*, 463 Mich. at 212-13. On appeal, the Supreme Court rejected the Respondent's claim because he had failed to make the required showings with respect to

either the second or third prongs of the *Duren* test. Id. at 202-205.

In ruling on the Respondent's claim that African Americans were underrepresented in his jury venire, the Michigan Supreme Court observed that since *Duren*, the lower federal courts have used three different methods of measuring fair and reasonable representation. The court noted that each method had weaknesses and each was subject to criticism. *People v. Smith*, 463 Mich. at 203-204. The court concluded, therefore, that "no individual method should be used exclusive of the others" and instead adopted a case by case approach. Id., at 204. The court rejected the Respondent's claim because he had failed to show a constitutionally significant disparity under either of the two most commonly used methods, absolute disparity or comparative disparity. Id., at 205-205.[2]

Despite the fact that it found no constitutionally significant underrepresentation, the Michigan court went on to consider the Respondent's claim that African Americans were systematically excluded from the jury venire. The Respondent claimed that African Americans were systematically excluded from being prospective jurors in the Kent County Circuit Court in three ways. First, he claimed that the practice of

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[2] With respect to the third method, which is known as the standard deviation test, the Michigan Supreme Court quoted the Second Circuit in noting that "no court in the country has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems." (Alteration in original.) *People v. Smith*, 463 Mich. at 204, quoting *United States v. Rioux*, 97 F.3d 648, 655 (2nd Cir. 1996).

excusing prospective jurors for reasons such as lack of transportation or child care had a disproportionate effect on African Americans. Second, he claimed that Kent County's failure to aggressively pursue persons not responding to the initial questionnaire or to follow up on questionnaires returned as undeliverable reduced the number of potential African American jurors. Finally, he claimed that the pool of African American jurors available to serve in the circuit court was diminished by the selection of jurors from Grand Rapids to serve in the 61st District Court. *People v. Smith*, 463 Mich. at 224-26.

The Michigan Supreme Court rejected the Respondent's claim that African Americans were systematically excluded from the jury venire. The court concluded that the first two problems cited by the Respondent were outside factors that were not "inherent in the particular jury selection process . . . used by Kent County." *People v. Smith*, 463 Mich. at 226; see *Duren*, 439 U.S. at 366. The court also rejected the Respondent's claim that selecting jurors for the district courts from the county juror pool "siphoned away" prospective African American jurors from the circuit court. The court concluded that the Respondent failed to carry his burden of proof by presenting evidence to show that the practice did, in fact, diminish the number of African American jurors available for service in the circuit court. *People v. Smith*, supra, 225.

Thereafter, the Respondent filed a petition for a writ of habeas corpus pursuant to § 2254 claiming, *inter alia*, that he was denied his right to a jury drawn from a fair cross section of the community. The district

court denied the Respondent's petition. *Smith v. Berghuis*, 543 F.3d at 333. The Respondent appealed and the Sixth Circuit reversed, concluding that "the Michigan Supreme Court unreasonably applied *Duren*'s three prong test in rejecting [the Respondent's] Sixth Amendment claim." Id. at 336. Because it is clear that African Americans are a distinctive group; see *Peters v. Kiff*, 407 U.S. 493, 503 (1972); the court indicated that it would address "only the second and third prong of the *Duren* prima facie test and the relative Michigan state court findings." *Smith v. Berghuis*, supra, 336.

In addressing the Respondent's claim regarding the second prong of the *Duren* test, the Sixth Circuit acknowledged that "the absolute disparity between jury-eligible African Americans and those that actually appeared for venire panels was 1.28 percent." *Smith v. Berghuis*, 543 F.3d at 337. Such a disparity falls far below the level that would establish a constitutionally significant underrepresentation for the purposes of *Duren*. See, e.g., *United States v. Rioux*, 97 F.3d 648, 658 (2nd Cir. 1996) (2.14 absolute disparity "statistically insignificant"); *United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir.), cert. denied, 519 U.S. 985 (1996)(4.9 absolute disparity constitutionally acceptable); *United States v. Biaggi*, 909 F.2d 662, 677-78 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) (4.7 absolute disparity not "a violation of the fair cross-section requirement").[3]

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[3] "[T]he absolute disparity method measures the difference between the group's representation in the population and in the jury pool." *United States v. Rioux*, supra, 656.

The Sixth Circuit, however, questioned "the wisdom of applying the absolute disparity test to the small African American population of Kent County . . ." *Smith v. Berghuis*, 543 F.3d at 337. The court, citing *United States v. Jackman*, 46 F.3d 1240, 1247 (2nd Cir. 1995) and *Foster v. Sparks*, 506 F.2d 805, 835 (5th Cir. 1975), concluded that "[w]here the distinctive group alleged to have been underrepresented is small . . . the comparative disparity test is the more appropriate measure of underrepresentation. *Smith v. Berghuis*, supra, 338.[4]

The Sixth Circuit then noted that application of the comparative disparity test to the Kent County venire panels revealed that African Americans were underrepresented by 18 percent in the six months preceding the Respondent's trial and by 15 percent in ten of the eleven months after trial. *Smith v. Berghuis*, 543 F.3d at 336-38. As with the absolute disparity in this case, these figures fall far below the level of comparative disparity needed to establish underrepresentation for the purposes of *Duren*. See, e.g., *Johnson v. McCaughtry*, 92 F.3d 585, 594 (7th Cir. 1996) (comparative disparity of 33 percent insufficient to satisfy second prong of *Duren*); *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3rd Cir. 1992), cert. denied, 508

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[4] The comparative disparity method "measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service." *Ramseur v. Beyer*, 983 F.2d 1215, 1231-32 (3rd Cir. 1992), cert. denied, 508 U.S. 947 (1993). Comparative disparity is calculated by dividing the "absolute disparity" in the groups representation by its percentage of the population and then multiplying by 100 percent. *Rioux*, 97 F.3d at 655.

U.S. 947 (1993)(rejecting a fair cross section claim based on a comparative disparity of 40 percent); *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990)(comparative disparity of 40 percent not large enough to establish unreasonable representation under *Duren*).

The Sixth Circuit, nevertheless, determined that the Respondent met the requirements of the second prong of the *Duren* test because of an increase in the comparative disparity during the month in which the Respondent's trial took place. The court noted that the comparative disparity during this month "increased to 34 percent."*Smith v. Berghuis*, 543 F.3d at 338. Based on the 34 percent comparative disparity during the month of the trial and the 18 percent comparative disparity in the six preceding months, the court concluded that the Respondent had "established that African Americans were underrepresented on Kent County venire panels." Id.[5]

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[5] The Sixth Circuit cited *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) and *Ramseur v. Beyer*, 983 F.2d at 1232, in support of its conclusion that a comparative disparity of 34 percent established constitutionally significant underrepresentation for the purposes of *Duren*. While the Eighth Circuit's decision in *Rogers* provides at least equivocal support for the court's conclusion, the Third Circuit's decision in *Ramseur* stands for precisely the opposite proposition. In *Ramseur*, the Third Circuit described a comparative disparity of 40 percent as being "borderline" and "at the margin of the range found acceptable by the courts." *Rasmeur v. Beyer*, supra, 1232. The court, nevertheless, concluded that the evidence did not "convincingly demonstrate that the representation of African-Americans on jury pools was unfair or unreasonable." Id., at 1235.

In order to prevail on the third prong of the *Duren* test, the Respondent had to show that the underrepresentation of African Americans was due to their "systematic exclusion . . . from the jury selection process." *Duren v. Missouri*, 439 U.S. at 364. In this case, the Sixth Circuit's analysis of the third prong was based on its conclusion that the Respondent had "demonstrated that African Americans were underrepresented on Kent County venire panels by between 15 and 18 percent over a period of 17 months and 34 percent in the month during which his jury was drawn." *Smith v. Berghuis*, 543 F.3d at 340. The court observed that "[w]hile this disparity may not rise to the level of demonstrating systematic exclusion *per se*, this persistent disparity combined with the petitioner's evidence that this disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*." Id. The court concluded, therefore, that the Respondent had "demonstrated that the underrepresentation of African Americans was 'inherent in the particular jury-selection process utilized,' and [that he had] met his burden to demonstrate that African were systematically excluded from Kent County venire panels." Id.

ARGUMENT

In *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), the Sixth Circuit granted *habeas corpus* relief and ordered a new trial for a state prisoner challenging his conviction pursuant to 28 U.S.C. § 2254. The Sixth Circuit held that the Michigan Supreme Court unreasonably applied this Court's ruling in *Duren v. Missouri*, 439 U.S. 357 (1979), when it rejected the

prisoner's Sixth Amendment fair cross section claim. The Sixth Circuit ruled that the Michigan court had applied both the second and third prongs of the *Duren* test unreasonably. The Sixth Circuit concluded that the Michigan court's application of the second prong of the test was unreasonable because it failed to apply the "comparative disparity" test to determine whether there was a constitutionally significant underrepresentation of African Americans in the venire. *Smith v. Berghuis*, 543 F.3d at 338-39. The Sixth Circuit also concluded that the Michigan court's application of the third prong of the test was unreasonable when it found that the petitioner had failed to meet his burden of showing that the underrepresentation was the result of a "systematic exclusion" of African Americans. The Sixth Circuit concluded that the persistence of the disparity along with evidence that the disparity was not random supported the conclusion that African Americans were systematically excluded from the venire. *Id.*, at 340-41.

The Sixth Circuit's decision in *Smith v. Berghuis* constitutes error for two reasons. First, the decision is based on a misapplication of federal law governing Sixth Amendment fair cross section claims. Specifically, the Sixth Circuit erred in ruling that the Michigan Supreme Court was required to apply the comparative disparity test in determining whether there was a constitutionally significant underrepresentation of African Americans in the venire and that the systematic exclusion of African Americans could be inferred from such factors as the persistence of the disparity and the fact that the disparity could not result from the random selection of jurors. Second, the Sixth Circuit erred in ruling that the Michigan Supreme Court's decision

involved an unreasonable application of "clearly established Federal law," as determined by this Court, and in granting relief under 28 U.S.C. § 2254.

A. The Sixth Circuit Erred in Ruling That the Respondent Was Denied His Sixth Amendment Right to a Jury Drawn from a Fair Cross Section of the Community

The Sixth Amendment guarantees the defendant in a criminal prosecution the right to trial by a fair and impartial jury. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court stated that in order to ensure fairness and impartiality, the jury must be "a body that is truly representative of the community . . . and not the organ of any special group or class." (Citation and quotation marks omitted.) Id., at 527. Thus, "the selection of the petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." Id., at 528. Accordingly, the Sixth Amendment requires that potential jurors be drawn from a venire that is a "fair cross section of the community." Id., at 530.

Nevertheless, the *Taylor* court recognized that "[t]he fair-cross-section principle must have much leeway in application." Id., at 537-38. The court noted that "[s]tates remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may fairly be said that the jury lists or panels are representative of the community." Id., at 538. The court emphasized that while "petit juries must be drawn from a source fairly representative of the

community [there is] no requirement that petit juries actually chosen mirror the community and reflect the distinctive groups in the population." Id. Thus, "[d]efendants are not entitled to a jury of any particular composition . . . but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id., see *Swain v. Alabama*, 380 U.S. 202, 208 (1965) (jury venire not constitutionally required to precisely mirror community).

In *Duren v. Missouri*, supra, this Court identified three factors that a defendant must establish to make a prima facie showing that his right to a jury drawn from a fair cross section of the community has been violated. Under the *Duren* test, the defendant must prove:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systemic exclusion of the group from the jury selection process.

Duren, 439 U.S. at 364. Once the defendant has made a prima facie showing of an infringement of his right to a jury drawn from a fair cross section of the community, "the State bears the burden of justifying this infringement by showing attainment of a fair cross

section to be incompatible with a significant state interest." Id., at 368; see *Taylor*, 419 U.S. at 533-35.

When the Sixth Circuit's decision in *Smith v. Berghuis* is carefully considered, it becomes clear that the court of appeals failed to heed this Court's admonition that "[t]he fair-cross-section principle must have much leeway in application." *Taylor v. Louisiana*, 419 U.S. at 537-38. Instead, the court proceeded on the assumption that the Sixth Amendment requires that jury venires precisely, or at least closely, reflect the racial and ethnic composition of the communities from which they are drawn. Consequently, the Sixth Circuit took the Kent County court system to task for its failure to produce the idealized jury pool that the court wrongly believes the Sixth Amendment requires. The Sixth Circuit's misconception regarding the fair-cross-section requirement led the court into error in its application of both the second and third prongs of the *Duren* test.

1. The Sixth Circuit erred in ruling that the representation of African Americans in the venire was not fair and reasonable

The second prong of the *Duren* test required the Respondent to demonstrate that the representation of African Americans in the Kent County jury venire was not fair and reasonable. *Duren v. Missouri*, 439 U.S. at 364. The Michigan Supreme Court ruled that the Respondent failed to make the required showing under the second prong of the test. The Sixth Circuit reversed the Michigan court and ruled that the Respondent had demonstrated a constitutionally significant underrepresentation of African Americans in the venire.

The Sixth Circuit's ruling was error for three reasons. First, the court erred in ruling that the comparative disparity test was the appropriate method for measuring underrepresentation in this case. Second, the court erred in basing its decision on the results of the juror selection process for a single month. Third, the court erred in ruling that the results of the comparative disparity test for that month showed a constitutionally significant underrepresentation of African Americans.

In this case, the Michigan Supreme Court used both the absolute disparity test and the comparative disparity test to make its determination that the Respondent had failed to demonstrate a significant underrepresentation of African Americans. *People v. Smith*, 463 Mich. at 204-205. In contrast, the Sixth Circuit concluded that "[w]here the distinctive group alleged to be underrepresented is small . . . the comparative disparity test is the more appropriate measure of underrepresentation." *Smith v. Berghuis*, 543 F.3d at 338. The Sixth Circuit's decision to rely exclusively on the comparative disparity test is contrary to the overwhelming weight of authority among the other circuits.

The comparative disparity test is generally disfavored because it "tends to magnify the size of the disparity as the relevant group's percentage of the population decreases." *United States v. Haley*, 521 F.Supp. 290, 292 (N.D.Ga. 1981). Indeed, in *United States v. Whitely*, 491 F.2d 1248 (8th Cir.), cert. denied, 416 U.S. 990 (1974), the Eighth Circuit concluded that the comparative disparity test "distorts reality" when

applied to a group which constitutes a small percentage of the population. Id., at 1249. Accordingly, comparative disparity has been consistently rejected as the appropriate method for measuring underrepresentation for fair cross section claims. See, e.g., *United States v. Sanchez-Lopez*, 879 F.2d 541, 548 (1989) (comparative disparity disfavored because it exaggerates effect of any deviation); *United States v. Hafen*, 726 F.2d 21 (1st Cir.), cert. denied, 466 U.S. 962 (1984) (comparative disparity "ordinarily inappropriate" where relevant population is small) ; *United States v. Rioux*, supra, 655 (rejecting use of comparative disparity test). Accordingly, the Sixth Circuit's decision to rely exclusively on the comparative disparity test was error.

Moreover, in order to prevail on the second prong of the *Duren* test, the Respondent had to show a "substantial underrepresentation [of African Americans] over a significant period of time. . . ." *Ramseur v. Beyer*, 983 F.2d at 1234. Although there was evidence in the case pertaining to the juror selection process in Kent County over a period of seventeen months, the Sixth Circuit's ruling was based, almost entirely, on the results of the selection process for one month. *Smith v. Berghuis*, 543 F.3d at 340. When the evidence from the entire period is considered, it is clear that the juror selection process was operating well within the requirements of the Sixth Amendment. Because of the small number of prospective jurors summoned in Kent County each month and the small African American population of the county, it would only have taken a difference of a few African American jurors to create a significant change in the comparative disparity. Thus, it was error for the Sixth Circuit to find

underrepresentation of African Americans based primarily on evidence from a single month.

Finally, the Sixth Circuit ruled that a 34 percent comparative disparity in the jury venire during the month in which the Respondent was tried established a constitutionally significant underrepresentation of African Americans. *Smith v. Berghuis*, 543 F.3d at 338. It is well established, however, that a comparative disparity of 34 percent does not rise to the level of a constitutional violation. See, e.g., *Swain v. Alabama*, 380 U.S. at 208-209 (comparative disparity of 42 percent permissible); *Ramseur v. Beyer*, 983 F.2d at 1232 (comparative disparity of 40 percent at margin of range found acceptable); *United States v. Clifford*, 640 F.2d 150, 155 (8th Cir. 1981)(comparative disparity of 46 percent does not rise to level of substantial underrepresentation); *United States v. Test*, 550 F.2d 577, 589 (10th Cir. 1976)(comparative disparity of 46 percent found not to be substantial). Accordingly, the Sixth Circuit erred in ruling that the 34 percent comparative disparity was constitutionally significant.

2. The Sixth Circuit erred in ruling that systematic exclusion of jurors could be inferred from the facts of the case

In order to prevail on the third prong of the *Duren* test, the Respondent had to prove that the underrepresentation of African Americans in the venire was the result of systematic exclusion. *Duren v. Missouri*, 439 U.S. at 364. On direct appeal, the Michigan Supreme Court rejected the Respondent's claim, ruling that he had presented no evidence to show

that the exclusion of African American jurors was the result of any factor "inherent in the particular jury selection process utilized." *People v. Smith*, 463 Mich. at 224. On appeal from the denial of the Respondent's federal habeas petition, the Sixth Circuit ruled that the Michigan court applied federal law unreasonably when it held that the underrepresentation of African Americans in the county jury venire was not the result of systematic exclusion. *Smith v. Berghuis*, 543 F.3d at 340.

The Sixth Circuit reasoned that the "persistent disparity" in the county court venires "combined with [the Respondent's] evidence that the disparity was not random was sufficient to establish systematic exclusion within the meaning of *Duren*." *Smith v. Berghuis*, supra, 340. In reaching its decision, the court observed that "the extremely low probability that the underrepresentation would have occurred by chance provides . . . evidence that the system itself contributed to the lack of African Americans in the venire pools." Id., quoting *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996). In addition, the court noted that Kent County allowed prospective jurors to "opt out" of jury service if it would result in hardship based on child care, transportation or the inability to take time off from work. *Smith v. Berghuis*, supra, 340. Although the policy applied to all persons summoned for jury service, the court speculated that it "would likely disproportionately exclude African Americans." Id., at 341. The court also took note of the county's practice of diverting prospective jurors from the circuit court to the district courts. Id., at 342. Although there was no evidence regarding the effect that this practice had on

the number of African Americans serving as jurors in the circuit court, the Sixth Circuit found that the diversion of prospective jurors did reduce the number of African Americans available to serve as jurors in that court. Id. Consequently, the Sixth Circuit stated that "the lack of random selection in the Kent County jury selection process leads us to conclude that the underrepresentation of African American resulted from processes 'inherent in the particular jury-selection process utilized.'" Id., at 341, quoting *Duren*, 439 U.S. at 366.

The Sixth Circuit's ruling is contrary to the weight of authority in the other circuits. In order to prevail on his claim, the Respondent had to show that the underrepresentation of African Americans was due to their "systematic exclusion in the jury selection process." *United States v. Pion*, 25 F.3d 18, 22 (1st Cir.), cert. denied, 513 U.S. 932 (1994). In order to prove systematic exclusion, the Respondent had to prove that African Americans were treated differently, and that the difference in their treatment impaired their ability to serve as jurors. *United States v. Footracer*, 189 F.3d 1058, 1061 (9th Cir. 1999). In this case, there is nothing in the record to suggest that Kent County treated African Americans differently in its juror selection process. The Sixth Circuit, therefore, had no basis from which to infer systematic exclusion of African Americans from the jury venire.

Moreover, the showing of a "'mere statistical underrepresentation, without evidence of actual discriminatory or exclusionary practices' [is] insufficient to establish 'a prima facie violation of the sixth

amendment fair cross-section requirement.'" *United States v. Cecil*, 836 F.2d 1431, 1446 (4th Cir.), cert. denied, 487 U.S. 1205 (1988), quoting *United States v. Lynch*, 792 F.2d 269, 271 (1st Cir. 1986). Indeed, in *Truesdale v. Moore*, 142 F.3d 749 (4th Cir.), cert. denied, 525 U.S. 951 (1998), the Fourth Circuit observed that allowing the petitioner to "substitute evidence of substantial underrepresentation for evidence of systematic exclusion would go a long way towards requiring perfect statistical correspondence between racial percentages in the venire and those in the community. Such a rule would exalt racial proportionality over neutral jury selection procedure." Id., at 755. Thus, the Sixth Circuit's reliance on the "persistence" of the disparity in support of its decision is misplaced.

Finally, in *United States v. Orange*, 447 F.3d 792 (10th Cir. 2006), the Tenth Circuit held that "[d]iscrepancies resulting from the private choices of potential jurors . . . do not represent the kind of constitutional infirmity contemplated by *Duren*." Id., at 800. "[C]ourts have uniformly maintained that [personal] predilections cannot form the basis of a cognizable class and evoke judicial sanctions against the selection system." *United States v. Cecil*, 836 U.S. at 1447. Thus, the private decision of certain prospective jurors to "opt out" of jury service for reasons related to child care, transportation or employment cannot serve as the basis for a finding of systematic exclusion of African Americans. Accordingly, the Sixth Circuit erred in ruling that the Respondent established the systematic exclusion of African Americans on this record.

B. The Sixth Circuit Ruling Was Not Based on Clearly Established Federal Law as Determined by the United States Supreme Court

In this case, the Sixth Circuit ruled that the Respondent was entitled to relief under 28 U.S.C. § 2254(d)(1) because the Michigan Supreme Court unreasonably applied this Court's ruling in *Duren v. Missouri*, supra, when it rejected his Sixth Amendment fair cross section claim. The Sixth Circuit erred in granting relief because its rulings on the second and third prongs of the *Duren* test were not based on clearly established federal law as determined by the decisions of this Court.

The standard governing review of claims by federal habeas corpus petitioners is set forth in § 28 U.S.C 2254 (d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"). Section 2254 (d) provides, in pertinent part, as follows:

> (d) An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . .

In *Williams v. Taylor*, 529 U.S. 362 (2000), Justice O'Connor, writing for the court, observed that § 2254(d)(1) "prohibits a federal court from granting a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Id., at 399. Justice O'Connor explained that "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of the this Court as of the time of the relevant state-court decision." Id., at 411. Justice O'Connor stated, therefore, that "§ 2254(d)(1) restricts the source of clearly established law to this Court's jurisprudence." Id.

Here, the Sixth Circuit's' decision is not based on "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). While the court acknowledged the AEDPA standard; *Smith v. Berghuis*, 543 F.3d at 334-35; it failed to apply that standard when conducting its review of the Michigan Supreme Court's ruling.

In rejecting the Respondent's claim on direct review, the Michigan Supreme Court's held that the Respondent had failed to show a constitutionally significant disparity under either absolute or comparative disparity. *People v. Smith,* 463 Mich. at 204-205. The Sixth Circuit held this ruling to be an unreasonable application of federal law because it deemed the "comparative disparity test to be the more

appropriate measure of underrepresentation." *Smith v. Berghuis*, 543 F.3d at 338. The Sixth Circuit reached this conclusion despite the fact that there is absolutely no authority under this Court's precedent to support it. The Sixth Circuit then conducted its own analysis using the comparative disparity test, applied a different standard for determining whether the disparity was substantial, and reached a different result than the state court, all without support from this Court's jurisprudence. Id., at 338-39. It is clear, therefore, that the Sixth Circuit did nothing more than replace the judgment of the Michigan Supreme Court with its own judgment. When reviewing the Michigan Supreme Court's ruling on the third prong of the *Duren* test, the Sixth Circuit did essentially the same thing. It conducted its own analysis, applied different standards and reached a different result, all without authority from this Court's precedent. *Smith v. Berghuis*, supra, 339-45.

Indeed, this Court has never addressed the issue of which method should be used to determine whether a constitutionally significant underrepresentation exists in a jury venire. This Court has consistently held that habeas relief should not be granted where no decision of the court "squarely addresses the issue in the case. . . ." *Wright v. Van Patten*, 128 S.Ct. 743, 746 (2008); see also *Carey v. Musladin* , 549 U.S. 70, 75-77 (2006). Moreover, where, as here, a state court has decided an issue on which the federal courts are divided, AEDPA bars federal habeas corpus relief. See *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005).

In *Lockyer v. Andrade*, 538 U.S. 63 (2003), this Court stated that "the only question that matters under § 2254(d)(1) [is] whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law." Id., at 71. When reviewing the Michigan Supreme Court's ruling in this case, the Sixth Circuit did not even consider that question. Accordingly, the Sixth Circuit decision is error and should be reversed.

CONCLUSION

For the foregoing reasons and those presented by the Petitioner, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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