No. _____ 081402 MAY 11 2009

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Duren v. Missouri*, this Court established a three-prong standard for determining whether a defendant was able to demonstrate a prima facie violation of the Sixth Amendment right to have a jury drawn from a fair cross section of the community. The circuits have split on the issue about the proper test for determining what constitutes a fair and reasonable representation of a distinct group from the community within the venires (jury pool) under the second prong of *Duren*. The Michigan Supreme Court ultimately concluded that the small disparities at issue here for African Americans (7.28% in the community as against 6% in the venires during the time period measured) did not give rise to a constitutional violation. The question presented is:

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* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as 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.

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

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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-37a. The order of the Sixth Circuit denying a motion for rehearing is unpublished. Pet. App. 38a. The district court decision adopting the federal magistrate's report and recommendation is also unpublished. Pet. App. 39a-51a. The report itself is unpublished as well. Pet. App. 52a-143a.

For the State court decisions, the decision of the Michigan Supreme Court in *People v. Smith* is reported at 463 Mich. 199; 615 N.W.2d 1 (2000). Pet. App. 144a-173a. The decision of the Michigan Court of Appeals is unpublished. Pet. App. 174a-204a.

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 State 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 Sixth Circuit found that there was a violation of the right to a fair cross section in the jury under the Sixth Amendment.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

The prisoner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court 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 of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The issue whether the State has provided a defendant with a fair cross section of the community from which to select his jury is a significant one.

The seminal case evaluating this issue is this Court's decision in *Duren v. Missouri*, in which this Court examined the absolute disparity between the numbers of the distinct group in the community as against the representation of the group within the venires in determining whether there was a violation of the Sixth Amendment.[1] There have been nine circuits – the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh – that have examined similar disparities as advanced here and found no constitutional violation. Nevertheless, in contrast to the other circuits and in contrast to the standard this Court applied in *Duren*, the Sixth Circuit adopted the comparative-disparity standard, and found that there was a constitutional violation. Thus, if the Sixth Circuit decision is allowed to stand, the question whether there is a constitutional violation for a small disparity depends on where one resides.

The fact that the Sixth Circuit reached this decision in habeas corpus is notable, because the standard under AEDPA requires that the State court's decision on the merits be an unreasonable application of *clearly established* Supreme Court precedent. There is no Supreme Court precedent that has established the comparative disparity test, which is confirmed by the rejection of this standard in at least four circuits. In fact, the Sixth Circuit had not previously adopted this test until this decision. It is not the role of the federal courts in

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

habeas to adopt new standards such as the one adopted here.

And on the merits of the issue, the process that the county in Michigan adopted did not result in significant differences between the number of African American jurors within the venires (jury pool) as measured against the number of adult African Americans in the community – only a 1.28% difference during the six-month period that was measured. The processes that the county employed to draw in the jurors were facially neutral and reasonable. In contrast, the standard imposed by the Sixth Circuit will require the State of Michigan to use processes that identify every person's racial and ethnic identity to ensure an identical representation of percentages for distinct groups in the venires, which would operate effectively as a quota system. The Sixth Amendment does not require this.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Preselink v. Avery* (09-___); *Metrish v. Newman* (09-___); and *Berghuis v. Thompkins* (09-___). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has dramatic consequences for this case, by wrongly vacating Smith's 1993 murder conviction. This Court should grant this petition.

STATEMENT

Diapolis Smith was convicted of second-degree murder after a jury trial in Kent County, Michigan in 1993. Smith was sentenced to life imprisonment with the opportunity for parole. He filed a post-trial motion in which he challenged whether his jury was drawn from a fair cross section of the community under the Sixth Amendment. The Michigan Supreme Court rejected this claim, but the Sixth Circuit determined that this decision was an unreasonable application of existing 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.

1. The Post-Trial Motion on Jury Composition

On appeal in State court, Smith raised the claim that there was underrepresentation of African American jurors from Smith's jury venire and that this disparity was a product of systematic exclusion. The Michigan Court of Appeals remanded the matter to the State trial court for a hearing on this claim.

At the evidentiary hearing, the Kent County Administrator testified that the database for jurors was obtained from a list from the Michigan Secretary of State from holders of driver's licenses and identification cards. Pet. App. 152a. The county then sent out a questionnaire to prospective jurors, allowing the prospective jurors to request exemptions either for statutory reasons, e.g., that the person was not conversant in English, or for other personal reasons, including "lack of transportation or child care, or because of work-related matters." Pet. App. 153a154a.

There were five percent of the questionnaires that were returned as undeliverable, and another fifteen to twenty percent did not respond at all. Pet. App. 152a. The county then sent a follow-up letter to the non-responders, and then half of these individuals did respond. Pet. App. 152a-153a. After receiving the questionnaires, the county then summoned the prospective jurors for service. The county allowed this pool of jurors to be first drawn for the city misdemeanor district courts, before the remaining unselected jurors were available for felony circuit courts. Pet. App. 154a.

In 1990, the census indicated that African Americans comprised 8.1% of the population of Kent County, a county in western Michigan, but that the African American population among adults (ages eighteen to sixty nine) was 7.28%. Pet. App. 155a. Relying on this 7.28% figure, the expert statistician who testified at the evidentiary hearing, Michael Stoline, explained that from April to October 1993, Kent County 929 jurors were selected from the Secretary of State lists and that 68 of these jurors would be expected to be African American. But only 56 of these jurors were African American, or 6% of the total. Pet. App. 155a.

The expert then gave a monthly analysis from April 1993 through September 1993, comparing the number of African American jurors that would be expected and the number that were actually drawn in, and that in September 1993 – the time of Smith's trial – the number of African American jurors expected would have been 12, but only 8 were present (as rounded to the nearest whole number). Pet. App. 155a.

The State trial court denied Smith's motion for new trial. Pet. App. 205a-212a.

2. The Review in the State Appellate Courts

On appeal to the Michigan Court of Appeals, the Court reversed in a 2-to-1 decision, concluding both that there was underrepresentation of African Americans and that this underrepresentation was systematic. Pet. App. 174a-183a.

The Michigan Supreme Court unanimously reversed. In applying the three-pronged *Duren* test, the Court acknowledged that African Americans were a distinct group, but concluded that Smith had "failed to establish a legally significant disparity under either the absolute disparity or comparative disparity tests." Pet. App. 146a.[2] The Court, however, stated that it would "give defendant the the benefit of the doubt on underrepresentation" prong in order to address the issue about whether there was a systematic exclusion. Pet. App. 147a.[3]

Nevertheless, in the Court's analysis of the third prong of *Duren*, the Court returned to the issue of the magnitude of the disparity in rejecting the claim that there was systematic exclusion:

> [W]hile defendant's proof may satisfy any duration requirement, the disparities over that time fell far short of those in *Duren*. *Defendant did not demonstrate unfair and unreasonable underrepresentation under the disparity analyses.* We therefore conclude that defendant has not shown a systematic exclusion of African-

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[2] *Smith,* 615 N.W.2d at 4.

[3] *Smith,* 615 N.W.2d at 4-5.

> Americans for the Kent County Circuit Court jury pool. [Pet. App. 148a-149a.][4]

The gravamen of this analysis is that Smith failed to show any legally-significant disparity.

The Court noted that there were three different tests that had been used by the federal courts for evaluating whether there was a fair and reasonable representation from the community: the absolute disparity test, comparative disparity test, and the standard deviation system of analysis. Pet. App. 145a-146a.[5]

On this issue of whether there was systematic underrepresentation, the Court agreed with the analysis of the concurring opinion. The concurrence rejected the claim of systematic exclusion and addressed the two possible sources of the reduced number of African Americans, which were the "siphoning" issue and the disparate impact of the processes on African Americans. The concurrence concluded that Smith had failed to carry his burden because he had "not shown" how the alleged siphoning of prospective jurors to the city misdemeanor district courts changed the percentage of African Americans available for service in the felony circuit court. Pet. App. 168a.[6]

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[4] *Smith,* 615 N.W.2d at 7 (emphasis added).

[5] *Smith,* 615 N.W.2d at 2-3. The standard deviation system of analysis measures the disparity between the percentages in the population and in the qualified pool that would result as a matter of random chance. *Ramseur v. Beyer*, 983 F.2d 1215, 123 (3d Cir. 1992). See also *United States v. Rioux,* 97 F.3d 651, 655 (2d Cir. 1996).

[6] *Smith,* 615 N.W.2d at 12.

Also, the concurrence addressed the points raised that the county should have anticipated the processes it employed for drawing in jurors would yield a smaller number of African Americans than were in the community. Specifically, Smith argued that there would be more questionnaires that were undeliverable in an area with a large minority population; that minorities would be less likely to return questionnaires; and that the excuses for personal reasons like transportation or lack of child care would more often apply to minorities. Pet. App.169a-170a.[7]

In response, the concurrence reasoned that the dynamic that would lead to fewer African American responding were not due "to the system itself" but were the result of "outside forces." The county, the concurrence determined, was not required to "affirmatively counteract outside forces" where the processes it employed were facially neutral. Pet. App. 171a.[8]

The Michigan Supreme Court majority expressly agreed with the analysis of the concurrence on the siphoning and on the influence of social and economic factors on juror participation. Pet. App. 147a.[9]

3. The Habeas Review in Federal Court

On habeas review, the federal magistrate entered a report and recommendation that recommended that the writ for habeas corpus be denied. Pet. App. 142a. The district court adopted this recommendation. Pet. App. 39a.

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[7] *Smith,* 615 N.W.2d at 12.

[8] *Smith,* 615 N.W.2d at 4.

[9] *Smith,* 615 N.W.2d at 6.

On appeal, the Sixth Circuit reversed. The Sixth Circuit noted that the Michigan Supreme Court had "rejected the disparities as constitutionally insignificant." Pet. App. 18a.[10] The Sixth Circuit then relied on the fact that there was a comparative disparity of 18% for African Americans in the venires as against in the community for the six months preceding the trial. Pet. App. 9a.[11] And the Court noted that the comparative disparity for the month in which the jury was selected was 34%. Pet. App. 9a.[12] Even though this Court used an absolute disparity test in *Duren*, the Sixth Circuit then determined that the Michigan Supreme Court was "unreasonable" in its reliance on the absolute disparity test in its finding that the disparities were not constitutionally significant.

The Sixth Circuit then determined that the disparity was systematic and was therefore a violation of the Sixth Amendment. The Sixth Circuit rejected the analysis of the Michigan Supreme Court on the issue of the social and economic factors by concluding that 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. 28a.[13] Consequently, because these

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[10] *Berghuis,* 543 F.3d at 337. See also *Berghuis*, 543 F.3d at 338 ("The Michigan Supreme Court found [Smith's] figures did not demonstrate that African Americans were significantly underrepresented").

[11] *Berghuis,* 543 F.3d at 332. This percentage is computed by evaluating the ratio of the expected jurors, 68, as compared to the actual jurors, 56, by dividing the difference between them (12) by 68.

[12] *Berghuis,* 543 F.3d at 332. The numbers from the specific report for this period compared 11.5 expected jurors in the venire as against 7.5 that was estimated to be actually present, determining that there was an underrepresentation of 34.8% for that month. Pet. App. 218a. This percentage is computed evaluating the ratio of expected jurors of 11.5 against the actual jurors, 7.5, by dividing the difference (4) by 11.5.

[13] *Berghuis,* 543 F.3d at 341.

factors impact the number of African Americans in Kent County, the Sixth Circuit found that the opportunity to be excused from service based on child care, transportation, or work considerations are "inherent" in the jury process. Pet. App. 29a.[14] The Sixth Circuit determined that the State had rebutted this prima facie showing under *Duren* because the there was a significant interest advanced by this exemption criteria based on the possible hardships that would otherwise be imposed on jurors. Pet. App. 35a.[15]

But the Sixth Circuit concluded that the other source of disparity – the siphoning of prospective jurors to the city misdemeanor district courts – was not justified. The Michigan Supreme Court had found that Smith had failed to carry his evidentiary proofs for the "siphoning" claim. In response, the Sixth Circuit noted that there was no obligation to provide the "precise numbers" but that "proof must be sufficient to support an inference that a particular process results in the underrepresentation of a distinctive group." Pet. App. 30a.[16]

REASONS FOR GRANTING THE PETITION

There are three reasons that this Court should grant this petition for review.

First, there is a split of authority of authority among the circuits about whether this kind of small disparity between the population of the distinct group within the community and the venire constitutes a violation of the Sixth Amendment. The majority of other circuits (First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh), relying on *Duren v.*

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[14] *Berghuis,* 543 F.3d at 342.

[15] *Berghuis,* 543 F.3d at 345.

[16] *Berghuis,* 543 F.3d at 342.

Missouri, have relied on the absolute disparity standard and rejected the claim that the kind of small disparity at issue here could constitute a violation. Several of the circuits (First, Second, Eighth, and Ninth) in fact have expressly rejected the comparative disparity standard applied here.

Second, the disagreement among the circuits on the issue about what standard to apply in evaluating if there is an underrepresentation of the distinct group evidences the point that there is no clearly established Supreme Court precedent on this point. The AEDPA statute, 28 U.S.C. § 2254(d), requires that the State court's decision be an unreasonable application of *clearly established* Supreme Court precedent. The fact that this Court did not apply the comparative disparity test in *Duren* and that several circuits have expressly rejected the comparative disparity test makes it apparent that this standard was not clearly established by the Supreme Court. The Sixth Circuit failed to honor the deference accorded to decisions of the State courts and misapplied the AEDPA.

Third, the decision was wrong. There was no systematic underrepresentation of African American jurors in this case. The county employed a neutral instrument for drawing in jurors from the community, and the absolute disparity during the six-month time period examined was only 1.28%. Moreover, the county's decision to allow prospective jurors to claim a hardship to avoid service was a reasonable exemption and was not a mechanism inherent in the process for systematically excluding African American jurors. The Sixth Circuit also failed to accord the presumption of correctness regarding the State court's factual findings about Smith's failure to show that the system of allowing jurors to serve in local courts significantly affected the number of African American jurors available for service.

1. The decision of the Sixth Circuit creates a conflict among the circuits on the issue of the fair cross section of the community under *Duren*.

The claim raised by Smith implicated his Sixth Amendment right to be tried before a jury that was drawn from a "fair cross section of the community."[17] Although a defendant is not entitled to a jury of any particular composition, this Court has noted that 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.[18]

On this basis, this Court held in *Duren* that the defendant must show that a distinctive group is underrepresented in venires due to systematic exclusion of that group in the jury-selection process. The prima facie case requires proof of three things:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show
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> (1) that the group alleged to be excluded is a "distinctive" group in the community;
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> (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

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[17] *Taylor v. Louisiana*, 419 U.S. 522, 526, 530 (1975).

[18] *Taylor*, 419 U.S. at 538.

> (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[19]

In applying this second prong, this Court in *Duren* compared the percentage of persons from the distinct group in the venire with the percentage of the persons in the community. At issue in *Duren* was the percentage of women from the community as against the numbers of women within the venires. This Court concluded that there was a "gross discrepancy" because women comprised a little more than half of the community but only 15% of the venires.[20] This comparison of the absolute percentages has been termed the absolute disparity test.

In the present case, during the time period from April 1993 to October 1993, there were 56 African American prospective jurors in the venires out of 929 persons, which is 6% of the total. Since 7.28% of the adults in the county were African American, there was an absolute disparity of 1.28% during the time period examined. The Sixth Circuit noted that using the absolute disparity test, the disparity was "negligible." Pet. App. 19a.[21] The Sixth Circuit went on, however, and evaluated these numbers using the comparative disparity standard, which compares the diminished likelihood that the distinct group would be called for jury service, which generally is calculated by dividing the absolute disparity by the percentage of population for the distinct group. In this view, the comparative disparity during the six month time

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[19] *Duren,* 439 U.S. at 364.

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

[21] *Berghuis,* 543 F.3d at 337.

period was 18% and for the month in which the jurors for this particular trial were drawn was 34%. Pet. App. 21a.[22]

In evaluating this second prong, there are at least nine circuits that have examined the same kind of disparities at issue and rejected the claim that the disparity violated the defendant's right to be tried by a jury drawn from a fair cross section of the community. The Sixth Circuit's decision here conflicts with the other circuits.

A survey of the circuits bears this point out.

In the First Circuit, the Court determined in *United States v. Royal* that a disparity between 4.86% of African Americans in the population and 1.89% of the prospective jurors was inadequate for a prima facie showing under *Duren.*[23] In *United States v. Hafen,* an earlier First Circuit decision, the Court examined a disparity between 3.73% in the community and 1.714% in the jury pool for African Americans and found that the resulting 2.02% absolute disparity was not constitutionally significant.[24]

Importantly, the First Circuit in *Hafen* expressly criticized the use of the comparative disparity test when the group allegedly underrepresented is "a very small proportion of the total population."[25] The comparative disparity at issue there – 54% – was higher than the one the Sixth Circuit relied on here – 34%. The First Circuit noted that the problem with the comparative disparity test is that it "distorts" the reality because such a small change

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[22] See *Berghuis,* 543 F.3d at 338.

[23] *United States v. Royal,* 174 F.3d 1, 27 (1st Cir. 1999).

[24] *United States v. Hafen,* 726 F.2d 21, 24 (1st Cir. 1984).

[25] *Hafen,* 726 F.2d at 24.

in percentage yields a very large comparative percentage. The Court noted that if there were only a single member of a distinct group in the community and that person was not selected as a prospective juror, the absolute percentage difference might be tiny while the comparative disparity would be 100%.[26]

In the Second Circuit, the Court in *United States v. Rioux* rejected a claim of underrepresentation for both African Americans and Latinos under the Sixth Amendment.[27] The adult population of African Americans and Latinos was 7.08% and 4.24%, while the grand jury was composed of only 5.0% and 2.10%. The absolute disparity for each was 2.08% and 2.14%. Although not calculated by the Second Circuit, the comparative disparities would be similar to or larger than the disparities at issue here. The Court determined that the numbers were "statistically and constitutionally insignificant even when dealing with smaller jury pools" and found there was no unfair representation.

In reaching this decision, the Second Circuit in *Rioux* noted that it had previously refused to employ the comparative disparity test.[28] In this previous case, *United States v. Jenkins,* the Second Circuit articulated a similar point as the one noted in *Hafen* that a comparison of the changes in percentages would exaggerate the effect, describing that if the distinct group comprised 1% of the population but only one quarter were registered, that it would create a 4 to 1 disparity.[29]

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[26] *Hafen,* 726 F.2d at 24.

[27] *Rioux,* 97 F.3d at 657.

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

[29] *Jenkins,* 496 F.2d at 65.

In the Third Circuit, the Court in *United States v. Weaver* examined a Sixth Amendment claim under *Duren* where the absolute disparity for the percentages of African Americans and Latinos were 1.23% and 0.71%, but the comparative disparity was 40.01% and 72.98% for each group, both of which are higher than the comparative disparity found here.[30] The Court then noted that the comparative disparity figures were of "questionable" probative value and determined that the results of the analysis under these two methods did not support the defendant's challenge.[31]

In the Fifth Circuit, the Court in *United States v. Butler* determined that absolute disparities of 9.14% and lower did not establish a prima facie case because they were not as high as 10%, which this Court had used as a benchmark in its decision in *Swain v. Alabama,* which examined the juror exclusion under the Equal Protection Clause.[32]

In the Seventh Circuit, the Court determined in *United States v. Ashley* that a discrepancy between 3% and 0% was not constitutionally significant because "a discrepancy of less than ten percent is not enough to demonstrate unfair or unreasonable representation" of the community in the venires.[33]

In the Eighth Circuit in *United States v. Rogers*, the Court examined a disparity between 1.87% African

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

[31] *Weaver,* 267 F.3d at 243.

[32] *United States v. Butler,* 611 F.2d 1066, 1070 (5th Cir. 1980), citing *Swain v. Alabama,* 380 U.S. 202 (1965).

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

Americans in the population and 1.29% in the jury pools.[34] The Eighth Circuit was constrained to follow the prior holding of an earlier decision of the Eighth Circuit in *United States v. Clifford*, which had rejected the comparative-disparity method.[35] The Eighth Circuit asked the entire circuit to reconsider the decision but affirmed the defendant's conviction in that case despite the comparative disparity.[36] The rest of the circuit thereafter declined the invitation.[37]

In the Ninth Circuit, the Court in *United States v. Sanchez-Lopez* determined that a disparity for Latinos between 3.87% of Latinos in the general population against 1.82% from the master jury wheel did not constitute a prima facie violation of *Duren.*[38] The Court noted the higher comparative disparity, but rejected this analysis as "exaggerated."[39] The Court therefore denied the defendant any relief.

In the Tenth Circuit, in *United States v. Orange,* the Court comparative disparities of between 35% and 55% were insufficient to establish a prima facie case that African Americans, Native Americans, Asian Americans,

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[34] *United States v. Rogers,* 73 F.3d 774, 777 (8th Cir. 1996).

[35] *Rogers,* 73 F.3d at 777, citing *United States v. Clifford,* 640 F.2d 150, 155 (8th Cir. 1981), and stating that "our court has declined to adopt the comparative disparity concept as a better means of calculating underrepresentation."

[36] *Rogers,* 73 F.3d at 778.

[37] *Rogers,* 73 F.3d 774 at 779.

[38] *United States v.Sanchez-Lopez,* 879 F.2d 541, 548-549 (9th Cir. 1989).

[39] *Sanchez-Lopez,* 879 F.2d at 547-548. See also *Thomas v. Borg,* 159 F.3d 1147, 1150 (9th Cir. 1998)(rejecting the use of the comparative disparity test in habeas).

and Latino Americans were underrepresented,[40] despite the fact that these groups were less than 10% of the voting age population.[41] The Court rejected any relief for the defendant.

Finally, in the Eleventh Circuit, in *United States v. Carmichael*, released on March 5, 2009, the Eleventh Circuit rejected a claim that there was an underrepresentation of African American eligible for juror service. The defendant claimed that 30.466% of the adult population were African American and the United States claimed that the number was only 20.74%.[42] The Eleventh Circuit concluded that there was no showing of underrepresentation because the defendant failed to show an absolute disparity of more than 10%, which the Eleventh Circuit stated defendant was required to do in order to establish the second element of *Duren*.[43]

The point is an obvious one that in all of these circuits, Smith's claim would have been rejected under the second prong of *Duren*. Thus, if the Sixth Circuit decision is allowed to stand, the issue whether there is a constitutional violation of a person's right to fair cross section of the community depends on where one lives. The four States in the Midwestern part of the United States are governed by a standard that is different from the rest

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

[41] *Orange,* 447 F.3d at 799.

[42] *United States v. Carmichael,* 560 F.3d 1270, ___ *22 (11th Cir. 2009).

[43] *Carmichael,* F.3d at __ *20 ("'[i]f the absolute disparity between these two percentages is ten percent or less, the second element is not satisfied'"), quoting *United States v. Grisham,* 63 F.3d 1074, 1078-1079 (11th Cir. 1995). See also *United States v. Clarke,* ___ F.3d ___; 2009 U.S. App. LEXIS 6169 (11th Cir. 2009), released on March 20, 2009.

of the country. Consistent with Supreme Court Rule 10(a), this Court should grant this petition.

2. The Sixth Circuit here applied a standard – the comparative disparity standard – that is not clearly established precedent from the Supreme Court under 28 U.S.C. § 2254.

In providing a survey of the other nine circuits that have examined the question of the whether there is a fair representation of the community for the prospective jurors, it is significant that all of the cases cited in the text were on direct review. In other words, Smith's case would have been rejected by the other circuits if his claims had been advanced on *direct* review. The fact that all of the other circuits have rejected similar claims, and that several of them specifically rejected the comparative disparity standard, demonstrates that this test is not clearly established. Moreover, this Court applied the absolute disparity test in *Duren*.

The reality here is that the Sixth Circuit has adopted the comparative disparity standard for the circuit, which is one of the tests that has been explored in the other circuits but not applied in justifying a finding of a violation of *Duren*. This appears to be the first time a circuit has applied the standard and found a violation. But this is not the role of a federal court in habeas review. It is not to make new law.

The form of relief contemplated AEDPA is limited. Under 28 U.S.C. § 2254(d)(1), relief can only be granted 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.[44] In the last few years, this Court has reiterated the point that the rule must be one that was specifically established by this Court.

In *Wright v. Van Patten,* this Court examined the question whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.[45] 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.[46] 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."[47] *Wright* required that there be a "clear[] hold[ing]" from this Court on the question at issue.[48]

Such is the case here. The claim raised by Smith implicated his Sixth Amendment right to be tried before a jury that was drawn from a "fair cross section of the community."[49] The seminal case for the standard for evaluating the issue is this Court's decision in *Duren.* But there is no case law from this Court that delineates by what standard a lower court must determine under the second prong whether the representation is not fair and reasonable. This is the paramount point.

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

[45] *Wright v. Van Patten,* 128 S.Ct. 743, 744 (2008).

[46] *Wright,* 128 S.Ct. at 745, citing *United States v. Cronic,* 466 U.S. 648 (1984).

[47] *Wright,* 128 S.Ct. at 746.

[48] *Wright,* 128 S.Ct. at 746. See also *Carey v. Musladin,* 549 U.S. 70 (2006).

[49] *Taylor,* 419 U.S. at 526, 530.

In *Duren,* this Court applied what other courts have termed the "absolute disparity" test to determine whether there was an unfair underrepresentation of women.[50] There was no suggestion that there were other possible formulas that must be employed by the lower courts to determine whether there was an underrepresentation. Nor did this Court identify percentage ranges that would establish underrepresentation.

In response to the *Duren* decision, the lower federal courts have applied three different standards to determine whether there is an unreasonable representation of a distinct group: (1) the absolute-disparity standard; (2) the comparative-disparity standard; and (3) the standard-deviation method.[51] The Michigan Supreme Court decided to consider all three approaches, determining that it would apply no individual method to the exclusion of the others. But there was no obligation from this Court for it to do so.

The Sixth Circuit here ignored the fact that there is no clearly established Supreme Court precedent, and examined the issue as if on direct review. The Sixth Circuit noted the different methods, examined the virtues of the systems, and then determined that the comparative disparity system of analysis was the better methodology for circumstances in which the group underrepresented is small. Pet. App. 20a.[52] The comparative-disparity standard is new to the Sixth Circuit. Indeed, the Sixth Circuit candidly acknowledged that this Court did not require this standard:

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[50] *Duren,* 439 U.S. at 365 n 23.

[51] *Ramseur v. Beyer,* 983 F.2d 1215, 1231 (3d Cir. 1992).

[52] *Berghuis,* 543 F.3d at 337 (citation omitted).

> [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.][53]

This is a concession that there is no clearly established Supreme Court precedent on this point. The Sixth Circuit's analysis was clear that it was adopting this standard for the first time.

In attempting to explain why the Michigan Supreme Court's application was an "erroneous" application of clearly established law, the Sixth Circuit cited two decision from other circuits, *United States v. Rogers,*[54] and *Ramseur v. Beyer,*[55] because the comparative disparity in those cases was over 30% and 40%, similar to the comparative disparity here (which was 34% for the month at issue). But this analysis failed to acknowledge that this methodology was not established by this Court, that other circuits (First, Second, Eighth, and Ninth) had rejected the comparative-disparity methodology; and that this was not even the prevailing rule within the Sixth Circuit until this case.[56]

This is a classic case of mere disagreement. A State court's decision is not unreasonable simply because the court in habeas review concludes in its independent judgment that the State court's decision applied clearly established federal law erroneously or incorrectly; the State court's application must also be objectively

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[53] *Berghuis*, 543 F.3d at 337.

[54] *United States v. Rogers,* 73 F.3d 774, 777 (8th Cir. 1996).

[55] *Ramseur v. Beyer,* 983 F.2d 1215 (3d Cir. 1992).

[56] See, e.g., *United States v. Forest*, 355 F.3d 942, 954 (6th Cir. 2004); *Ford v. Seabold,* 841 F.2d 677 (6th Cir. 1988).

unreasonable.[57] More importantly, the relevant law is *clearly established* Supreme Court precedent. There was no such guidance here on these questions. As this Court's stated in *Van Patten,* the question about which standard to apply for evaluating the second prong of *Duren* is an unresolved issue for this Court. The Sixth Circuit's decision here was not supported in law.

Moreover, the two cases cited by the Sixth Circuit do not support its decision. In *Ramseur,* the Third Circuit found no violation despite the 40% comparative disparity.[58] The Sixth Circuit's reference inaccurately stated the holding of *United State v. Rogers.* The Sixth Circuit cited *Rogers* for the proposition that the court there made a "finding [that] disparity of over 30 percent [met] the underrepresentation prong of the *Duren* prima facie test where African Americans comprised only 1.87 percent of the jury-eligible population." Pet. App. 21a.[59] But the ultimate holding was just *the opposite.* 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.*[60] Consequently, the Eighth Circuit asked the entire circuit to reconsider the decision but it nevertheless affirmed the defendant's conviction in that case despite

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[57] *Williams,* 529 U.S. at 410.

[58] *Ramseur,* 983 F.2d at 1232 ("[W]e conclude that the studies conducted here, which do not reflect substantial underrepresentation over a significant period of time, also do not satisfy *Duren's* fair cross-section analysis").

[59] *Berghuis,* 543 F.3d at 338.

[60] *Rogers,* 73 F.3d at 777, citing *Clifford,* 640 F.2d 150, 155 (8th Cir. 1981), and stating that "our court has declined to adopt the comparative disparity concept as a better means of calculating underrepresentation."

the comparative disparity.[61] The error of the Sixth Circuit on this point was significant because it was the only case with a similar percentage of comparative disparity cited by the Court to justify its conclusion that the decision of the State court was erroneous.

The action here by the Sixth Circuit also is not an isolated failure to accord a State court decision the proper deference under AEDPA. The State is seeking certiorari in three other cases, all published, all murders, in which it contends that the Sixth Circuit failed to properly apply the AEDPA standard.[62]

3. The decision of the Sixth Circuit was also wrong on the merits – there was no significant underrepresentation and no systematic exclusion of African Americans from juries in Kent County, Michigan.

Even in reaching the merits of the issue, the analysis of the Sixth Circuit on the second and third prong of *Duren* is problematic and if applied may call into question the constitutionality of ordinary processes used by the State to draw in jurors for service.

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[61] *Rogers,* 73 F.3d at 778.

[62] See *Avery v. Prelesnik,* 548 F.3d 434 (6th Cir. 2008)(the Sixth Circuit rejected the State court's determination that there was no prejudice on the claim of ineffective assistance of counsel because alibi testimony is always a jury question); *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008)(the Sixth Circuit determined that there was a violation of *Miranda* where the police continued to interview the defendant where the defendant acknowledged his rights but did not expressly waive them); and *Newman v. Metrish,* 543 F.3d 793 (2008)(the Sixth Circuit determined that there was insufficient evidence even though there was compelling circumstantial evidence of defendant's guilt including evidence linking him to the murder weapons).

Regarding the second prong of *Duren*, the standard that the Sixth Circuit has adopted – the comparative disparity test – does not effectively measure whether there was unconstitutional underrepresentation. The problem with this standard is that it magnifies the significance of small variations for a distinct group who comprises a small percentage of the community. Several circuits have noted this same point.[63] There may be numerous explanations that explain why the distinct group has smaller numbers in the venires than the adult census population that are not inherent in the processes used by the State to draw in prospective jurors.

But the only way to then rectify these small variations will be to specifically select prospective jurors – based on their racial or ethnic identity – to ensure that there is a corresponding proportionate representation. In the name of creating an exactly proportionate juror system, the State will be required to match as a quota the percentage for every distinct group, because it will need to ensure that it will not be subject to a comparative disparity challenge. In other words, the State will have to know the ethnic or racial identity of every person on the juror list to then ensure that the overall percentages of this list match the percentages within the adult community. This is an untenable process. It also is not constitutionally required.

Consider the numbers at issue here. According to the statistician who evaluated the numbers from the six month period April 1993 through October 1993, there were 929 prospective jurors and, based on the adult census for African Americans in Kent County (7.28%), there should have been 68 African American jurors, but there were 56 according to the expert's analysis, which is 6%. Pet. App.

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[63] See, e.g., *Hafen,* 726 F.2d at 24; and *Jenkins,* 496 F2d at 65.

160a. Thus, there were twelve fewer African American prospective jurors over six months, an average of two fewer African Americans in each venire than one would have expected based on the census population. This 1.28% absolute disparity then can be measured as an exaggerated 18% comparative disparity when comparing the relative percentages. The smaller the numbers at issue, the larger that a deviation will appear to be.

Although it was not a basis for the Sixth Circuit's analysis, the instrument used from which to draw the prospective jurors itself might not have captured the full numbers of an African Americans or other distinct groups. Kent County relied on driver's licenses and driver identifications from which to draw the names of prospective jurors. There may be some distinct groups in Michigan, particularly relatively new ethnic immigrants, who are less likely to obtain driver's licenses or State identifications. The same may be true for other jurisdictions in Michigan or other States that rely on the list of registered voters for obtaining names of prospective jurors.[64] Where there is an insular ethnic group that does not register to vote in the same numbers as the rest of the community, this otherwise neutral instrument would then be subject to a challenge based on the comparative disparity test.[65]

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[64] See *United States v. Biaggi,* 909 F.2d 662, 678 (2d Cir. 1990)(rejecting a challenge under *Duren* even though there was a disparity where the prospective jurors were drawn from the voter registration lists).

[65] The same is true for the requirement under Michigan law that the prospective juror be "conversant with the English language." See Mich. Comp. Laws § 600.1307(1)(b). This facially-neutral requirement, which is a common-sense precondition for jury service, might also have the effect of reducing the numbers of certain distinct groups if they are new immigrants.

In *Duren*, this Court did not specify how the absolute disparity test was to be applied. Given that the right relates to the objective measure of the cross section of the community, for future cases, including habeas, this Court should specify that a defendant should be required to prove an absolute disparity of 10% – which is currently the standard employed by the Fifth, Seventh, and Eleventh Circuits – in order to establish a prima facie case of failing to draw from a fair and reasonable representation of the community.[66] If the absolute disparity is less than 10%, a defendant fails to demonstrate a violation of the second prong of the *Duren* test for measuring underrepresentation. For all fair cross section cases, including distinct groups that comprise a small percentage of the population, Equal Protection safeguards remain to protect against constitutionally infirm jury selection processes under *Castaneda v. Partida*.[67] Where the State has selected a neutral, reasonable means of selecting a prospective jury – here the use of driver's licenses and identification cards – there would be no prima facie showing of a violation of Sixth Amendment under the second prong of *Duren,* unless the deviation surpassed 10%.

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[66] See *Butler,* 611 F.2d at 1070 (Fifth Circuit); *Ashley*, 54 F.3d at 314 (Seventh Circuit); and *Carmichael*, 560 F.3d at ___ *20 (Eleventh Circuit). This Court's analysis in *Swain,* 380 U.S. at 209 (insufficient showing that an "identifiable group in a community is underrepresented by as much as 10%").

[67] *Castaneda v. Partida,* 430 U.S. 482, 494 (1977)(establish 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).

Regarding the third prong of *Duren,* Smith challenged the Kent County system as systematic underrepresentation, claiming that there were as many as four ways in which the process did not adequately capture the prospective African American jurors: (1) the return to senders that the Michigan county received when it sent out the questionnaires to the jurors; (2) the rate that the recipients of this inquiry did not respond; (3) the number of jurors for whom service in a jury would present a hardship because of child care, transportation, or work considerations; and (4) the use of the jurors in local courts for city misdemeanors before the jurors were drawn into felony circuit court.

In its analysis of the third prong of *Duren* – whether underrepresentation is due to systematic exclusion of a distinct group – the Sixth Circuit focused on two of Smith's claims, the claims of excuses for hardship and the "siphoning" of prospective jurors to the local courts for city misdemeanors.

In rejecting the Michigan Supreme Court's findings 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.

This Court specifically acknowledged in *Duren* that there may be reasonable exemptions for hardships or incapacity.[68] It counseled that there may be "occupational" exemptions, but that "any category expressly limited to a group in the community of sufficient magnitude and

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

distinctiveness" might constitute a prima facie violation of the fair cross section requirement.[69] The circuits have not apparently found a violation based on excuses for hardship.[70]

Rather, the systematic exclusion must be "inherent in the particular jury-selection process utilized."[71] Nevertheless, in examining the excusal provision for hardships, the Sixth Circuit determined that the hardship excusals established a prima facie violation of *Duren*:

> [B]ecause [the] social or economic factors disproportionately impact African Americans in Kent County, such factors produced systematic exclusion within the meaning of *Duren* inasmuch as they are "inherent in the particular jury selection process utilized."[72]

In reaching this conclusion, the Sixth Circuit ignored the AEDPA standards and contrived a novel constitutional requirement.

The Michigan county's facially-neutral allowance of hardship excusals involves external forces — much like the findings of other circuits that the failure to follow up on unreturned juror questionnaires involves private

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[69] *Duren,* 439 U.S. at 370.

[70] See, e.g., *McGinnis v. Johnson,* 181 F.3d 686, 691 n 6 (5th Cir. 1999) ("We have found no cases that examine the appropriate use of statistical analysis in the context of a facially neutral excusal provision, under which jurors voluntarily decide whether to seek an excuse from jury service").

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

[72] *Berghuis*, 543 F.3d at 340.

external forces and is not systematic exclusion.[73] In the questionnaire example, a prospective juror either elects not to return the questionnaire or some other factor prevents its return. Compare a prospective juror who demonstrates a hardship and is excused. Both are the result of self-elimination or other external forces not created by the process instituted by the Michigan county.

In contrast, two examples of true systematic exclusion from other circuits are illustrative of the point. In *United States v. Jackman*, there was an unintended computer error that excluded people who resided in two populous counties from which juries were drawn – counties with a large proportion of racial and ethnic minorities.[74] The Second Circuit concluded that the underrepresentation was "inherent in the particular jury-selection process utilized."[75] Also, in *Gibson v. Zant*, a panel of jury commissioners was required to "compile and maintain and revise a jury list of intelligent and upright citizens of the county to serve as jurors."[76] The Eleventh Circuit concluded that the criteria were so subjective ("easily manipulated") to enable the commissioners to cause the underrepresentation of African Americans and women.[77] The circumstances here relate to factors outside of the processes themselves in contrast to the outright exclusion of *Jackman* or the subjective criteria in *Gibson*.

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[73] See, e.g., *Orange*, 447 F.3d at, 800; *Randolph v. California*, 380 F.3d 1133, 1141 (9th Cir. 2004); and *Rioux*, 97 F.3d at 658.

[74] *United States v. Jackman*, 46 F.3d 1240, 1242-43 (2nd Cir. 1995).

[75] *Jackman,* 46 F.3d at 1248, citing *Duren*, 439 U.S. at 366.

[76] *Gibson v. Zant*, 705 F.2d 1543, 1547 (11th Cir. 1983).

[77] *Gibson,* 705 F.2d at 1549.

In concluding that the social and economic influences were inherent in the Michigan county process, the Sixth Circuit wrongly determined that the hardship excusals somehow qualified as a "criteria."[78] The use of hardship to allow prospective jurors to excuse themselves from service are not distinguishable from the circumstance in which the failure to return a questionnaire will relieve a person from juror service. The Sixth Circuit indicated that the social and economic factors were "non-random," from which there may be an "inference of systematic exclusion."[79]

This analysis is wrong because these provisions apply equally to everyone. The Sixth Circuit suggests that there may be some underlying animus on the part of the Michigan county, which is without any support in the record below. To the contrary, there is no category or group identified by the provision: it is facially neutral and is consistent with the reasonable exemptions identified by this Court in *Duren.* Without this provision, 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.[80]

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[78] *Berghuis*, 543 F.3d at 341 n 4, distinguishing the Michigan Supreme Court's citation to *United States v. Purdy,* 946 F.Supp. 1094, 1104 (D. Conn. 1996).

[79] *Berghuis,* 543 F.3d at 341.

[80] 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 burden on jurors, see *Berghuis,* 543 F.3d at 345, but the State of Michigan contends that these considerations were not inherent in the process and there was no prima facie showing of a Sixth Amendment violation. The Michigan Supreme Court did not fail to apply "clearly established" Supreme Court precedent.

Moreover, the Sixth Circuit's finding of a factual and legal nexus between the alleged "siphoning" of African Americans stands in stark contrast to the Michigan Supreme Court's factual analysis:

> 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.[81]

This factual determination was underscored by the point that the concurring opinion in the Michigan Supreme Court 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.[82] This was based on a statement in the dissenting opinion from the Michigan Court of Appeals, which noted that "in the year after defendant's jury was chosen, no statistically significant change occurred when the system stopped 'draining' the largest concentration of African Americans from the master jury list by first selecting district court jurors." Pet. App. 203a.

In rejecting this factual analysis, 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 factual 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

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[81] *Smith,* 615 N.W.2d at 6.

[82] *Smith,* 615 N.W.2d at 12 n 15.

this process.[83] Because 85% of the African American population resided in Grand Rapids, the Sixth Circuit then found that this diversion process to the local Grand Rapid courts "essentially omits" the African American jurors. Pet. App. 33.[84] But in the absence of direct evidence to rebut the factual conclusion of the Michigan courts that the "siphoning" did not significantly affect the number of African Americans in the venires because of the evidence of jurors the following year after this practice ceased, 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] By not according the Michigan Supreme Court finding the presumption of correctness under AEDPA, the Sixth Circuit failed to perform the proper review in habeas. In the end, the Sixth Circuit functioned as if sitting in direct review, thereby invading the province of the State courts.

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[83] *Berghuis,* 543 F.3d at 342, quoting 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.

[84] *Berghuis,* 543 F.3d at 343.

[85] *Berghuis*, 543 F.3d at 342.

CONCLUSION

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

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