

CHAPTER THIRTEEN: THE COURTROOM: THE PRETRIAL AND TRIAL  
PROCESS

**DID THE JURY POOL SATISFY THE FAIR CROSS SECTION  
REQUIREMENT?**

*BERGHUIS V. SMITH*  
\_\_U.S.\_\_ (2010)

Ginsburg, J.

**Issue**

The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community. The question presented in this case is whether that right was accorded to respondent Diapolis Smith, an African-American convicted of second-degree murder by an all-white jury in Kent County, Michigan in 1993. At the time of Smith's trial, African-Americans constituted 7.28% of Kent County's jury-eligible population, and 6% of the pool from which potential jurors were drawn. In *Duren v. Missouri*, this Court described three showings a criminal defendant must make to establish a prima facie violation of the Sixth Amendment's fair-cross-section requirement. He or she must show: "(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 systematic exclusion of the group in the jury-selection process." The first showing is, in most cases, easily made; the second and third are more likely to generate controversy. The defendant in *Duren* readily met all three measures. He complained of the dearth of women in the Jackson County, Missouri, jury pool. To establish underrepresentation, he proved that women were 54% of the jury-eligible population, but accounted for only 26.7% of the persons summoned for jury service, and only 14.5% of the persons on the postsummons weekly venires from which jurors were drawn. To show the "systematic" cause of the underrepresentation, *Duren* pointed to Missouri's law exempting women from jury service, and to the manner in which Jackson County administered the exemption. Concluding that no significant state interest could justify Missouri's explicitly gender-based exemption, this Court held the law, as implemented in Jackson County, violative of the Sixth Amendment's fair-cross-section requirement.

We here review the decision of the United States Court of Appeals for the Sixth Circuit holding that Smith "satisf[ie]d the prima facie test established by *Duren*," and granting him habeas corpus relief, *i.e.*, release from imprisonment absent a new trial commenced within 180 days of the Court of Appeals' order. Despite marked differences between Smith's case and *Duren*'s, and a cogent Michigan Supreme Court decision holding that Smith "ha[d] not shown ... systematic exclusion," the Sixth Circuit found the matter settled. Cognizant of the restrictions Congress placed on federal habeas review of state-court convictions, the Court of Appeals considered that a decision contrary to its own would "involv[e] an unreasonable application of [f] clearly established Federal law, as determined by the Supreme Court of the United States." .... According to the Sixth Circuit, Smith had demonstrated that a Kent County prospective-juror-assignment procedure, which Smith calls "siphoning," "systematic[ally] exclu[ded]" African-Americans. Under this procedure, Kent County assigned prospective jurors first to local district courts, and, only after filling local needs, made remaining persons available to the countywide Circuit Court, which heard felony cases like Smith's. The Michigan Supreme Court, however, had rejected Smith's "siphoning" plea for lack of proof that the assignment procedure caused underrepresentation. We review the Sixth Circuit's reversal of the Michigan Supreme Court.

## Facts

On November 7, 1991, Christopher Rumbley was shot and killed during a bar brawl in Grand Rapids, Michigan. The bar was crowded at the time of the brawl, with 200-to-300 people on the premises. All patrons of the bar were African-American. The State charged Smith with the murder in Kent County Circuit Court. *Voir dire* for Smith's trial took place in September 1993. The venire panel included between 60 and 100 individuals. The parties agree that, at most, three venire members were African-American. Smith unsuccessfully objected to the composition of the venire panel. Smith's case proceeded to trial before an all-white jury. The case for the prosecution turned on the identity of the man who shot Rumbley. Thirty-seven witnesses from the bar, including Smith, testified at the trial. Of those, two testified that Smith fired the gun. Five testified that the shooter was not Smith, and the remainder made no identifications of the shooter. The jury convicted Smith of second-degree murder and possession of a firearm during a felony, and the court sentenced him to life imprisonment with the possibility of parole.

On first appeal, the Michigan Court of Appeals ordered the trial court to conduct an evidentiary hearing on Smith's fair-cross-section claim. The hearing occurred in early 1998. Smith's evidence showed that Grand Rapids, the largest city in Kent County, was home to roughly 37% of Kent County's population, and to 85% of its African-American residents. Felony charges in Kent County were tried in a sole Circuit Court. Misdemeanors were prosecuted in 12 district courts, each covering a discrete geographical area. To fill the courts' venires, Kent County sent questionnaires to prospective jurors. The Circuit Court Administrator testified that about 5% of the forms were returned as undeliverable, and another 15 to 20% were not answered. From the pool of prospective jurors who completed questionnaires, the County granted requests for hardship exemptions, *e.g.*, for lack of transportation or child care. Kent County then assigned nonexempt prospective jurors to their local district courts' venires. After filling the district courts' needs, the County assigned the remaining prospective jurors to the Circuit Court's panels. The month after *voir dire* for Smith's trial, Kent County reversed the assignment order. It did so, according to the Circuit Court Administrator, based on "[t]he belief ... that the respective districts essentially swallowed up most of the minority jurors," leaving the Circuit Court with a jury pool that "did not represent the entire county." The Jury Minority Representation Committee, its co-chair testified, held the same view concerning the impact of choosing district court jurors first and not returning unused persons to the pool available for Circuit Court selections. The trial court considered two means of measuring the extent of underrepresentation of African-Americans on Circuit Court venires: "absolute disparity" and "comparative disparity." "Absolute disparity" is determined by subtracting the percentage of African-Americans in the jury pool (here, 6% in the six months leading up to Smith's trial) from the percentage of African-Americans in the local, jury-eligible population (here, 7.28%). By an absolute disparity measure, therefore, African-Americans were underrepresented by 1.28%. "Comparative disparity" is determined by dividing the absolute disparity (here, 1.28%) by the group's representation in the jury-eligible population (here, 7.28%). The quotient (here, 18%), showed that, in the six months prior to Smith's trial, African-Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list.

Isolating the month Smith's jury was selected, Smith's statistics expert estimated that the comparative disparity was 34.8%. In the 11 months after Kent County discontinued the district-court-first assignment policy, the comparative disparity, on average, dropped from 18% to 15.1%. Smith also introduced the testimony of an expert in demographics and economics, who tied the underrepresentation to social and economic factors. In Kent County, the expert explained, these forces made African-Americans less likely than whites to receive or return juror-eligibility questionnaires, and more likely to assert a hardship excuse. The hearing convinced the trial court

that African-Americans were underrepresented in Circuit Court venires. But Smith's evidence was insufficient, that court held, to prove that the juror-assignment order, or any other part of the jury-selection process, had systematically excluded African-Americans. The court therefore rejected Smith's fair-cross-section claim.

The Michigan Court of Appeals concluded that the juror-allocation system in place at the relevant time did result in the underrepresentation of African-Americans. Reversing the trial court's judgment, the intermediate appellate court ordered a new trial, with jurors selected under the Circuit-Court-first assignment order installed shortly after the *voir dire* in Smith's case. The Michigan Supreme Court, in turn, reversed the Court of Appeals' judgment, concluding that Smith "ha[d] not established a prima facie violation of the Sixth Amendment fair-cross-section requirement." The Michigan High Court observed, first, that this Court has specified "[no] preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable." The court then noted that lower federal courts had applied three different methods to measure fair and reasonable representation: the absolute and comparative disparity tests, and "the standard deviation test."

Recognizing that no single test was entirely satisfactory, the Michigan Supreme Court adopted a case-by-case approach allowing consideration of all three means of measuring underrepresentation. Smith's statistical evidence, the court found, "failed to establish a legally significant disparity under either the absolute or comparative disparity tests." Nevertheless "grant[ing] [Smith] the benefit of the doubt on unfair and unreasonable underrepresentation," the Michigan Supreme Court ultimately determined that "he ha[d] not shown systematic exclusion." Smith's evidence, the court said, did not show "how the alleged siphoning of African American jurors to district courts affected the circuit court jury pool." In particular, the court observed, "[t]he 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." The court also ruled that "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion."

In February 2003, Smith filed a habeas corpus petition in the United States District Court for the Western District of Michigan, reasserting his fair-cross-section claim. Because Smith is "in custody pursuant to the judgment of a State court," the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), §2254, governed the District Court's review of his application for federal habeas corpus relief. Under the controlling provision of AEDPA, codified in §2254(d), a state prisoner's application may not be granted as to "any claim ... adjudicated ... in State court" unless the state court's adjudication

"(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."

Applying these standards, the District Court dismissed Smith's habeas petition. The Court of Appeals reversed. Where, as here, the allegedly excluded group is small, the Sixth Circuit ruled, courts should use the comparative disparity test to measure underrepresentation. In that court's view, Smith's comparative disparity statistics sufficed "to demonstrate that the representation of African American veniremen in Kent County ... was unfair and unreasonable." As to systematic exclusion, the Sixth Circuit, in accord with the Michigan intermediate appellate court, believed that the juror-assignment order in effect when Smith's jury was empaneled significantly reduced

the number of African-Americans available for Circuit Court venires. Smith was entitled to relief, the court concluded, because no important state interest supported that allocation system.

The State petitioned for certiorari attacking the Sixth Circuit's decision on two principal grounds: First, the State charged that the federal appellate court erred in adopting the comparative disparity test to determine whether a distinctive group was underrepresented in the jury pool. . Second, the State urged that, in any event, "there was no ... systematic exclusion of African Americans from juries in Kent County, Michigan," and no warrant for the Sixth Circuit's contrary determination. According to the Sixth Circuit, the Michigan Supreme Court's rejection of Smith's Sixth Amendment plea "involved an unreasonable application o[f] clearly established Federal law, as determined by [this Court in *Duren* ]." §2254(d)(1) We disagree. As explained below, our *Duren* decision hardly establishes—no less "clearly" so—that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community.

### **Reasoning**

To establish a prima facie violation of the fair-cross-section requirement, this Court's pathmarking decision in *Duren* instructs, a defendant must prove that: (1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and (3) "systematic exclusion" in the jury-selection process accounts for the underrepresentation. The defendant in *Duren* successfully challenged Jackson County's administration of a Missouri exemption permitting any woman to opt out of jury service. . The Court explained why it was plain that defendant *Duren* had established a prima facie case. First, women in Jackson County were both "numerous and distinct from men." Second, *Duren*'s "statistical presentation" showed gross underrepresentation: Women were over half the jury-eligible population; in stark contrast, they accounted for less than 15% of jury venires. *Duren* also demonstrated systematic exclusion with particularity. He proved that women's underrepresentation was persistent—occurring in every weekly venire for almost a year—and he identified the two stages of the jury-selection process "when ... the systematic exclusion took place." First, questionnaires for prospective jurors stated conspicuously that women could opt out of jury service. Less than 30% of those summoned were female, suggesting that women in large numbers claimed the exemption at the questionnaire stage. "Moreover, at the summons stage women were ... given another opportunity to [opt out]." And if a woman ignored the summons, she was deemed to have opted out; no further inquiry was made. At this "final, venire, stage," women's representation plummeted to 14.5%. In the Federal District Court serving the same territory, the Court noted, despite a women-only childcare exemption, women accounted for nearly 40% of those actually serving on juries.

The "disproportionate and consistent exclusion of women from the [Jackson County] jury wheel and at the venire stage," the Court concluded, "was quite obviously due to the system by which juries were selected." "[A]ppropriately tailored" hardship exemptions, the Court added, would likely survive a fair-cross-section challenge if justified by an important state interest. But no such interest, the Court held, could justify Missouri's exemption for each and every woman—the altogether evident explanation for the underrepresentation.

As the Michigan Supreme Court correctly observed, neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools. The courts below and the parties noted three methods employed or identified in lower federal court decisions: absolute disparity, comparative disparity, and standard deviation.

Each test is imperfect. Absolute disparity and comparative disparity measurements, courts have recognized, can be misleading when, as here, "members of the distinctive group comp[ose] [only] a small percentage of those eligible for jury service." And to our knowledge, "[n]o court ... has

accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems.” On direct review, as earlier stated, the Michigan Supreme Court chose no single method “to measur[e] whether representation was fair and reasonable.” Instead, it “adopt[ed] a case-by-case approach.” “Provided that the parties proffer sufficient evidence,” that court said, “the results of all of the tests [should be considered].” In contrast, the Sixth Circuit declared that “[w]here the distinctive group alleged to have been underrepresented is small, as is the case here, the comparative disparity test is the more appropriate measure of underrepresentation.”

Even in the absence of AEDPA’s constraint, we would have no cause to take sides today on the method or methods by which underrepresentation is appropriately measured. Although the Michigan Supreme Court concluded that “[Smith’s] statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests,” that court nevertheless gave Smith “the benefit of the doubt on underrepresentation.” It did so in order to reach the issue ultimately dispositive in *Duren* : To the extent underrepresentation existed, was it due to “systematic exclusion.

Addressing the ground on which the Sixth Circuit rested its decision, Smith submits that the district-court-first assignment order systematically excluded African-Americans from Kent County Circuit Court venires. But as the Michigan Supreme Court not at all unreasonably concluded, *Smith*, Smith’s evidence scarcely shows that the assignment order he targets caused underrepresentation. Although the record established that some officials and others in Kent County believed that the assignment order created racial disparities, and the County reversed the order in response, the belief was not substantiated by Smith’s evidence.

Evidence that African-Americans were underrepresented on the Circuit Court’s venires in significantly higher percentages than on the Grand Rapids District Court’s could have indicated that the assignment order made a critical difference. But, as the Michigan Supreme Court noted, Smith adduced no evidence to that effect. Nor did Smith address whether Grand Rapids, which had the County’s largest African-American population, “ha[d] more need for jurors per capita than [any other district in Kent County].” Furthermore, Smith did not endeavor to compare the African-American representation levels in Circuit Court venires with those in the Federal District Court venires for the same region. Smith’s best evidence of systematic exclusion was offered by his statistics expert, who reported a decline in comparative underrepresentation, from 18 to 15.1%, after Kent County reversed the assignment order. This evidence—particularly in view of AEDPA’s instruction, §2254(d)(2)—is insufficient to support Smith’s claim that the assignment order caused the underrepresentation. As Smith’s counsel recognized at oral argument, this decrease could not fairly be described as “a big change.” In short, Smith’s evidence gave the Michigan Supreme Court little reason to conclude that the district-court-first assignment order had a significantly adverse impact on the representation of African-Americans on Circuit Court venires.

To establish systematic exclusion, Smith contends, the defendant must show only that the underrepresentation is persistent and “produced by the method or ‘system’ used to select [jurors],” rather than by chance. In this regard, Smith catalogs a laundry list of factors in addition to the alleged “siphoning” that, he urges, rank as “systematic” causes of underrepresentation of African-Americans in Kent County’s jury pool. Smith’s list includes the County’s practice of excusing people who merely alleged hardship or simply failed to show up for jury service, its reliance on mail notices, its failure to follow up on nonresponses, its use of residential addresses at least 15 months old, and the refusal of Kent County police to enforce court orders for the appearance of prospective jurors. No “clearly established” precedent of this Court supports

Smith’s claim that he can make out a prima facie case merely by pointing to a host of factors that, individually or in combination, might contribute to a group’s underrepresentation. Smith recites a sentence in our *Duren* opinion that, he says, placed the burden of proving causation on the State. The sentence reads: “Assuming, *arguendo* , that the exemptions mentioned by the court below [those for persons over 65, teachers, and government workers] would justify failure to achieve a fair community cross section on jury venires, the State must demonstrate that these exemptions [rather than the women’s exemption] caused the underrepresentation complained of.” That sentence appears after the Court had already assigned to Duren—and found he had carried—the burden of proving that the underrepresentation “was due to [women’s] systematic exclusion in the jury-selection process.” The Court’s comment, which Smith clipped from its context, does not concern the demonstration of a prima facie case. Instead, it addresses what the State might show to *rebut* the defendant’s prima facie case. The Michigan Supreme Court was therefore far from “unreasonable,” §2254(d)(1), in concluding that *Duren* first and foremost required Smith himself to show that the underrepresentation complained of was “due to systematic exclusion.”

This Court, furthermore, has never “clearly established” that jury-selection-process features of the kind on Smith’s list can give rise to a fair-cross-section claim. In *Taylor* , we “recognized broad discretion in the States” to “prescribe relevant qualifications for their jurors and to provide reasonable exemptions.” And in *Duren* , the Court understood that hardship exemptions resembling those Smith assails might well “survive a fair-cross-section challenge.” In sum, the Michigan Supreme Court’s decision rejecting Smith’s fair-cross-section claim is consistent with *Duren* and “involved [no] unreasonable application o[f] clearly established Federal law,” §2254(d)(1).

### **Holding**

For the reasons stated, the judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opi

### **Questions for Discussion**

1. What is the holding in *Duren*?
2. Can you explain why the Michigan Supreme Court and the Sixth Circuit Court of Appeals disagreed with one another?
3. Why does the U.S. Supreme Court reverse the Sixth Circuit Court of Appeals?