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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The Brief in Opposition only confirms the jurisprudential significance of this case by underscoring the legal points that there is a conflict among the circuits – and no clearly established Supreme Court precedent – on the central issue presented.

Respondent asserts that the decision of the Sixth Circuit here "is not likely to apply" to other cases because the process used by Kent County, Michigan was discontinued in 1993. Brief in Opposition, p 2. But this claim is wrong.

The Sixth Circuit adopted the comparative disparity standard for determining whether a defendant has established a prima facie violation of a defendant's right to have a jury drawn from the fair cross section of the community under the Sixth Amendment. This test will apply to all such claims that arise in the four States within the Sixth Circuit. In Michigan alone, there are currently two pending federal district court cases in the Eastern District of Michigan, *Ambrose v. Booker*, No. 1:06-cv-13361, and *Parks v. Warren*, No. 2:05-cv-10036, in which this issue has been raised.

There is no basis on which to believe that this case will not have a wide application to the jurisdictions throughout Michigan, Ohio, Kentucky, and Tennessee. There is nothing that limits the application of this case to only the facts that gave rise to the standards that the Sixth Circuit established here.

Otherwise, the points in the Brief in Opposition only highlight the need for this Court to grant certiorari because (1) there is a clear split in the circuits on the issue; and (2) the standard applied by the Sixth Circuit was not "clearly established" under 28 U.S.C. § 2254(d) of

the Antiterrorism and Effective Death Penalty Act (AEDPA).

Finally, with regard to the third argument raised in the petition for certiorari, the analysis of the Brief in Opposition only underscores the erroneous nature of the Sixth Circuit's decision on its merits. The Brief in Opposition cites numerous neutral methods of excusing prospective jurors, see pp 39-40, that it claims may result in an underrepresentation of distinct groups under the Sixth Amendment. But the methods employed here by Kent County, Michigan were reasonable, did not result in significant underrepresentation, and did not systematically exclude African Americans.

1. **The Brief in Opposition candidly acknowledges that there is a conflict among the circuits on the proper standard at issue here.**

The first argument in support of the State's petition for certiorari is that the Sixth Circuit decision created a conflict among the circuits. This argument was based on the point that nine of the circuits (First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh) have examined substantially the same fact patterns as alleged here under the three-pronged test of *Duren v. Missouri* that their Sixth Amendment right to have a jury drawn from a cross section was violated, and the circuits rejected these claims.[1] See *United States v. Royal* and *United States v. Hafen* (First Circuit);[2] *United States v. Rioux* and *United States v. Jenkins* (Second Circuit);[3] *United States*

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[1] *Duren v. Missouri,* 439 U.S. 357, 364 (1979).

[2] *United States v. Royal,* 174 F.3d 1, 10 (1st Cir. 1999); *United States v. Hafen,* 726 F.2d 21, 24 (1st Cir. 1984).

[3] *United States v. Rioux,* 97 F.3d 651, 655 (2d Cir. 1996); *United States v. Jenkins,* 496 F.2d 57, 65-66 (2d Cir. 1974).

v. Weaver (Third Circuit);[4] *United States v. Butler* (Fifth Circuit);[5] *United States v. Ashley* (Seventh Circuit);[6] *United States v. Rogers* and *United States v. Clifford* (Eighth Circuit);[7] *United States v. Sanchez-Lopez* (Ninth Circuit);[8] *United States v. Orange* (Tenth Circuit);[9] and *United States v. Carmichael* and *United States v. Clarke* (Eleventh Circuit).[10] In four of the circuits (First, Second, Eighth, and Ninth), the courts criticized the comparative disparity test in reaching their decisions.[11]

The Brief in Opposition frankly acknowledges that there is a conflict among the circuits. It cites a decision from the Fourth Circuit Court of Appeals, *United States v. Lewis,*[12] arguing that the Fourth Circuit applied the

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[4] *United States v. Weaver,* 267 F.3d 231, 241 (3d Cir. 2001).

[5] *United States v. Butler,* 611 F.2d 1066, 1070 (5th Cir. 1980).

[6] *United States v. Ashley,* 54 F.3d 311, 314 (7th Cir. 1995).

[7] *United States v. Rogers,* 73 F.3d 774, 777 (8th Cir. 1996); *United States v. Clifford,* 640 F.2d 150, 155 (8th Cir. 1981).

[8] *United States v. Sanchez-Lopez,* 879 F.2d 541, 548-549 (9th Cir. 1989). See also *Thomas v. Borg,* 159 F.3d 1147, 1150 (9th Cir. 1998).

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

[10] *United States v. Carmichael,* 560 F.3d 1270, ___ *22 (11th Cir. 2009); *United States v. Clarke,* 562 F.3d 1158 (11th Cir. 2009).

[11] *Hafen,* 726 F.2d at 24 (1st Cir.); *Jenkins,* 496 F.2d at 65 (2d Cir.); *Clifford,* 640 F.2d at 155 (8th Cir.); and *Sanchez-Lopez,* 879 F.2d at 547-548 (9th Cir.).

[12] *United States v. Lewis,* 10 F.3d 1086, 1090 (4th Cir. 1993): the Court in *Lewis* noted that the use of voter registration rolls does not give rise to a prima facie case under the Sixth Amendment, holding that "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).

comparative disparity test. Brief in Opposition, p 16.[13] The Brief then states that the Sixth Circuit decision here did not establish a conflict, but rather that "*the conflict was already there.*" Brief in Opposition, p 16 (emphasis added). But regardless whether the Sixth Circuit created this conflict or merely confirmed an existing conflict, the fact of such a conflict is not a point in dispute. See Supreme Court Rule 10(a).

On this point, the Brief in Opposition then engages in a survey of the cases cited by the State from the nine circuits. In its analysis, the Brief attempts to distinguish several of the circuit decisions either by noting that the methods for drawing the prospective jurors was different from the one here, *United States v. Royal* (First Circuit) and *United States v. Rioux* (Second Circuit), or that the courts had relied on both the absolute disparity test and the comparative disparity test in rejecting the claim for relief, *United States v. Weaver* (Third Circuit) and *United States v. Orange* (Tenth Circuit). See Brief in Opposition, pp 14-19.

But for the remaining five circuits, the Brief in Opposition merely claims that these decisions were wrongly decided. This concession acknowledges that the conflict between the other circuits and the Sixth Circuit here is deep, and that these decisions cannot be reconciled.

For the Fifth Circuit's decision in *United States v. Butler,* the Brief in Opposition notes that the opinion was based on *Swain v. Alabama,*[14] which it characterized as a

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[13] Contrary to the Brief in Opposition's characterization, the First Circuit in *Royal* noted that this methodology applied in *Lewis* was different from both the absolute disparity and the comparative disparity test. *Royal,* 174 F.3d at 8.

[14] *Swain v. Alabama,* 380 U.S. 202 (1965).

"flawed" decision and that *Butler* was therefore unreliable. Brief in Opposition, p 16. The Brief describes the decision in *United States v. Ashley* for the Seventh Circuit as "outrageous." Brief in Opposition, p 17. The Brief then states that the decision in *United States v. Sanchez-Lopez* from the Ninth Circuit "is as about as bad as [*Ashley*]. Brief in Opposition, p 18. For the decision of the Eighth Circuit, *United States v. Rogers,* the Brief in Opposition decries the fact that the circuit was compelled to follow a previous decision which then required a denial of relief ("[i]t is a peculiarity and disgrace"). Brief in Opposition, p 18 n 3. Finally, for the Eleventh Circuit's decision in *United States v. Carmichael,* the Brief in Opposition argued that the decision "does not conform to *Duren* and enshrines systematic underrepresentation of minorities as legitimate." Brief in Opposition, p 19 n 4.

The Brief in Opposition suggests that the split in the circuits may be stale, noting that the decision in *Butler* from the Fifth Circuit was from 1980 and had not been cited for 25 years. Brief in Opposition, p 16. But any claim that this conflict is no longer relevant is belied by the fact that the two decisions from the Eleventh Circuit, *United States v. Carmichael* and *United States v. Clarke,* were released in March of 2009. The conflict is real, the issue is ripe, and it requires resolution.

Moreover, even for the four circuits that the Brief in Opposition attempts to distinguish, these decisions nevertheless directly conflict with the Sixth Circuit's decision here. The opinion of the First Circuit in *Royal* expressly rejected the comparative disparity test and elected to apply the absolute disparity test alone in denying the defendant relief, where there African Americans were 4.86% of the community but only 1.89% of

the prospective jurors.[15] The same is true in *Rioux* for the Second Circuit. The court there applied the absolute disparity test alone after examining the comparative disparity test where the claim of underrepresentation was approximately two percent absolute disparity for African Americans and Latinos in grand juries, but would have been approximately 30% and 50% in a comparative disparity analysis.[16] The court found there was no prima facie showing of underrepresentation and denied relief.

That the courts in *Royal* and *Rioux* were not addressing the issue of "siphoning" as in this case was of no moment where the comparative disparities that the courts were addressing were the same or higher to the ones at issue here. The courts found there was no prima facie showing of a violation of *Duren* under its second prong. Contrary to the Brief in Opposition, these cases also evidence the conflict among the circuits.

For the final two circuits, the Brief in Opposition asserted that the State had "mischaracterized" the decisions in *Weaver* and *Orange* because the Third and Tenth Circuits had relied on both the absolute disparity test and the comparative disparity test in examining the second prong of *Duren* in those cases. Brief in Opposition, pp 16, 18. The Brief in Opposition apparently misapprehends the nature of the argument that the State of Michigan is making here.

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[15] *Royal,* 174 F.3d at 7-10 ("this Circuit has rejected comparative disparity analysis and applied absolute disparity analysis in cases similar to the case at hand").

[16] *Rioux,* 97 F.3d at 656 ("We are satisfied that the absolute disparity approach is most appropriate for analyzing the underrepresentation claims in this case").

In both of those cases, the circuits rejected the claim under *Duren* that there was a showing of prima facie of unconstitutional underrepresentation even though the comparative disparities were *higher* than here and the courts examined the absolute disparity test in reaching this conclusion. The fact that the comparative disparity was also examined in these two cases does not change the point that the decisions there are in conflict with the Sixth Circuit's decision here, which relied exclusively on the comparative disparity test in finding a violation for a comparative disparity of 34%. In *Weaver,* the Third Circuit rejected the claim even though the comparative disparities for African Americans were higher than those alleged here, over 40%.[17] Again, the same is true for the decision in *Orange,* where the alleged comparative disparities were between 35% and 55% for the distinct groups at issue there.[18]

Thus, the Sixth Circuit's decision stands in opposition to the decisions of nine other circuits. There is profound disagreement between the Sixth Circuit and the other circuits on how to apply *Duren,* a point acknowledged by the Brief in Opposition at 13 ("Cases cited by [the State of Michigan] that fail to follow these rules, or that evade them by clever mathematical tests which depreciate persistent underrepresentation as

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[17] *Weaver,* 267 F.3d at 243 (" Looking first at the comparative disparity figures, we find that they are quite high – 40.01% and 72.98% – but that because African-Americans and Hispanics comprise such a small percentage of the population, the results of this analysis are of questionable probative value").

[18] *Orange,* 447 F.3d at 779 ("Here, the comparative disparity figures are less: 35.41%, 36.82%, 54.41%, and 54.97%, while the percentage of adult populations are roughly the same. As such, the comparative disparity figures here are insufficient to establish a prima facie case that the representation is not fair and reasonable.").

insignificant, are in conflict with the holdings of the United States Supreme Court").

2. This Court's decision in *Duren* did not "clearly establish" under AEDPA the test applied here by the Sixth Circuit.

In the State of Michigan's second argument in support of the petition, the State argued that there was no "clearly established" Supreme Court precedent under 28 U.S.C. § 2254(d) in which to conclude that the decision of the Michigan Supreme Court was unreasonable. As noted already, this same substantive claim has been rejected by nine other circuits under *Duren* on direct review. The very fact that four circuits have expressly refused to follow the comparative disparity test makes it plain that this method of determining if there is a fair representation of the community under *Duren's* second prong is not clearly established.

The Brief in Opposition acknowledges the point that the circuits have applied *Duren* differently than did the Sixth Circuit here. In its view, the other courts are wrong – it argues that "the mere fact some courts have strayed from the *Duren* ruling" is no basis on which to grant certiorari. Brief in Opposition, p 15. The Brief in Oppostion also stated that "in most jurisdictions of the United States, the rule of *Duren* cannot apply[.]" Brief in Opposition, p 20. But this is a significant concession. The fact that the other circuits have *on direct review* rejected the position taken by the Sixth Circuit demonstrates the point that the legal standard adopted here was not required by this Court in *Duren*.

On this point, the Brief in Opposition asserts that this Court in *Duren* did not apply the absolute disparity test. Brief in Opposition, p 21. A review of *Duren* contradicts this claim.

In *Duren,* this Court noted that 54% of the population of the county were women and that only 14.5% of the members of the venires were women.[19] The Court then determined that there was a "gross discrepancy" when comparing the percentage of women in the community to the women in the venires:

> Such a gross discrepancy between the percentage of women in jury venires and 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.[20]

The use of the word "gross" in the phrase "gross discrepancy" here signifies the total difference, indicating a straight comparison of 54% with 14.5%. That is an absolute-disparity evaluation. There was no effort to examine the reduction in likelihood for women to serve as would occur in the comparative disparity test. The Third Circuit noted the same point that this Court applied the absolute disparity in *Duren* – even though it was not termed as such.[21]

The fact that the Brief in Opposition contested this point suggests it misunderstands the nature of the tests.

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[19] *Duren,* 439 U.S. at 363.

[20] *Duren,* 439 U.S. at 365-366.

[21] *Weaver,* 267 F.3d at 242 ("absolute disparity, which was the method employed in *Duren*, seems to be the preferred method of analysis in most cases"). See also *Royal,* 174 F.3d at 8, quoting Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel,* 103 Yale L.J. 1913, 1919-20 (1994)("While not explicitly endorsing any of the mathematical tests, the [*Duren*] Court seems to have considered only absolute disparity").

In the absolute disparity test, the result is yielded by subtracting the percentage of the distinct group in the venires from the percentage of the distinct group in the community.[22] It is a simple calculation. Here, during the sixth months at issue from April 1993 to October 1993 in Kent County, Michigan, African Americans were 7.28% of the adult population, and comprised 6% of the venires, an absolute disparity of 1.28%. The comparative disparity is determined by dividing the absolute disparity, 1.28%, by the percentage within the population, 7.28%, which here would result in an 18% comparative disparity. The numbers for the specific month of trial resulted in a 34% comparative disparity. Pet. App. 9a.

This Court in *Duren* engaged in a straightforward comparison of the percentages from the population and the venires. It did not engage in a comparative disparity analysis. In brief, the comparative disparity test was not established by the United States Supreme Court.

The Brief in Opposition cited *Norris v. Alabama* and argues that this Court has previously adopted the comparative disparity test. Brief in Opposition, p 24.[23] But that case was not based on the Sixth Amendment right to have one's jury drawn from a fair cross section of the community, but was based on the Equal Protection Clause that the process for selecting jurors was discriminatory.[24] The case does not apply for analysis under the Sixth Amendment.

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[22] See *Rioux*, 97 F.3d at 655 for a description of the calculation methods for absolute disparity and comparative disparity.

[23] *Norris v. Alabama*, 294 U.S. 587 (1935).

[24] See *Castenada v. Partida*, 430 U.S. 482 (1977).

Thus, the standards established by the Sixth Circuit in this case were newly adopted, and were not established by this Court's decision in *Duren*. There was no basis in habeas review to conclude that the Michigan Supreme Court's decision was an unreasonable application of clearly established Supreme Court precedent. This is another reason this Court should grant certiorari to ensure that the Sixth Circuit faithfully applies the AEDPA standards to ensure that the province of the State courts is not invaded by second-guessing on habeas review.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

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