

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Kathleen Jansen, P.J., and Stephen L. Borello, and Cynthia D. Stephens, J.J.

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 141741
Plaintiffs-Appellant, Court of Appeals No. 280073
v Kent County Circuit Court
No. 01-08625-FC
RAMON LEE BRYANT,
Defendants-Appellee.

BRIEF ON APPEAL OF ATTORNEY GENERAL BILL SCHUETTE
AS AMICUS

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

B. Eric Restuccia
Deputy Solicitor General

Attorneys for the State of Michigan
Department of Attorney General
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Dated: October 28, 2011



TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Index of Authorities.....	iii
Statement of Questions Presented	vi
Statement of Interest of Amicus Curiae.....	1
Introduction	2
Statement of Facts	4
Argument.....	5
I. In evaluating whether a distinct group has been underrepresented under <i>Duren</i> , the reviewing court should review more than the specific venire, but examine whether there has been a pattern of venires with this underrepresentation.....	5
A. Standard of Review.....	5
B. Analysis	5
1. The Court must examine whether the underrepresentation appears in a pattern of venires, not just the specific venire in that case.	5
2. The issue whether there is a pattern of a significant disparity under the second prong of <i>Duren</i> is distinct from the claim whether there is “systematic exclusion” under its third prong.....	7
3. The conclusion that <i>Duren</i> requires proof of more than underrepresentation in the specific venire appears to be universal in the courts.	11
II. In Michigan, a defendant’s claim will ordinarily be supported by statistical estimates, which is adequate in law to support a prima facie showing.	13
A. Standard of Review.....	13
B. Analysis	13

III.	Defendant has not established a prima facie case of a fair cross-section violation under <i>Duren</i> .	16
A.	Standard of Review	16
B.	Analysis	16
1.	The underrepresentation here was not sufficient as to warrant a finding of a prima facie violation of the second prong of <i>Duren</i> .	16
2.	A survey of the federal courts supports this conclusion.	19
	Conclusion and Relief Requested	24

INDEX OF AUTHORITIES

Cases

<i>Ambrose v Booker</i> (No. 11-1430).....	1, 19
<i>Batson v Kentucky</i> , 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).....	14
<i>Berghuis v Smith</i> , 130 S Ct 1382; 176 L Ed 2d 249 (2010).....	8, 19
<i>Carter v Lafler</i> (No. 10-1247).....	1
<i>Duren v Missouri</i> , 439 US 357 (1979).....	passim
<i>Garcia-Dorantes v Warren</i> , 769 F Supp 2d 1092 (ED MI 2011).....	1
<i>Parks v Warren</i> , 574 F Supp 2d 737 (ED MI 2008).....	1
<i>Parks v Warren</i> , 773 F Supp 2d 715 (ED MI 2011).....	1, 7
<i>People v Dowdy</i> , 489 Mich 373; 802 NW2d 239 (2011).....	5
<i>People v Smith</i> , 463 Mich 199; 615 NW2d 1 (2000).....	passim
<i>Powell v Howes</i> , 2007 WL 1266398 (ED MI 2007).....	1
<i>Ramseur v Beyer</i> , 983 F2d 1215 (CA 3, 1992).....	17
<i>Swain v Alabama</i> , 380 US 202; 85 S Ct 824; 13 L Ed 2d 759 (1965).....	14
<i>Taylor v Louisiana</i> , 419 US 522 (1975).....	2, 16, 19, 23
<i>Terrell v Howes</i> , 2011 WL 1705567 (WD MI 2011).....	1

<i>United States v Allen</i> , 160 F3d 1096 (CA 6, 1998)	11
<i>United States v Ashley</i> , 54 F3d 311 (CA 7, 1995)	20, 22
<i>United States v Butler</i> , 611 F2d 1066 (CA 5, 1980)	22
<i>United States v Carmichael</i> , 560 F3d 1270 (CA 11, 2009)	22
<i>United States v Forest</i> , 355 F3d 942 (CA 6, 2004)	17
<i>United States v Jackman</i> , 46 F3d 1240 (CA 2, 1995)	21, 22
<i>United States v McAnderson</i> , 914 F2d 934, (CA 7, 1990)	22
<i>United States v Miller</i> , 771 F2d 1219 (CA 9, 1985)	6
<i>United States v Odeneal</i> , 517 F3d 406 (CA 6, 2008)	10
<i>United States v Orange</i> , 447 F3d 792 (CA 10, 2006)	10, 20
<i>United States v Osorio</i> , 801 F Supp 966 (D Conn, 1992)	21
<i>United States v Rioux</i> , 97 F3d 648 (CA 2, 1996)	10, 20
<i>United States v Rogers</i> , 73 F3d 774 (CA 8, 1996)	20
<i>United States v Royal</i> , 174 F3d 1 (CA 1, 1999)	20
<i>United States v Sanchez-Lopez</i> , 879 F2d 541 (CA 9, 1989)	20
<i>United States v Weaver</i> , 267 F3d 231 (CA 3, 2001)	20

United States v Williams,
264 F3d 561 (CA 5, 2001)11

Wellborn v Berghuis (No. 09-1539)1

Statutes

18 U.S.C. § 1863(b).....10

MCL 14.301

Other Authorities

“Overview of Race and Hispanic Origin: 2010,”
2010 Census Briefs, March 2011.....13

LaFave, Israel, King & Kerr, *Criminal Procedure*,
Trial by Jury and Impartial Judge, § 22.2(d), p. 6311

Moore’s Federal Practice,
Criminal Procedure § 624.03[2][c]22

Constitutional Provisions

US Const, Am VI1, 2, 19

STATEMENT OF QUESTIONS PRESENTED

The questions presented by the court are as follows:

1. Whether, in evaluating whether a distinctive group has been sufficiently underrepresented under *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979), so as to violate the Sixth Amendment's fair cross-section requirement, courts may choose to examine only the composition of the defendant's particular jury venire, or whether courts must always examine the composition of broader pools or arrays of prospective jurors;
2. Whether a defendant's claim of such underrepresentation must always be supported by hard data, or whether statistical estimates are permissible and, if so, under what circumstances; and
3. Whether any underrepresentation of African-Americans in the defendant's venire, or in Kent County jury pools between 2001 and 2002, was the result of systematic exclusion under the third prong of *Duren v Missouri*, *supra*.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Attorney General is the chief law enforcement officer for the State of Michigan and he has supervisory authority and provides guidance to the prosecutors for the State under MCL 14.30. The issue about the proper standards for evaluating the issue whether there is a violation of a criminal defendant's right to a jury drawn from a fair cross-section under the Sixth Amendment is an important one for the State of Michigan.

In specific, the Department of Attorney General is currently defending the constitutional validity of seven criminal convictions pending in habeas corpus review arising from Kent County for which there are fair cross-section claims raised based on the same computer error. Three are in the Sixth Circuit: *Ambrose v Booker* (No. 11-1430) (armed robbery); *Carter v Lafler* (No. 10-1247) (armed robbery); and *Wellborn v Berghuis* (No. 09-1539) (first-degree criminal sexual conduct). And four are in federal district court: *Parks v Warren*, 773 F Supp 2d 715 (ED MI 2011) and 574 F Supp 2d 737 (ED MI 2008) (first-degree criminal sexual conduct); *Garcia-Dorantes v Warren*, 769 F Supp 2d 1092 (ED MI 2011) (second-degree murder); *Powell v Howes*, 2007 WL 1266398 (ED MI 2007) (assault with intent to murder); and *Terrell v Howes*, 2011 WL 1705567 (WD MI 2011) (first-degree murder). The Attorney General does not believe that the disparities at issue here give rise to a violation of a criminal defendant's right to a jury drawn from a fair cross-section of the community.

INTRODUCTION

The circumstances that gave rise to the establishment of a fair cross-section claim under the Sixth Amendment by the United States Supreme Court in *Taylor v Louisiana*, 419 US 522 (1975), and in *Duren v Missouri*, 439 US 357 (1979), were very different than the ones posed by the disparities at issue in this case. Other courts have almost uniformly rejected the kinds of small disparities presented by this case, and this Court should likewise determine that there was no violation of the fair cross-section standard where the small disparities would likely have had little or no effect on the petit jury actually selected. The difference between a 40% absolute disparity in *Taylor*, or the 39.5% absolute disparity in *Duren*, is qualitatively different than the 4.1% absolute disparity here. This Court should conclude that there was no violation of defendant's right to a fair trial by an impartial jury. Defendant's conviction for first-degree criminal sexual conduct should stand.

In light of this general statement, the Attorney General's response to the three questions the Court has asked is as follows:

First, the relevant comparison for examining whether there is an underrepresentation should generally examine the composition of the broader arrays of prospective jurors because the disparity cannot be a mere random variation, but must result from the particular system of selecting jurors.

Second, a criminal defendant may offer statistical estimates because the State and the county governments have no obligation to record the ethnic and racial composition of the prospective jurors. Moreover, the trend is away from seeking to

categorize every person into a discrete group, and this conclusion will confirm the current practice of Kent County of not pressing prospective jurors into identifying themselves in this fashion.

Third, the question whether there has been a systematic exclusion of African Americans under the third prong of *Duren* requires the initial determination about whether there is a violation of the second prong of *Duren*. A proper analysis of *Duren* applied to these facts should lead this Court to reject a claim that there has been significant underrepresentation of African Americans from the venires. During a three-month time period, the absolute disparity of 4.1% and comparative disparity of 49.5% would translate into two more African Americans in the venire, for which there is basically a 50% likelihood that either of these prospective jurors would have actually sat in the petit jury if it were randomly selected. The federal courts have almost uniformly rejected claims of a violation based on these statistical claims.

STATEMENT OF FACTS

The Attorney General adopts the statement of facts as prepared by the Kent County Prosecutor Office's brief.

ARGUMENT

I. In evaluating whether a distinct group has been underrepresented under *Duren*, the reviewing court should review more than the specific venire, but examine whether there has been a pattern of venires with this underrepresentation.

A. Standard of Review

This Court reviews constitutional questions as a matter of law. *People v Dowdy*, 489 Mich 373, 379; 802 NW2d 239 (2011). Questions of law are reviewed de novo. *Id.*

B. Analysis

Under the second prong of *Duren*, a reviewing court must determine that a criminal defendant has shown underrepresentation in a sufficient pattern of venires in order to establish a prima facie violation. Otherwise, the disparity within the particular venire may be the result of random variation. Rather, the underrepresentation must in fact be caused by the system of selecting prospective jurors and must be constitutionally significant. This inquiry is distinct from the third prong of *Duren*, which examines whether the exclusion is systematic. This is the near universal conclusion of other courts in examining the issue.

1. The Court must examine whether the underrepresentation appears in a pattern of venires, not just the specific venire in that case.

The general standard from *Duren* requires the criminal defendant to prove three elements in order to establish a prima facie violation:

- (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. [*Duren*, 439 US at 364.]

In applying the second prong, the Court in *Duren* compared the percentage of persons from the distinct group in the venire with the percentage of the persons in the community eligible for jury service. *Id.* at 668-669.

The standard as articulated by *Duren* contemplates an examination of a range of venires as occurred in that particular case. The factual record there had demonstrated that over an eight-month period of time (June-October 1975 and January-March 1976) that 14.5% of the prospective jurors that appeared for service were women when the census indicated that women comprised 54% of the adult population of the county. *Duren*, 439 US at 362-363. In the month when *Duren* was tried, 15.5% of the weekly venires were women. *Id.* At the point of the opinion when the Supreme Court applied the second prong, the Court concluded that “we must disagree with the conclusion of the court below that *jury venires* containing approximately 15% women are ‘reasonably representative’ of this community.” *Id.* at 365 (emphasis added). Its use of “jury venires,” the plural, demonstrates that it was examining a range of venires. The language of the second prong standard itself – using the words “venires” and “juries” – confirms this point. See *United States v Miller*, 771 F2d 1219, 1228 (CA 9, 1985) (“It appears to us that the Supreme Court’s

use of the plural in setting up the *Duren* test is a clear indication that a violation of the fair cross-section requirement cannot be premised upon proof of underrepresentation in a single jury.”).

Moreover, this is the most logical understanding of the standard. There will obviously be a natural variation in the number of members of a distinct group that appear in any specific venire. The issue whether there is actually underrepresentation or mere variation can only be determined by examining if this disparity appears over a range of time, and not in just one instance. And of course this pattern will have to include the time period in which the specific criminal defendant is charged.¹

2. The issue whether there is a pattern of a significant disparity under the second prong of *Duren* is distinct from the claim whether there is “systematic exclusion” under its third prong.

There is a critical distinction between underrepresentation that arises from external factors outside the process used for selecting jurors and underrepresentation actually *caused* by the process. Only the latter is systematic and satisfies *Duren*’s third prong. Consequently, even where there is a pattern of disparities across a range of venires does not resolve the issue of whether this disparity is “systematic.”

¹ As argued by Kent County, see p 22, if the specific venire itself is representative of the distinct group, this would foreclose relief. See *Parks v Warren*, 773 F Supp 2d 715, 726-727 (ED MI 2011) (“As it turns out in this case, Kent County’s flawed system yielded a constitutionally acceptable result, perhaps by happenstance, but an acceptable result nonetheless.”).

This distinction was present in the Supreme Court's decision in *Berghuis v Smith* in examining whether there was a violation of the third prong of *Duren*.

Berghuis v Smith, 130 S Ct 1382, 1394; 176 L Ed 2d 249 (2010). The Court noted that Smith had identified a list of possible causes of underrepresentation:

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. [*Berghuis*, 130 S Ct at 1395.]

In response, the Court noted that it had never previously held that the jury selection "features of the kind on Smith's list" were ones that could give rise to a fair cross-section claim. *Id.* at 1395. In contrast, the Court stated that Smith's "best evidence" of systematic exclusion came from the assignment order of jurors, by which Kent County would assign its prospective jurors to jury service in district court before making them available in circuit court. *Id.* at 1394.²

This distinction between the assignment order and the other jury selection features, e.g., allowing for hardship exceptions, demonstrates the distinction between features that are inside and those that are outside the jury selection process. Either could cause a pattern of underrepresentation, but one results from an inherent part of the process and the other does not. In specific, the assignment order might be a cause of systematic exclusion, because the process sends out more

² It is worth noting that the jury selection scheme at issue in *Smith* was different from the computer error that gives rise to the claim in this case.

members of the distinct group to serve as jurors in district court, while the hardship exception only affects the numbers of jurors available based on external factors, because more members of certain distinct groups seek this exception.

This Court noted this distinction in its decision in *People v Smith*:

We also agree with our concurring colleague that the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans. The Sixth Amendment does not require Kent County to counteract these factors. . . .²

² Although the constitution does not concern itself with *problems not inherent in a jury selection process* that nevertheless may adversely affect jury participation, this Court, through the State Court Administrative Office, has been studying ways to increase jury participation. [*People v Smith*, 463 Mich 199, 206; 615 NW2d 1 (2000)(emphasis added).]

In particular, this Court noted that “*Duren* did not hold that the third prong was established solely on the basis of statistical proof; there was also proof of the *cause* of the underrepresentation.” *Id.* at 207 n 6 (emphasis added). This analysis indicates that even though the county establishes a neutral process, like allowing for hardship excuses, the social and economic factors may create a pattern of underrepresentation. Such features affect distinct groups differently based on the independent actions or decisions of the members of the group and are external to the process – these “problems [are] not inherent in [the] jury selection process.” *Id.* at 206, n 2.

Consistent with this point, the federal appellate circuits have rejected the claim of systematic exclusion regarding disparities that arise from the use of voter registration lists. See, e.g., *United States v Odeneal*, 517 F3d 406, 412 (CA 6,

2008)(“The circuit courts are in complete agreement that neither the Act nor the Constitution require that a supplemental source of names be added to voter lists simply because an identifiable group votes in a proportion lower than the rest of the population.”)(citations and internal quotes omitted). As noted by the federal courts, the United States Government relies on voter registration lists for its “presumptive” statutory list of prospective jurors under 18 U.S.C. § 1863(b). *United States v Orange*, 447 F3d 792, 800 (CA 10, 2006).

Likewise, the federal courts have rejected claims based on neutral standards that affect distinct groups differently. In *Orange*, the defendant claimed that there were disparities in the jury selection for the United States that arose from (1) the failure to update mailing addresses; (2) the failure to follow up on undelivered questionnaires; and (3) from the use of voter registration where minorities were less likely to vote. In rejecting that any disparities were systematic, the United States Court of Appeals for the Tenth Circuit identified this same distinction between “private choices” and systematic exclusion:

None of these purported causes for under-representation constitute systematic exclusion. Discrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*. [*Orange*, 447 F3d at 800.]

The same is true for the failure to follow up on questionnaires that were not returned by prospective jurors. See *United States v Rioux*, 97 F3d 648, 658 (CA 2, 1996) (“The inability to serve juror questionnaires because they were returned as undeliverable is not due to the system itself, but to *outside forces*, such as demographic changes”)(emphasis added).

Thus, the requirement that the exclusion be systematic measures whether the underrepresentation is inherent in the system, which is distinguishable from underrepresentation that is caused by external factors. As a consequence, whether there is a consistent significant underrepresentation among many venires does not resolve the issue whether there has been *systematic* underrepresentation.

3. The conclusion that *Duren* requires proof of more than underrepresentation in the specific venire appears to be universal in the courts.

The federal courts have apparently reached the same conclusion without exception, either relying on the second prong of *Duren* or relying on the third prong of *Duren*. See, e.g., *United States v Williams*, 264 F3d 561, 568 (CA 5, 2001) (“Defendant must demonstrate not only that African-Americans were not adequately represented on his jury but also that this was the general practice in other venires”)(internal quotes and brackets removed), citing decisions of the D.C., Eighth, and Ninth Circuits. See also *United States v Allen*, 160 F3d 1096, 1103 n 5 (CA 6, 1998)(“*Duren* itself looked at the make-up of the weekly venires over several months time in determining whether the second prong was met”).

The critical literature supports this analysis:

Moreover, because a single venire brought into the courtroom for defendant’s trial is an unacceptably small sample for the purposes of any statistical showing or underrepresentation, *a defendant will usually have to present evidence based upon analysis of the composition of past venires as well.*

[LaFave, Israel, King & Kerr, *Criminal Procedure*, Trial by Jury and Impartial Judge, § 22.2(d), p. 63 (internal quotes, citations, and footnote omitted; emphasis added).]

Thus, this Court should conclude, like other courts, that a criminal defendant must establish a pattern of underrepresentation in order to satisfy the second prong of *Duren*.

II. In Michigan, a defendant's claim will ordinarily be supported by statistical estimates, which is adequate in law to support a prima facie showing.

A. Standard of Review

The review is the same as for Issue I.

B. Analysis

In Kent County, like the majority, if not all, of the jurisdictions in the State of Michigan, the county does not identify the racial and ethnic identity of its prospective jurors. In fact, the experience of the United States 2010 Census demonstrates the increasing difficulty in neatly categorizing a person into a single racial or ethnic group. The 2010 census form has increased the number of racial categories from six to fifteen categories from the 2000 to 2010 census, and continues the 2000 census form of allowing for the selection of multiple races. See "Overview of Race and Hispanic Origin: 2010," 2010 Census Briefs, March 2011, p. 2.³ Consequently, in the absence of the ability to demonstrate a significant disparity by the use of credible statistical data, the evidentiary hurdle would become almost insurmountable for establishing a prima facie case under *Duren* in a jurisdiction like Kent County that does not record this information.

³ This document may be accessed at the website for the United States Census as the following web address:

<http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>

(accessed October 19, 2011).

The United States Supreme Court recognized a similar point in an analogous setting. In *Batson v Kentucky*, the Court examined the evidentiary standard necessary to demonstrate an Equal Protection violation where there was a claim that the prosecution exercised a peremptory challenge to a prospective juror based on a racially-discriminatory motive. *Batson v Kentucky*, 476 US 79, 92; 106 S Ct 1712; 90 L Ed 2d 69 (1986). The Court characterized as “crippling” the prior standard from *Swain v Alabama*, 380 US 202; 85 S Ct 824; 13 L Ed 2d 759 (1965), which required proof of repeatedly striking African Americans over a number of cases in order to establish a violation. *Batson*, 476 US at 92. The Court then expressly noted the difficulty in proving this requirement in a jurisdiction that did not record the race of prospective jurors:

[T]he defendant would have to investigate, over a number of cases, the race of persons tried in the particular jurisdiction, the racial composition of the venire and petit jury, and the manner in which both parties exercised their peremptory challenges. The court believed this burden to be “most difficult” to meet. *In jurisdictions where court records do not reflect the jurors’ race and where voir dire proceedings are not transcribed, the burden would be insurmountable.* [*Batson*, 476 US at 92 n 17 (citations omitted; emphasis added).]

The same difficulty would apply in fair cross-section claim cases if the county – as Kent County here – did not record the race and ethnicity of jurors.

In fact, this Court reviewed a claim based on statistical projections in the *Smith* case. Justice Cavanagh, writing for the Court in part I, explained the factual posture of the claim of underrepresentation in which 68 of the 929 prospective jurors would be expected to be African American over a seven-month period, but only 56 were according to the statistician’s estimates, by “round[ing] to the nearest

whole prospective juror.” *Smith*, 463 Mich at 212 n 8. In light of this factual record, the majority concluded that “defendant presented some evidence of a disparity between the number of jury-eligible African-Americans and the actual number of African-American prospective jurors selected to the Kent County Circuit Court jury pool list.” *Id.* at 204 (Corrigan, J., for the majority). Although the Court did not expressly examine this issue, it relied on these statistical representations as a basis for giving the criminal defendant the “benefit of the doubt” on the second prong of *Duren*. *Smith*, 463 Mich at 205 (Corrigan, J., for the majority).

III. Defendant has not established a prima facie case of a fair cross-section violation under *Duren*.

A. Standard of Review

The review is the same as for Issue I.

B. Analysis

The question as presented in the third issue only raises the issue of the third prong of *Duren*, but the Attorney General contends that *Duren*'s second prong is a threshold issue for this third prong, and here the second prong is dispositive. The underrepresentation demonstrated by the credible expert, Dr. Paul Stephenson, revealed that there was a 4.1% absolute disparity and a 49.5% comparative disparity. For a 45-person jury venire, this would mean an additional two prospective jurors from the distinct group. Such a small disparity in the venire is far removed from the considerations that gave rise to the United States Supreme Court decisions in *Duren* and *Taylor*.

Significantly, in relying on the federal courts in their application of *Duren*, no other federal court, in the absence of non-benign factors, has found such small disparities to satisfy the second prong.

1. The underrepresentation here was not sufficient as to warrant a finding of a prima facie violation of the second prong of *Duren*.

The relevant standard for evaluating whether there is a violation under the second prong of *Duren* is to examine whether "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.” *Duren*, 439 US at 364. As the lower courts have made clear, the comparison is not to just the community generally but to the jury-eligible population, generally marked by the adult population of the distinct group. See, e.g., *United States v Forest*, 355 F3d 942, 954 (CA 6, 2004) (“the appropriate comparison is between the percentage of group members who are eligible for jury service in the population as a whole and in the jury pool”).

As noted by Kent County, the relevant evidence of disparity came from Dr. Stephenson. He explained that the relevant jury eligible pool of African Americans was 8.25% of the population and that 4.17% of the jurors summoned for the three-month time period evaluated were African American. Appendix, p 90a. This would then constitute a 4.08% absolute disparity ($8.25\% - 4.17\% = 4.08\%$), which can be rounded to 4.1%, and a 49.5% comparative disparity ($4.08\% \div 8.25\% = 49.5\%$). See *Ramseur v Beyer*, 983 F2d 1215, 1231-1232 (CA 3, 1992) (describing the method for calculating the absolute disparity and comparative disparity).

Regarding these standards, this Court has adopted a case-by-case approach in which it will examine the different relevant tests, but not rely on any one exclusively. See *Smith*, 463 Mich at 204 (“We thus consider all these approaches to measuring whether representation was fair and reasonable, and conclude that no individual method should be used exclusive of the others. Accordingly, we adopt a case-by-case approach.”).

In reviewing the statistical evidence from both the absolute disparity test and comparative disparity test, this Court should reach the conclusion that these kinds

of disparities do not establish a basis for a prima facie case. Such a decision accords with common sense because it is only speculative whether the small disparities would have affected the actual composition of the petit jury if it had been randomly selected.

For the specific venire of 45 prospective jurors in this case, a 4.1% absolute disparity would result in a loss of two prospective African American jurors (45 multiplied by 0.041 equals 1.845, rounded to two) for the entire venire. Since each juror has a little more than 25% chance of being selected for the petit jury (12 slots for 45 prospective jurors, which equals 26.7% of being selected), there is only an approximate 50% chance that the loss of these two prospective jurors would have affected the actual composition of the petit jury. Such a speculative matter should not serve as a basis for relief. As Dr. Stephenson noted, the fact that there would be zero or one African Americans would occur 10% of the time, and zero, one, or two African Americans 27% of the time, in the absence of this computer error. Appendix, 113a. The suggestion that one venire is a constitutional violation where the underrepresentation occurred based on the computer error, but the identical venire – if selected fairly but randomly resulted in the same underrepresentation – would be constitutional strains the *Duren* test.

This is significant because one of the issues is what real harm did defendant suffer from this computer error. The argument that defendant deserves a new trial, many years later, from this kind of disparity is far removed from the considerations that gave rise to the Supreme Court's granting relief in *Duren*, where there was a

39.5% absolute disparity. *Duren*, 439 US at 362 (“Petitioner established that according to the 1970 census, 54% of the adult inhabitants of Jackson County were women. . . . 14.5% . . . of the persons on the postsummons weekly venires during the period in which petitioner’s jury was chosen were female.”). See also *Taylor v Louisiana*, 419 US 522, 524 (1975) (absolute disparity of 40%; 53% of women were jury eligible and they comprised no more than 10% of the jury wheel).⁴

2. A survey of the federal courts supports this conclusion.

A comparison of these disparities in a survey of the federal circuits demonstrates that this level of underrepresentation has been almost uniformly rejected as establishing a prima facie case under the second prong of *Duren*:

⁴ In fact, the State contends that *Duren* is no longer necessary, should be overruled, and that all claims regarding jury composition should be evaluated under the Equal Protection Clause. See *Berghuis*, 130 S Ct 1396 (Thomas, J., concurring) (“The Court has nonetheless concluded that the Sixth Amendment guarantees a defendant the right to a jury that represents ‘a fair cross section’ of the community. In my view, that conclusion rests less on the Sixth Amendment than on an ‘amalgamation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment,’ and seems difficult to square with the Sixth Amendment’s text and history. Accordingly, in an appropriate case I would be willing to reconsider our precedents articulating the ‘fair cross section’ requirement.”)(citations omitted). The State is currently pressing this claim in the Sixth Circuit in *Ambrose v Booker*, (No. 11-1430).

TABLE

<u>Circuit</u>	<u>Community</u>	<u>Jury Pool</u>	<u>Absolute Disparity</u>	<u>Comparative Disparity</u>
1st	4.86%	1.89%	2.97%	[61%] ⁵
2d	7.08%	5.0%	2.08%	[29%]
	4.24%	2.10%	2.14%	[50%] ⁶
3d	3.07%	1.84%	1.23%	40.01%
	0.97%	0.26%	0.71%	72.98% ⁷
7th	3%	0%	3%	[100%] ⁸
8th	1.87%	1.29%	0.579%	30.96% ⁹
9th	3.87%	1.82%	2.05%	52.9%
	5.59%	2.79%	2.8%	50.0% ¹⁰
10th	7.40%	4.78%	2.62%	35.41%
	4.21%	2.66%	1.55%	36.82%
	1.47%	0.67%	0.80%	54.41%
	3.02%	1.36%	1.66%	54.97%
	8.63%	5.06%	3.57%	41.37%
	4.27%	2.64%	1.63%	38.17%
	1.64%	0.80%	0.84%	51.22%
	2.74%	1.49%	1.25%	45.62% ¹¹

⁵ *United States v Royal*, 174 F3d 1, 10 (CA 1, 1999) (African Americans).

⁶ *United States v Rioux*, 97 F3d 648, 657-658 (CA 2, 1996) (African Americans and Latinos).

⁷ *United States v Weaver*, 267 F3d 231, 241, 243 (CA 3, 2001) (African Americans and Latinos).

⁸ *United States v Ashley*, 54 F3d 311, 313-314 (CA 7, 1995) (African Americans).

⁹ *United States v Rogers*, 73 F3d 774, 776-777 (CA 8, 1996) (finding no constitutional disparity for African Americans because the panel was constrained to follow prior precedent).

¹⁰ *United States v Sanchez-Lopez*, 879 F2d 541, 547-549 (CA 9, 1989) (Latinos in Southern Division and Northern Division).

¹¹ *United States v Orange*, 447 F3d 792, 798-799 (CA 9, 2006) (1993 qualified wheel and the 1997 qualified wheel for African Americans, Native Americans, Asian Americans, and Latino Americans).

The exception to the general standard applied by the circuits is the Second Circuit's decision in *United States v Jackman*, 46 F3d 1240, 1243 (CA 2, 1995), where comparable disparities were found to establish a prima facie case of a violation under *Duren's* second prong. In *Jackman*, the Second Circuit was examining a similar circumstance in which a computer error resulted in the exclusion of two major communities (Hartford and New Britain) from the qualified wheel in which there was a significant concentration of Latinos and African Americans. *Jackman*, 46 F3d at 1242. The difference between *Jackman* and this case, however, is that after this computer error was "condemned" by a federal district court, see *United States v Osorio*, 801 F Supp 966 (D Conn, 1992), the jury clerk there continued to use the old, unrepresentative qualified wheel and would only supplement it if necessary by the new qualified wheel, which included residents of Hartford and New Britain. *Jackman*, 46 F3d at 1244. Under this process, according to the dissent, the absolute disparities were 2.5% for African Americans and 3.4% for Latinos, where the voting-age population was 6.3% and 5.1%, respectively. *Jackman*, 46 F3d at 1252 (Walker, J., dissenting). Although not calculated by the Second Circuit, this would be a comparative disparity of 40% and 67%, respectively.

But the Second Circuit eschewed the absolute disparity test, and relied on a different statistical analysis. *Jackman*, 46 F3d at 1247. And it relied on the "less [than] benign" decision of the clerk to continue to use the unrepresentative list for more than a year despite the disclosure of its constitutional infirmities. *Id.* There

is no such bad will here, or less than “benign” circumstances regarding the computer error. The facts of this case are distinguishable from *Jackman*.

In fact, on the other side of the divide, there are a couple of federal circuits that have indicated that the absolute disparity of 10% is the proper threshold of analysis. See *Ashley*, 54 F3d at 314 (CA 7)(“[A] discrepancy of less than ten percent alone is not enough to demonstrate unfair or unreasonable representation”); *United States v McAnderson*, 914 F2d 934, 941 (CA 7, 1990) (describing as “de minimis” the absolute disparity of 8% for a situation in which African Americans were 20% of the population but 12% of the venire); and *United States v Carmichael*, 560 F3d 1270, 1280-1281 (CA 11, 2009) (following Eleventh Circuit precedent that an absolute disparity of ten percent or less fails to satisfy *Duren*’s second prong).¹² However, given the small absolute disparities proven and the fact that a ‘less-than-10% minority’ was not at issue, we did not feel consideration of other statistical methods was necessary in this case.”). The 10% rule generally reflects the actual practice of the appellate courts. See Moore’s Federal Practice, Criminal Procedure § 624.03[2][c] (“Although there are no precise mathematical standards, in practice, if the absolute disparity is less than about 12%, the courts will find that there is not statistical underrepresentation of the group.”).

¹² Cf. *United States v Butler*, 611 F2d 1066, 1070 (CA 5, 1980) (stating that “[n]one of the disparities urged by the appellants are as great as the 10% disparity found not to present a case of purposeful discrimination in *Swain*” in rejecting absolute disparities of 9.14%, 8.69%, and 5.71%), and then subsequently qualifying this remark in rejecting a petition for rehearing en banc, 615 F2d 685, 686 (1980) (“We did not wish to imply that the absolute disparity method is the sole means of establishing unlawful jury discrimination.”).

Given this Court's adoption of the case-by-case approach in *Smith*, there is every reason to follow the example by the federal courts that have examined similar disparities and denied relief. The actual application of the *Duren* test has generally limited relief to cases in which there has been a more radical alteration of the venires than has been alleged here. The effect on defendant's venire was qualitatively different than proven in *Duren* and *Taylor*. The claim that the small disparity that arose from a computer error undermined defendant's right to a trial drawn from the district where the crime occurred is unfounded. His conviction should stand.

CONCLUSION AND RELIEF REQUESTED

The Attorney General would ask this Court to reverse the Court of Appeals and affirm defendant's conviction.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch (P57679)
Solicitor General
Counsel of Record

Richard A. Bandstra (P31928)
Chief Legal Counsel

B. Eric Restuccia

B. Eric Restuccia
Deputy Solicitor General
Department of Attorney General
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Dated: October 28, 2011