JUN 12 2009

No. 08-1402

IN THE SUPREME COURT
OF THE UNITED STATES

MARY BERGHUIS,

Petitioner

-v.-

DIAPOLIS SMITH

Respondent.

ANSWER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

This case deals with the unanimous ruling of the Sixth Circuit Court of Appeals that the all-white jury that convicted Respondent in 1993 in Kent County, Michigan, was part of an objected-to, and persistent, pattern of underrepresentation of minorities in that county before 1994, and thus was unconstitutional under the Sixth Amendment and *Duren v. Missouri*, 439 U.S. 357 (1979).

The questions presented by Petitioner are:

QUESTION 1: WHETHER THE SIXTH CIRCUIT RULING CREATES A CONFLICT AMONG THE CIRCUITS.

QUESTION 2: WHETHER THE SIXTH CIRCUIT BASED ITS RULING ON CLEARLY ESTABLISHED LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT.

QUESTION 3: WHETHER THE SIXTH CIRCUIT CORRECTLY FOUND THERE WAS SYSTEMATIC UNDERREPRESENTATION.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	5
Statement of Proceedings	5
Statement of Facts	5
PETITIONER'S CLAIMED REASONS FOR GRANTING THE WRIT	12
1. CLAIM THAT THE SIXTH CIRCUIT RULING CREATES A CONFLICT AMONG THE CIRCUITS.	12
2. CLAIM THAT THERE IS NO CLEARLY ESTABLISHED LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT.	21
3. CLAIM THAT THERE WAS NO SYSTEMATIC UNDERREPRESENTATION.	24
CONCLUSION	43

INDEX OF AUTHORITIES

Cases

Avery v. Prelesnik, 538 F.3d 434 (6th Cir. 2008) 3
Brecht v. Abrahamson, 507 U.S. 619 (1993) 41
Duren v. Missouri, 439 U.S. 357 (1979) passim
Jane Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996) 33
Jefferson v. Morgan, 962 F.2d 1185 (6th Cir. 1992) 23
LaRoche v. Perrin, 718 F.2d 500 (1st Cir. 1983) 15
National Railroad Passenger Corporation v. Morgan, 535 U.S. 101 (2002) 33
Neogen Corp. v. Neo Gen Screening, Inc., 282 F,3d 883 (6th Cir. 2002) 33
Newman v. Metrish, 543 F.3d 793 (6th Cir. 2008) 3
Norris v. Alabama, 294 U.S. 587 (1935) 24
People v. Hubbard, 217 Mich. App. 459 (1996) 14, 38
People v. VanderVliet, 444 Mich. 52 (1993) 26
Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 33
Swain v. Alabama, 380 U.S. 202 (1965) 16
Taylor v. Louisiana, 419 U.S. 522 (1975) 12
Thompson v. Berghuis, 547 F.3d 572 (6th Cir. 2008) 3
United States v. Ashley, 54 F.3d 311 (7th Cir. 1995) 17, 18, 20

United States v. Butler, 611 F.2d 1066 (5th Cir. 1980) 16
United States v. Carmichael, 560 F.3d ___ (11th Cir. 2009) 19
United States v. Gelb, 881 F.2d 1155 (2d Cir. 1989) 12
United States v. Jackman, 46 F.3d 1240 (2d Cir. 1995) 15, 19
United States v. Lewis, 10 F.3d 1086 (4th Cir. 1993) 16
United States v. Orange, 447 F.3d 792 (10th Cir. 2006) 18
United States v. Rioux, 97 F.3d 648 (2d Cir. 1996) 15, 18
United States v. Rogers, 73 F.3d 774 (8th Cir. 1996) 17, 18
United States v. Royal, 174 F,3d 1 (1st Cir. 1999) 14, 18
United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989) 18, 20
United States v. Shinault, 147 F.3d 1266 (10th Cir. 1998) 19
United States v. Weaver, 267 F.3d 231 (3rd Cir. 2001) 16
Wright v. Van Patten, 128 S.Ct. 743 (2008) 23

Constitutional Provisions

U.S. Const., Amend. VI 1, 12, 20

Statutes

17 U. S. C. § 602(a) 33
28 U.S.C. § 2254 1
M.C.L. 600.1307a 30

Rules

M.C.R. 2.511(D)(4) 30

DIAPOLIS SMITH, Respondent, by and through his attorney, James S. Lawrence, moves this Court to deny a Writ of Certiorari to review the unanimous ruling of the Sixth Circuit Court of Appeals panel granting a Petition for Habeas Corpus.

OPINIONS BELOW

Petitioner has properly cited the opinions below.

STATEMENT OF JURISDICTION.

Respondent concedes jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has properly cited U.S. Const., Amend. VI, and 28 U.S.C. § 2254.

INTRODUCTION

This case involves the application of *Duren v. Missouri*, 439 U.S. 357 (1979), prohibiting the systematic underrepresentation of minorities on juries. The trial took place in Kent County (Grand Rapids) Michigan in 1993. Somehow there were no African-Americans available to be on the jury, in a county that is 8.1% black. The showings over a 17 month period, showed underrepresentation of African-Americans 15 out of 17 months, and

underrepresentation of 34% in Respondent Smith's jury month.

The Sixth Circuit ruled this was caused by an improper procedure that Kent County abandoned in late 1993. The ruling is therefore not likely to apply to others. Because the practice we complain of has stopped entirely, we submit it is not an appropriate subject for United States Supreme Court action. Indeed, it appears that not a single person but Smith himself has ever gotten a conviction reversed on the basis of the ruling in this case.

The provisions of *Duren v. Missouri* are almost impossible to enforce for any criminal defendant, because the evidentiary showings required are so burdensome and expensive as to be beyond the reach of almost all defendants. Respondent, and apparently Petitioner, has not been able to find even a single federal court ruling granting such a claim over the last 20 years. When one person manages to squeeze through the eye of this needle by making the requisite showings, Diapolis Smith, that is considered by the State to be intolerable.

The required showings are even more difficult to make in counties like Kent County that refuse to keep records of the race of people called for jury service, and to keep records of the excuses given out. Petitioner seeks to maintain the county's own failure to keep records as a basis to deny relief.

Petitioner's position is that the ruling of *Duren*

is not clear enough to be enforceable. Respondent submits that the constitutional protections upheld in *Duren* may not be so easily dismissed.

Petitioner claims (Pet. 4) that 3 other Petitions for Certiorari filed by them, involving different legal issues than this case, show hostility by the Sixth Circuit against the State of Michigan. In fact, if those other cases show anything, they show a persistent pattern of unreasonable affirmances by Michigan courts. [1]

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[1] See the 3 Sixth Circuit rulings in the cases cited by Petitioner, issued by 8 different judges, each of which appears to be correctly decided: *Avery v. Prelesnik*, 538 F.3d 434 (6th Cir. 2008): "we agree with the district court's conclusion that potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to 'undermine confidence' in the outcome of the jury verdict"; *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008): "where the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, there is insufficient evidence to satisfy the *Jackson* standard"; *Thompson v. Berghuis*, 547 F.3d 572 (6th Cir. 2008): "Rendering the trial 'fundamentally unfair,' however, is not the standard used to evaluate a claim of ineffective assistance; under *Strickland*, the required showing is prejudice, measured as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Not only was this panel ruling unanimous, and coincident with the original ruling of the Michigan Court of Appeals in this case, but not one judge of the Sixth Circuit voted to grant rehearing en banc. The unanimous opinion of the Sixth Circuit that these issues were not worthy of further review is entitled to some respect.

Underrepresentation of minorities on juries is a national problem and national disgrace. This Sixth Circuit ruling will not fix the problem. However, a ruling unfavorable to Respondent will encourage state officials to ignore inadequate representation of minorities on juries, since that defect will not result in federal action. If Respondent with his overwhelming showings cannot win, then no one can win, and the modest progress that this ruling might inspire among court administrators would come to a halt. The rule of *Duren*, that purports to give protections to the public, but in practice almost never protects anyone, shows how far many lower courts have strayed from its teachings.

If the Sixth Circuit erred at all, it was by not finding other bases to grant a new trial.

The trial of Mr. Smith was riddled with errors which did not receive court attention. The case against him is so weak that it is inconceivable that with effective representation and a properly constituted jury he can be convicted. The first ruling granting him reversal took place 10 years ago, yet,

no new trial has taken place. This Court should deny the writ of certiorari and permit the long-delayed fair trial to finally take place.

STATEMENT OF THE CASE

Statement of Proceedings

Respondent accepts Petitioner's factual account of the historical proceedings in this case.

Statement of Facts

Trial Testimony

The charges arose from the shooting of Christopher Rumbley at So So's Bar in Grand Rapids late in the evening on November 6, 1991. The bar was crowded with 200 to 300 people, all black. (T 172, 1008).

Two witnesses out of 36 who testified and who were present during the shooting testified that Respondent Smith was the one who shot Rumbley. Katherine Brown testified that she saw Respondent shoot while Respondent was holding the victim's collar (T 219). The medical examiner, Dr. Cohle, testified the shot was from at least 4 feet away at a downward angle. (T 694-695, 702). Brown didn't identify Smith at the lineup because she "didn't

understand the question" being posed to her by the police at the lineup. (T 226). At the preliminary examination, she testified she did not see Smith with a gun, while at trial she said she saw him shoot with a gun. (T 234; PET I, 12). The police got her to change her story because the existing evidence was not good enough to convict him.

Anthony Hardin testified that he saw Respondent shoot the deceased holding the gun level while right next to him (T 1313, 1346-1347), but admitted that he told police the shooter was shorter than Rumbley, (T 1344-1345). Respondent Smith was 5 inches taller than Rumbley. (T 399, 693)

Chris Rumbley, the deceased, was 5'7 1/2" tall. (T 693). The deceased died from a gunshot wound to the right side of his chest, fired at a downward angle from a range of more than 4 feet. (T 694-695, 702). It was inconsistent with a person firing while grabbing the deceased's collar. (T 711-712).

Two witnesses testified that Respondent was the shooter, and 3 testified they saw Respondent with a gun. One of the 3 was uncertain, while another saw the man for only a second or two. Five witnesses plus Respondent testified they saw the shooting and were certain Respondent was not the shooter. One witness testified Respondent was not one of the men he saw fighting with the deceased.

Laura Dean and Jimmy Mack testified the shot came from a distance. (T 373, 805). Yet, Smith was

convicted because he was seen next to the deceased when the shot was fired.

A man named Rod Fee looked similar to Respondent Smith. (T 206, 1056, 1090). Sandra Buchanan identified Rod Fee as the man she saw arguing with Rumbley shortly before the shooting. (T 516). Eva Price testified Dorothy Brown introduced her to a man at So So's that night who resembled Respondent but was not Respondent. (T 623-624). Dorothy Brown told her the man, named "Raffee" or "Rafael," was "her man." (Dorothy's man). (T 630, 1180-1181).

Evidentiary Hearing Testimony

By the time of final seating of 14 jurors, 23 had been excused, making a total of 37 people who had gotten into the jury box. Every one of these 37 people was white. (T 145, 148). Defense counsel challenged this, but was denied. (T 148).

At the evidentiary hearing, Kent County Circuit Court Administrator Kim Foster testified that notices to prospective jurors were sent out by mail. 5% were returned by the post office as undeliverable. An additional 15 to 20% were not responded to. (EHT I, 17). Of the no-response letters, a second letter is sent out, which gets about a 50% response rate. (EHT I, 18-19).

For those who do not respond, an order to show

cause is mailed out. No action is taken against those who fail to respond to the show cause order. (EHT I, 19-20). It is unknown how many served with show cause orders appeared or failed to appear. (EHT I, 48). Kent County law enforcement would not serve bench warrants, if issued. (EHT I, 48). After this process, the responding potential jurors are placed on the qualified jurors list. (EHT I, 20).

Mr. Foster explained that if a person on the questionnaire claims one of the statutory exemptions, that person is not placed on the qualified jurors list. As for verification of the exemption, "We do some verification, depending on our resources." Beyond checking birthdate and mental disability lists, "we generally take the individual's word." (EHT I, 21).

Neither list contained the race of the individual being kept or being excused. (EHT I, 22).

If a notice to appear to a juror is not delivered, the court takes no action. (EHT I, 25). If a person who gets a notice to appear fails to show up, they make an attempt to contact the person by telephone. If the person does not have a telephone, they "generally" send out a letter, with no action taken if no response. (EHT I, 26-27).

Beginning October 1, 1993, the court began selecting Circuit Court jurors first, then District Court jurors. However, before that date, District Court jurors were selected first, and only then were

Circuit Court jurors selected. (EHT I, 27-31).

Respondent's jury selection began September 13, 1993. The juror list would have been selected in May and June of 1992, approximately 15-16 months before Respondent's trial. (EHT I, 28).

Mr. Foster testified (EHT I, 30):

> "Circuit Court was essentially left with whatever was left, which did not represent the entire county, it generally just -- it represented certain portions of the county."

Mr. Foster observed "[t]he visible minority jurors appeared low." (EHT I, 38).

Dr. Michael Stoline is professor of mathematics and statistics at Western Michigan University, with a doctorate degree in 1967. (EHT I, 66). Through statistical analysis, he concluded that out of the 2,252 jurors who appeared at court, one would expect to have 164 blacks, but there were only 139 blacks. (EHT I, 77).

Dr. Stoline testified that out of 11 jury terms in his 1993-1994 figures, in 10 out of 11 there was significant underrepresentation of blacks, in two of them more than 40%. (EHT I, 80). On average, that was a 15 % underrepresentation. (EHT I, 102-103).

He found the extent of deviation was larger, and more consistently pointed away from blacks, than could be accounted for by chance. (EHT I, 81-82).

The overall underrepresentation of blacks on juries was 18%, which was higher than the 15% observed in 1993-1994. (EHT II, 9-10). During month 12 of the 1992-1993 year, which ended October 1, 1993 [Mr. Smith's trial month], the underrepresentation of blacks was 34.8%, much higher than the half-year figure of 18% for April thru September, and more than twice as high as the 15.1% underrepresentation for the 1993-1994 year. (EHT II, 11, 15-17).

Richard Hillary of the Kent County Defenders Office testified that "Back prior to 1993, or even halfway through 93 and up to 94, I recall there being very few, if any, minorities, specifically black potential jurors at all." "It had been a consistent problem since I began my practice in 1980." "If I said it in terms of percentages, 98% of the time we had all-white juries." (EHT I, 130). The problem was frequently discussed by local attorneys and by the bench. (EHT I, 130). The court in 1994 began sending out second mailings to those who did not answer the first mailing. Another change was to put stronger language in the letters as to sanctions for not appearing. (EHT I, 133-135). Since those changes were made, "there has been a noticeable increase in the number of minorities that show up." (EHT I, 135).

Mr. Hillary also testified that it was a concern that qualified jurors were first sent to District Court,

then the leftovers would be sent to Circuit Court. In fact, jurors called to District Court, if they did not get on a jury, were not even put back into the pool for Circuit Court. After some months of study, they concluded that this caused too few minority residents to appear on Circuit Court juries. (EHT I, 135-136).

Kurt Metzger of Wayne State University since 1990 was director of the Michigan Metropolitan Information Center, that does demographic and economic research. He had degrees and worked for the census bureau for 15 years. (EHT I, 142-144). He was qualified as an expert in demographics and surveying techniques and the use of census information. (EHT I, 147).

Mr. Metzger testified to statistics showing that blacks had far more single parent households, poverty households, rented, moved in the last 15 months, and had no car, and the effects this had on their appearance on juries. (EHT I, 154-157).

PETITIONER'S CLAIMED REASONS FOR GRANTING THE WRIT

1. CLAIM THAT THE SIXTH CIRCUIT RULING CREATES A CONFLICT AMONG THE CIRCUITS.

A defendant in a criminal trial is entitled to a jury drawn from a venire representative of a fair cross-section of the community from which the case is tried. *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). As the Court held in *United States v. Gelb*, 881 F.2d 1155 (2d Cir. 1989):

> "While the equal protection clause of the Fourteenth Amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination ... the Sixth Amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of ... motive."

To establish violation of the right to a jury drawn from a fair cross-section of the community, the defendant must prove: (1) that the excluded group is a "distinctive" group in the community; (2) that the representation of this group in the venire 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. *Duren v. Missouri*, supra.

Cases cited by Petitioner that fail to follow these rules, or that evade them by clever mathematical tests which depreciate persistent underrepresentation as insignificant, are in conflict with the holdings of the United States Supreme Court.

The use by the Michigan Supreme Court, and in some of the cases cited by Petitioner, of the faulty "absolute disparity" test was unreasonable, because it presumes that wherever blacks are only a small percentage of the population, their underrepresentation on juries is justified because of the small number of people being discriminated against, compared to the population as a whole.

Because of the number of blacks in Kent County, it would be <u>impossible</u> for any Kent County jury selection to ever meet the absolute disparity standard, even if no blacks were ever put on juries for decades. The prosecutor conceded this in his brief to Michigan Supreme Court, p. 15.

Under the absolute disparity test promoted by Petitioner, and rightly rejected by unanimous Sixth Circuit vote, only those defendants in the 5 Michigan counties with black populations higher than 11.2% (Berrien, Lake, Muskegon, Saginaw and Wayne

counties) could ever complain about underrepresentation of minorities on juries, while defendants in the remaining 78 counties would be mathematically barred from complaining.

In the instant case, jurors were siphoned from the jury pool to appear on the local city juries (District Court), and if not selected for District Court service, were excused, without being returned to the jury pool. The large volume of cases in the city of Grand Rapids compared to the whole county, and the large number of minorities in the city of Grand Rapids compared to the rest of the county, caused this system of manipulation of the jury lists to directly result in substantial underrepresentation of minorities in the Circuit Court jury pools, month after month after month. The Michigan courts recognized this in *People v. Hubbard*, 217 Mich. App. 459 (1996), but were to abandon that recognition in this case.

Respondent has never claimed it is wrong to use voting lists as a basis from which to call prospective jurors. However, after using those voter lists, Kent County removed substantial numbers of minorities from the available pool by using nonrandom criteria that make this case very different from the challenges that have failed for other defendants.

The cases cited by Petitioner are readily distinguishable from this case. In *United States v. Royal*, 174 F,3d 1 (1st Cir. 1999), there was no

siphoning. When jurors had excuses, these were temporary, and the jurors were resummoned later, unlike this case where jurors once removed stayed removed. In *Royal*, only 10 of the excuses were unrecorded, unlike this case where none of the excuses was recorded.

Most importantly, the Court, in speaking of an earlier case on which it relied, stated: "The court recognized that the absolute disparity in the case would be small 'even if every black in the region were excluded from jury service.'" Yet, they use that test anyway. They also recognized that that result could only be accomplished by overruling *LaRoche v. Perrin*, 718 F.2d 500 (1st Cir. 1983).

In *United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996), the Court followed the absolute disparity test, but had to overrule *United States v. Jackman*, 46 F.3d 1240 (2d Cir. 1995) in order to do it. Moreover, in *Rioux*, unlike this case, the Court was not dealing with the siphoning and other nonrandom elements that removed minorities from the jury pool in this case. Also, the Court in *Rioux* held that "it remains unclear whether statistics alone can prove systematic exclusion," brushing off that that was the very approach applied by the Supreme Court in *Duren*.

The mere fact that some courts have strayed from the *Duren* ruling (even though they had to overrule their own precedent to do it) is no basis for

overturning the Sixth Circuit ruling in this case which was true to the principles of *Duren*.

Petitioner cites *United States v. Weaver*, 267 F.3d 231 (3rd Cir. 2001), but that case did not use absolute disparity alone, examining the issue using both absolute and comparative disparity. Thus, Petitioner mischaracterizes the case. Moreover, *Weaver* involved a challenge to the use of voter lists to choose prospective jurors, which is nothing like the challenge Respondent prevailed upon here. The Court stated that "where substantial representation is traceable solely to the exclusive reliance on voter registration lists" the defendant could not prevail, a very different situation from this case.

Petitioner ignores the 4th Circuit, which in *United States v. Lewis*, 10 F.3d 1086 (4th Cir. 1993) uses the comparative disparity test, though they do not use that label. Therefore, it is not true that the instant case "establishes" a conflict among the circuits: the conflict was already there.

Petitioner cites *United States v. Butler*, 611 F.2d 1066 (5th Cir. 1980). However, that case based its result on the flawed, and essentially overruled, case of *Swain v. Alabama*, 380 U.S. 202 (1965), which disgracefully denied relief even though "no Negro has actually served on a petit jury since about 1950." [2]

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[2] *Swain* requires "purposeful or deliberate denial to Negroes on account of race of participation as jurors"

Significantly, Respondent has not found and Petitioner has not cited any 5th Circuit case from the last 25 years employing the standard of *Butler.*

Petitioner then cites *United States v. Ashley*, 54 F.3d 311 (7th Cir. 1995), an outrageous decision that highlights the problem with Petitioner's approach. In that case, where the population was 3% black, but none appeared on juries, that was held to be only a 3% shortfall (rather than 100%), and thus not constitutionally significant.

Moreover, in *Ashley*, the Court held: "they have not shown that this discrepancy amounts to anything more than a statistical coincidence." In this case, the underrepresentation happened month after month, and amounted to 34% in Respondent Smith's jury month. If this is just coincidence, why does it keep happening? At the evidentiary hearing Dr. Michael Stoline testified, without contradiction, that the persistent underrepresentation went beyond that which could be caused by simple chance. (EHT I, 81-82). Respondent Smith made the showings that the defendant in *Ashley* did not.

Petitioner then cites *United States v. Rogers*, 73 F.3d 774 (8th Cir. 1996), where the panel felt obligated to affirm because of prior case law of the

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to make a claim, a very different standard than that announced in *Duren.*

circuit, but felt the prior case law was wrong and in direct violation of the ruling in *Duren*. [3] Apart from the believed-required adherence to a prior ruling of the Circuit, instead of adhering to Supreme Court authority, the opinion in *Rogers* strongly supports the correctness of the Sixth Circuit ruling in this case.

Petitioner cites *United States v. Sanchez-Lopez*, 879 F.2d 541 (9th Cir. 1989). While this case does endorse the absolute disparity test, it is about as bad as *United States v. Ashley*, supra. The case finds that since there are not many Hispanics in Idaho, it does not matter that there is underrepresentation on jury venires, because the absolute disparity is always going to be less than 10% because the Hispanic population is less than 10%.

Petitioner then cites *United States v. Orange*, 447 F.3d 792 (10th Cir. 2006), but mischaracterizes the case by ignoring its statement that "In order to make this determination, we have consistently relied upon two measurements: absolute and comparative

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[3] It is a peculiarity and disgrace of the federal court system that the principle requiring a panel to adhere to previous decisions of the same circuit is scrupulously honored when doing so denies relief to an individual, *United States v Rogers*, supra, yet, the principle is readily abandoned when needed to avoid denying relief to the government. See *United States v. Royal*, supra; *United States v. Rioux*, supra.

disparity."

Petitioner further mischaracterizes the 10th Circuit holdings by ignoring *United States v. Shinault*, 147 F.3d 1266 (10th Cir. 1998):

> "Indeed, small absolute disparity figures are less persuasive in a case such as this, where, because of the minorities' small population, even the complete exclusion of the groups would result in absolute disparities of less than 6%. See *United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) (noting the weakness of absolute disparity analysis when dealing with small population)."

Petitioner then cites *United States v. Carmichael*, 560 F.3d ___ (11th Cir. 2009), and does correctly characterize the case, which holds:

> "Under black letter Eleventh Circuit precedent, "[i]f the absolute disparity between these two percentages is ten percent or less, the second element is not satisfied[,]" [4]

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[4] This is not reasoning, but the bald application of "black letter law," that is, deference to past decisions of the circuit whether right or wrong, but only when that deference favors the government. The ruling does not conform to *Duren* and enshrines systematic underrepresentation of minorities as legitimate.

This holding reveals the nub of the problem. It provides that in most jurisdictions of the United States, the rule of *Duren* cannot apply, because the minority population is too small to be worthy of constitutional protection. Petitioner wants minorities to be disenfranchised from jury participation like the Hispanics of Idaho were in *Sanchez-Lopez* and the African-Americans of southern Illinois were in *Ashley*.

Petitioner claims that denying certiorari will mean that a person's rights will depend on where one lives. (Pet. 19). This ignores the fact that the rule Petitioner wants enshrined as law would do exactly that, by making the public's access to the right of juries that fairly represent the community as dependent on whether the minority population of the jurisdiction is large enough. If the minority figure is less than 10%, under Petitioner's proposed rule, the defendant loses before he even starts. In those places, the Sixth Amendment right would not exist at all, if Petitioner gets its way.

Petitioner ignores that places where minority population is somewhat small are the very places where that population is most in need of protection. What good is a rule that allows defendants to complain in Detroit, where minorities have political power and thus no need to complain, but withholds the right to complain in Lansing, Jackson, and Grand Rapids?

Petitioner attempts to portray the instant ruling as a rogue ruling that stands alone, but the reality of the case law is far more complex. The key question is does the instant ruling uphold the letter and the spirit of *Duren*, and since it clearly does, there is no real basis for granting certiorari.

2. CLAIM THAT THERE IS NO CLEARLY ESTABLISHED LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT.

In *Duren*, the Supreme Court announced as the second prong of the test: "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." This standard is no less clear than many standards announced by the Supreme Court.

Petitioner's claim that the Court in *Duren* established the absolute disparity test as the law of the land (Pet. 20) is absolutely false. Petitioner does not quote from any passage of *Duren* that makes such a holding. The word "absolute" does not appear in *Duren* at all, and the test Petitioner claims as controlling was not used. The *Duren* court said:

> "Petitioner established that according to the 1970 census, 54% of the adult inhabitants of Jackson County were

> women. He also showed that for the periods June-October 1975 and January-March 1976 11,197 persons were summoned and that 2,992 of these or 26.7%, were women. Of those summoned, 741 women and 4,378 men appeared for service. Thus, 14.5% (741 of 5,119) of the persons on the postsummons weekly venires during the period in which petitioner's jury was chosen were female. In March 1976, when petitioner's trial began, 15.5% of those on the weekly venires were women (110 of 707). Petitioner's jury was selected from a 53-person panel on which there were 5 women; all 12 jurors chosen were men. None of the foregoing statistical evidence was disputed.
>
> ... The second prong of the prima facie case was established by petitioner's statistical presentation...Petitioner's presentation was clearly adequate prima facie evidence of population characteristics for the purpose of making a fair-cross-section violation."

Duren did not establish any particular means of mathematical analysis, and simply observed that the showing in that case was adequate. The standard established in *Duren* is whether "the representation of this group in venires from which juries are selected is [...] fair and reasonable in relation to the number of such persons in the community." That is the test the Sixth Circuit used in this case, and is the

test that should continue to be used.

Because the precedent of *Duren* exists, this case is nothing like Petitioner's cited case of *Wright v. Van Patten*, 128 S.Ct. 743 (2008). In *Wright*, there had been no Supreme Court authority holding that counsel's participation by speaker phone constituted a constitutional violation. In this case, *Duren* holds that the minority presence on juries must be "fair and reasonable in relation to the number of such persons in the community."

Petitioner's argument is essentially that because *Duren* did not state a specific method of mathematical analysis to be used, no challenge under *Duren* can ever be made. That approach would render *Duren* a dead letter. It was the duty of the Sixth Circuit to apply *Duren*, not to implicitly overrule it as some circuits have done.

While Petitioner claims the instant ruling is a novel one, Petitioner fails to mention or address *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir. 1992):

> "if a disparity is sufficiently large over a significant period of time, then it is unlikely that the disparity is due solely to chance or to accident, and in the absence of evidence to the contrary, a court should conclude that racial or other class-related factors entered into the selection process."

Indeed, the principle has been around much

longer than *Duren*. In *Norris v. Alabama*, 294 U.S. 587 (1935), the Court found underrepresentation where the African-American population was only 7.2% of the population. Under Petitioner's rule, since less than 10% of the population was excluded, *Norris v. Alabama* would have to be considered wrongly decided.

When the Court in *Norris* stated that there was "total exclusion from juries," 294 U.S. at 599, the Court was using the comparative disparity test. The Supreme Court said there was a total, i.e. 100%, shortfall, which is a comparative disparity analysis. The Supreme Court did not say there was a 7.2% shortfall, which would be an absolute disparity analysis.

This panel based its ruling on clearly established law announced by the Supreme Court, primarily *Duren v. Missouri*, prohibiting the systematic underrepresentation of minorities on juries. Petitioner's argument on this point is frivolous.

3. CLAIM THAT THERE WAS NO SYSTEMATIC UNDERREPRESENTATION.

U.S. Census Bureau figures show that as of 1990, Kent County was 8.1% African-American. One would expect to find approximately 1 black person

out of every 12, if the selection procedure were fair. Here, 37 people got into the jury box, without any of them being black. Even if only 2.7% of the county were black, we would expect to see at least 1 black person out of the 37 venirepersons. With 8.1% being black, we would expect to see 3 out of 37. Instead, we saw zero.

There are over 40,000 black people residing in Kent County. Black people by the thousands have been denied the equal right to serve on a jury, and black defendants have been denied the equal right to have persons of their own race have a fair chance to sit on their juries.

The Sixth Circuit ruling is based on the Kent County practice, since discontinued, of calling jurors first to District Court, and only the remaining persons were eligible for Circuit Court service. Grand Rapids had its own District Court, with a high volume of cases as any urban area would have, and with a high proportion of minorities. Even if a prospective juror was not used in the District Court, the system took him or her out of the Circuit Court pool anyway. This stacked the Circuit Court pool with out-county residents, who were predominantly white.

An evidentiary hearing was held. Judge Sullivan found that blacks were a distinctive group in the community, and that there was underrepresentation of that group among persons

called for jury service. We agree. He ruled, however, there was no showing that the underrepresentation was "systematic." We find that ruling to be unreasonable, as did the Sixth Circuit.

One way of determining whether a particular problem is systematic, or simply the result of chance, is whether it keeps happening. Of the 17 jury months for which we have figures, April 1993 to August 1994, in 15 of those months there was underrepresentation of African-Americans among those called to be jurors in Kent County Circuit Court. (EHT II, 50, 75). This is a consistent pattern stretching over a 17 month period. By showing it happens repeatedly, one necessarily shows it is systematic.

If the underrepresentation were not caused by the method of selecting those to appear for jury service, the only remaining possibility is chance. Dr. Stoline testified, without contradiction, the persistent underrepresentation went beyond what could be caused by simple chance. (EHT I, 81-82).

In *People v. VanderVliet*, 444 Mich. 52 (1993), the Court accepted this kind of statistical analysis to demonstrate facts, stating in footnote 35, "The man who wins the lottery once is envied; the one who wins it twice is investigated." To analogize, the Kent County Circuit Court played the lottery 17 times, with chance making it just as likely that blacks would be overrepresented as underrepresented. The

lottery came up with blacks underrepresented 15 times. We would not tolerate such results even from a roulette wheel; we cannot deem them acceptable coming from a court system.

"Systematic" means the result is produced by the method or "system" used to select from the population at large the small number who appear in jury pools. If not produced by chance, the results are necessarily produced by the system. Other than chance, and the system, nothing more remains.

Richard Hillary of the Kent County Public Defender's Office testified that "Back prior to 1993, or even halfway through 93 and up to 94, I recall there being very few, if any, minorities, specifically black potential jurors at all." "It had been a consistent problem since I began my practice in 1980." "If I said it in terms of percentages, 98% of the time we had all-white juries." (EHT I, 130). Evidence at the hearing also showed that the circuit judges had long been aware of the problem. (EHT I 131-133).

The statistics alone are sufficient to show systematic underrepresentation. The observations of Mr. Hillary, alone, and Mr. Foster, alone, are sufficient to show systematic underrepresentation. This would be so even if we had no evidence showing why the system produced these results. But, we do have such evidence.

Court Administrator Foster testified minimal

efforts were made to follow up when mail proved undeliverable, and when, though delivered, it was not answered. When people on the jury list did not show up for court, the efforts were again minimal to get any of those people in. There was a 25% rate of people who either did not get the mailing, or who got it and did not respond. Kent County law enforcement, which is obviously part of the system, will not so much as serve a bench warrant for failure to appear as a juror.

Mr. Foster explained that people could get off jury duty without ever seeing a judge, just by claiming an excuse, such as no ride, no babysitter, etc. Mr. Metzger explained the black population was far more likely to have no ride or no babysitter, based on statistics showing blacks had far more single parents, far more poverty, far more renters, far more people moving, far fewer cars, and far fewer phones. That is before we even get to the attitude of distrust of government which is far more prevalent among blacks than whites, according to the uncontradicted testimony. [5]

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[5] We cannot help but note that the problem of minority distrust of government will certainly not be alleviated by rulings holding that all-white juries in a county that is not all-white violates no rule of law, even when it happens month after month. As Mr. Hillary noted, for years in Kent County there were plenty of blacks available to sit in the defendant's

If someone is a single parent, that person is more likely to need a babysitter. If someone has no car, that person is more likely to need a ride. If a person moves, that person is less likely to appear on the jury panel. If a person has no phone, that person is less likely to receive a call from the court administrator.

As Mr. Metzger testified, the introduction of excuses into the system introduces a non-random element, one that tends toward underrepresentation of blacks. That the excuses are handled without any record kept increases the arbitrariness.

If changes in the system can cure the problem, that identifies the system as where the problem lies. The testimony at the evidentiary hearing showed that once the practice of the "District Court draft" was stopped, in 1994, the problem of all-white Circuit Court juries disappeared.

Similar problems exist with the "no ex-felons on jury" rule. [6] Statistics show that blacks are over 8

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chair, but to see one in the juror's chair was a remarkably rare occurrence. (EHT I, 134-137). In Respondent Smith's trial, 37 people got in the jury box, all white, while 37 civilian witnesses testified, all black. Surely, the racial makeup of the jury did not escape the 37 witnesses.

[6] The legislature, until 2003, did not exempt ex-felons from serving on juries. It exempted only persons presently under a felony sentence. M.C.L.

times as likely to be under sentence for felony than whites. [7] A no felon and no ex-felon rule guarantees a much whiter jury, unless remedial steps are taken.

In the case of Mr. Smith, his month showed underrepresentation of blacks over twice the already-excessive level of underrepresentation for the entire 17 month period.

We also have the fact that Smith's jury was selected in the last month of the jury year. As counsel argued to the court (EHT II. 52-53):

> "We have also the fact that these lists are made a year in advance. Therefore, as you start to get towards the end of the year, such as September of 93, where Mr. Smith's case lies, what you find is that if the people have moved away during that year, or moved to another place within the county, then they are not going to be found and they are not going to appear in the jury box."

Kent County persistently had severe underrepresentation of blacks on juries, yet

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600.1307a. However, the Michigan Supreme Court, had in place a provision disqualifying all ex-felons from serving. M.C.R. 2.511(D)(4). This court rule, was part of the system that led to no opportunity to have blacks on Respondent Smith's jury.

[7] Blacks are 13% of the state population, but 58% of the prison inmates.

Petitioner claims that the system had nothing to do with it. We submit it is the duty of the system to take steps to cure this consistent pattern of underrepresentation. Defendants in Kent County should not have to wait until blacks gain economic parity with whites in order to get judicial parity with whites.

The Michigan Supreme Court decision is brimming with unreasonable rulings. For example, the Court ruled that Respondent Smith must be able to trace the exact mechanism by which the Kent County courts routinely and systematically had underrepresentation of blacks on juries, even though the county kept no records of what they were doing.

Where the county government chooses not to keep records that a litigant might use to show the reasons for the underrepresentation, it is absurd and unreasonable to require Respondent Smith to show what the records would have shown if the government had kept them. It denies due process to allow the government to insulate its decisions from court review by the expedient of not keeping records of what they do.

The 3 factors announced by the United States Supreme Court in *Duren*, supra, do not include requiring the defendant to show WHY there was systematic underrepresentation, only that the defendant show that that there WAS systematic underrepresentation. To require this would allow

the very officials responsible for not keeping records to maintain any illegal practices they want, while the lack of records would prevent anyone from complaining about it. By requiring showings above and beyond those required by the clearly established law of the United States Supreme Court, the Michigan Supreme Court acted unreasonably and in defiance of the standards employed by the United States Supreme Court.

Another unreasonable ruling by the Michigan Supreme Court was their adoption of an unreasonable definition of "systematic." While they gave lip-service to following the ruling of *Duren* (holding that systematic means "inherent in the particular jury-selection process utilized") in fact they ruled precisely the opposite of *Duren*. The United States Supreme Court ruled:

> "His undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic - that is, inherent in the particular jury-selection process utilized."

Here, Respondent showed that there was a discrepancy for 15 out of 17 months, not just occasionally. In the half year of April through

September, underrepresentation was 18%, while underrepresentation for the 1993-1994 year was 15.1%. Underrepresentation for September 1993, when Respondent's trial was held, was 34.8%. It was unreasonable to hold these shortfalls statistically insignificant. It might have been reasonable to hold such figures insignificant if they had been a one-shot aberration, and not been part of a persistent and consistent trend of underrepresentation. But, it kept happening again and again. According to the Michigan Supreme Court, persistent underrepresentation means nothing.

Repeated results are systematic even when not done the majority of the time. See *National Railroad Passenger Corporation v. Morgan*, 535 U.S. 101 (2002) [one proves something to be systematic when it is shown to be "serial or systemic"]; *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) [corporation systematically advertised in state where it did so 3 times in 12 months]; 17 U.S.C. Section 602(a) [copying of copyrighted material can be deemed systematic even if it happens only 6 times]; *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F,3d 883 (6th Cir. 2002) [contacts were "systematic" where they were "something more than random, fortuitous, or attenuated"]; *Jane Doe v. Claiborne County*, 103 F.3d 495 (6th Cir. 1996) [6 instances of sexual abuse over 20 months (approximately once in 100 days) constituted "systematic" sexual abuse]. One would

think that 15 out of 17, far more than a simple majority, would qualify as systematic, but to the Michigan Supreme Court, it is merely random coincidence.

It is true that in the *Duren* case the state of Missouri had a specific rule that allowed exemptions to women. In this case, the rules that were being applied were hidden rules. No records were kept. No rules were published about requests to be taken off jury service. No rules were published about people who did not receive jury summons, or people who ignored them.

Another error of the Michigan Supreme Court was the reliance on the absolute disparity test, discussed above.

Yet another unreasonable action by the Michigan Supreme Court was committed in their failure to heed the ruling of *Duren* that the State bears the burden of justifying the failure to attain a fair cross-section of the community.

Because Respondent Smith made several showings about factors that caused the underrepresentation, and was unable to point to any single "smoking gun," he lost. We submit that was highly unreasonable. Constitutionally, Respondent was not required to show why the Kent County Circuit Court persistently and systematically had underrepresentation of blacks on juries. Constitutionally, the prosecution had the duty of

showing why such underrepresentation was necessary to meet "significant state interests." The Michigan Supreme Court wrongly and unreasonably failed to require such showings from the prosecution.

Even the Circuit Judge found that "defendant has established to this Court's satisfaction that there appears to have been an underrepresentation of blacks on the jury...Frankly, there appears to have been rather consistent underrepresentation." (Circuit Court Opinion, June 8, 1998).

Rather than following the Supreme Court in *Duren*, the Michigan Supreme Court ruling took direction from the dissent in *Duren*, which finds that systematic underrepresentation of women is not the same as exclusion of women. The majority in *Duren* expressly finds such analysis to be improper.

The question was whether the underrepresentation was by chance or was systemic. The expert testimony, uncontradicted and accepted as fact, demonstrated that it was not by chance. (EHT I, 81-82, EHT II, 15-17, 50, 75). To conclude as the Michigan Supreme Court did that the underrepresentation was not systemic is patently unreasonable.

In *Duren v. Missouri*, part of the system was a practice that women could get excused simply by asking, which resulted in fewer women on juries, which was held to be unconstitutional. In this case, part of the system was a practice that people without

cars, without rides, or without babysitters could get excused simply by asking, which resulted in fewer blacks on juries.

The Michigan Supreme Court's central premise was that since there was no showing that officials in Kent County intended to have underrepresentation of African-Americans on juries, the demonstrated underrepresentation that did exist is not "systematic." However, in *Duren v. Missouri*, the United States Supreme Court ruled that a showing of systematic underrepresentation does not depend on a showing of wrongful intent by officials.

In *Duren v. Missouri*, the Court used a statistical analysis similar to that used by Dr. Stoline to conclude that underrepresentation of women was systematic:

> "The first sign of a systematic discrepancy is at the next stage--the construction of the jury wheel from which persons are randomly summoned for service. Less than 30% of those summoned were female, demonstrating that a substantially larger number of women answering the questionnaire claimed either ineligibility or exemption from jury service. Moreover, at the summons stage women were not only given another opportunity to claim exemption, but also were presumed to have claimed exemption when they did not respond to the summons. Thus, the

> percentage of women at the final, venire, stage (14.5%) was much lower than the percentage of women who were summoned for service (26.7%).
>
> The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which juries were selected. Petitioner demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria--whether the automatic exemption for women or other statutory exemptions--as implemented in Jackson County. Women were therefore systematically underrepresented within the meaning of *Taylor*."

Here, as in *Duren*, the system as implemented in Kent County at the time of Respondent's trial resulted in persistent underrepresentation of African-Americans, and therefore systematic underrepresentation.

In *Duren v. Missouri*, supra, the Court defined systematic as "systematic--that is, inherent in the particular jury-selection process utilized." It is inherent that when you start with a fair list, then take out lots of urban residents before passing the list on to the Circuit Court, that you are going to get fewer of the urban minority residents. It is inherent

that when you use only mail to reach people, that when you do not follow up adequately with no-responses and no-shows, when you automatically exclude a group where minorities outnumber majorities (ex-felons), when you give out excuses to anyone who asks, when the excuses favor the exclusion of minorities (such as excuses for no car, no ride, no babysitter, etc.), and when the failure to follow up favors the exclusion of minorities (as testified to by witness Metzger) the underrepresentation of blacks is inherent in the particular jury selection process used.

This case is indistinguishable from *People v. Hubbard,* supra, as to the jury matter. The only differences between this case and *People v. Hubbard* are that in this case the record identified many additional reasons inherent in Kent County's system that would also contribute to the underrepresentation of minorities that in fact did occur, that Dr. Stoline found, that Judge Sullivan found, and that the Court of Appeals found.

The system used in Kent County gave these results. A different system would give different results. The underrepresentation is necessarily systematic where it is a result of the system used.

The diversion of jurors to District Court juries was part of the system. The excusal of those designated for District Court jury service who did not actually serve, without putting them back in the pool

for Circuit Court, was part of the system. The refusal of deputies to serve warrants for failure of jurors to appear was part of the system. The exclusion of ex-felons was part of the system. The excusing of people who claimed a lack of a car was part of the system. The excusing of people who claimed need for a babysitter was part of the system. The failure to require proof of excuse was part of the system. The reliance on mail was part of the system. The failure to follow up on nonresponses was part of the system. The irregular nature of the follow-ups that did take place (there was some follow-up in some cases, sometimes by phone, but no record was kept of the follow-ups or how the candidates for follow-up were selected) was part of the system. The failure to follow up on no-shows was part of the system. The use of a jury list using residences at least 15 months old (in the case of Respondent, in the last month of the jury year) was part of the system. The arbitrary excusals by court employees rather than a board, without any guidance, and without any record of what took place, was part of the system.

Under the reasoning of the Michigan Supreme Court, if jurors are notified to appear only by e-mail, and if blacks have less e-mail access than whites, this would prove nothing, because, 463 Mich. at 206, "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." Such analysis

would ignore the (hypothetical) decision of the Circuit Court employees to depend on e-mail where blacks have less of it. The reason for underrepresentation of blacks on Kent County juries is NOT that blacks have fewer cars or fewer phones or more single-parent families. The reason for the underrepresentation is that the system adopted by Kent County is such that those factors make a difference.

The police made a decision not to serve warrants upon nonappearing jurors, which just happens to coincide with their institutional interest in having more defendants convicted. It was unreasonable for the Michigan Supreme Court to find that the police decisions were not a systematic factor that made a difference to the number of blacks appearing on Kent County juries.

Respondent had an all white jury in a county that is far from all white. The underrepresentation in Respondent Smith's jury year was 18%. The underrepresentation in Respondent's jury month was 34%. The underrepresentation on Respondent Smith's jury was 100%. The Michigan Supreme Court acted unreasonably by finding that Respondent Smith's jury was drawn from a fair cross-section of the community.

The real question is how important do judges feel is the need for representative jury arrays enshrined in the constitution. If judges feel that it is

important, they will want to take steps to see that the individuals responsible for the jury selection decisions will work to root out this problem. Some of those people are the police, who refuse to serve orders to appear to people who do not show for jury duty. If all-white juries are felt to be desirable by elements in the police community because they are felt to lead to a higher rate of conviction, then the police have little incentive to change their policies, if no defendant can get a remedy. If Mr. Smith, with this strong a case, cannot get a reversal, the police certainly need not fear any other reversals, and the modest efforts at administrative reform will stop or even regress.

The prosecutor indicated in state court that if there is underrepresentation, "corrective efforts" should be taken, but no new trials should be given. (P. Br. to Michigan Supreme Court, 24). This analysis wrongly assumes that the identity of who is on the jury has nothing to do with the fairness of the trial. In reality, this is a structural error "which def[ies] analysis by 'harmless-error' standards." *Brecht v. Abrahamson*, 507 U.S. 619 (1993). It is reasonable to conclude (but not required for relief) that a racially-mixed jury will give fairer, more accurate results than juries where the system continually dredges up nothing but white jurors, time after time.

The right to a jury from a fair cross-section of

the community is a constitutional right. It should be given out freely, not doled out in drips and drabs to the one person in 100,000 fortunate enough to be able to commission studies. Certainly, if Mr. Smith, the one person in 100,000 who did make it this far, cannot win on this strong a record, no defendant can ever win. What would that say about the commitment of the court system to fair minority representation on juries?

This was not an open-and-shut case. There were many reasons to disbelieve the 2 people who identified Respondent, who were both directly contradicted by the medical examiner. There were several witnesses certain it was not Respondent. Yet, Mr. Smith is African-American, large and muscular, and the all-white jury who condemned him would be far more likely to react fearfully to him than would a racially-mixed jury. A differently-composed jury might well have reached a different verdict.

The fact that the case against Mr. Smith is questionable, and that he is very likely to win on retrial, especially if the jury is properly constituted, makes this case even more appropriate for the remedy. Largely-black juries in Detroit convict black defendants of crimes every day. If the prosecutor's case against Mr. Smith is strong enough, it will be strong enough even if one or more black citizens make it onto the jury.

CONCLUSION

This Court should deny the writ of Certiorari.

Respectfully submitted,

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