

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

RAMON LEE BRYANT,

Defendant-Appellee.

Michigan Supreme Court
No. 141741

Michigan Court of Appeals
No. 280073

Kent County Circuit Court
No. 01-08625-FC

AMICUS CURIAE BRIEF OF
CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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INTEREST OF AMICUS CURIAE

Since its founding in 1976, Criminal Defense Attorneys of Michigan (CDAM) has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has approximately 458 members.

As reflected in its by-laws, CDAM exists in part to “promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy,” “provide superior training for persons engaged in criminal defense,” “educate the bench, bar and public of the need for quality and integrity in defense services and representation,” and “guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws.” Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles on various subjects relating to criminal law and procedure, provides relevant information to the state legislature regarding contemplated changes of laws, engages in other educational activities and participates as an amicus curiae in litigation of relevance to the organization’s interests. As in this case, CDAM is often invited to file briefs amicus curiae by the Michigan appellate courts.

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STATEMENT OF JURISDICTION

Amicus agrees with the jurisdictional statements provided in the parties' briefs.

STATEMENT OF QUESTION PRESENTED

Where the jury in this case was selected from a pool and venire that substantially excluded most of the zip codes in which African-Americans live, and where the African-American representation within these bodies was therefore between 49% and 81% lower than it should have been, was Defendant Ramon Bryant deprived of his Sixth Amendment right to a jury drawn from a fair cross-section of the community?

Amicus answers, "Yes."

STATEMENT OF RELEVANT FACTS

The facts giving rise to this case are undisputed and well documented. In an article appearing in the Grand Rapids Press on July 30, 2002, Kent County Circuit Court Chief Judge George Buth was quoted as saying, "There has been a mistake—a big mistake." *Kent admits computer glitch in jury selection*, Grand Rapids Press, July 30, 2002, at A1. He was referring to an error in the jury selection system, whereby "[m]any blacks were excluded from Kent County jury pools due to a computer glitch that selected a majority of potential candidates from the suburbs" *Id.*

The "computer glitch" was a simple programming error that misinformed the jury department computer system about the total number of names on the "State File" or "SOS database," the list of prospective jurors annually generated by the Michigan Secretary of State's Office and provided to Kent County. (105a-108a.) The error lasted for several months in 2001 and 2002, and there is no dispute that it impacted the jury pool in this case.

In an internal Report, the Kent County Information Technology Department explained the computer glitch as follows:

[I]n the initial set-up of the . . . database to accommodate the . . . data from the State file, an error was made in one parameter. . . . The parameter that was entered within the database was 118,169. What should have been inserted within this setting was the total number of records in the State File, or 453,981 in 2001. . . .

The percentage of jurors selected per Zip Code was proportional to the Zip Code composition of the first 118,169 records—but not Kent County as a whole. . . .

[I]n 1998 . . . the State File did not come in random order, but rather in Zip Code order . . . lowest numbers to highest numbers. In subsequent years, new prospective jurors . . . were added to the end of the database. . . . Therefore, the first 118,169 records of the dataset have a high percentage of lower numbered zip codes. . . . [A]ll the Zip Codes with the lower numbers are located outside of the Grand Rapids metro area.

Kent County Jury Management System Report, August 1, 2002 (as quoted in *Ambrose v Booker*, 781 F Supp 2d 532, 538 (ED Mich, 2011)).¹

In the trial court below, Professor Paul Stephenson provided statistical analysis and testimony regarding the effect of the computer glitch on the composition of the jury pool in this case. He found that the computer glitch impacted the geographic (zip code) representation within the jury pool. His analysis showed that there was “essentially no chance of acquiring the result that we obtained if the selection process for potential jurors was unbiased,” and thus “confirm[ed] the fact that there was some type of computer error that caused . . . the jury-pool selection process[] to be tainted.” (89a.)

He also confirmed that the excluded higher-numbered zip codes are home to the majority of

¹Although the trial court relied on this Report in its April 13, 2007 Opinion, Amicus has been informed that the Report is not part of the Appendix before this Court. The above excerpt is drawn from a federal district court opinion addressing exactly the same issue and quoting from the Report at length. The full Report is a matter of public record and is available on the docket in the *Ambrose* case, E.D. Mich. Case No. 06-13361, Docket Entry No. 40-3, pp. 12-41.

Kent County's African-American population:

I used census data to estimate the number of blacks that are in each of the zip codes. . . . [F]or the vast majority of these zip codes that are over-represented, there's a small number of . . . African-Americans in those particular zip codes. . . . [W]here the zip codes . . . were under-represented, there's a large number of . . . African-Americans.

(90a.)

He then assessed the racial impact on the composition of the jury pool. He studied the pool of summoned jurors for the months of January, February, and March of 2002. (88a.)² During that time, Kent County mailed 3898 summonses.³ Although the State File does not include racial data, Professor Stephenson was able to "calculate[] the percent summoned in each zip code, and then . . . calculate[] . . . the expected number of . . . African-Americans" based on census data regarding the racial composition of individual zip codes. (90a.)

His analysis demonstrated that if Kent County had mailed jury summonses to a geographically representative pool of people during the first three months of 2002, 322 summonses would have been mailed to African-Americans. But in light of the computer glitch, it sent summonses to only about half of that number: 163 African-Americans. (112a.) Put differently, "only 4.17 percent [of summons recipients] were likely to be . . . African-American," whereas "if

²The selection of these three months appears to have been somewhat arbitrary, as this does not constitute the entire tainted pool of jurors. In an event, this three-month span unquestionably fell within the tainted pool, and Professor Stephenson presumably found this sample to be large enough to support his opinion.

³This figure appears on page 6 of Professor Stephenson's Report, which does not appear to be part of the appellate record in this case. The Report is a matter of public record and is available on the docket in the *Ambrose* case, E.D. Mich. Case No. 06-13361, Docket Entry No. 40-5.

everything was working correct, [8.25]⁴ percent . . . would have been . . . African-American.” (90a.)

This confirmed that “the way that the process was performing did, in effect, over the long run, create a situation where . . . African-Americans were going to be underrepresented . . . in the compilation of jury venires.” (91a.)

On the day that trial in this case began, 132 people answered jury summonses and appeared in the assembly room for jury service. Every single person completed a questionnaire asking about racial identity. One person identified himself or herself as African-American, and one more identified himself or herself as “multi-racial,” albeit apparently without specifying which racial groups. (110a.) Thus, even assuming that the “multi-racial” individual was African-American, the daily pool from which Mr. Bryant’s jury venire was selected was only 1.5% African-American.

From the daily pool, the jury clerk assembled a venire of 45 people.⁵ Among them was a single African-American, making the individual venire in this case 2.22 percent African-American. (103a.)⁶

⁴Professor Stephenson testified to a figure of “8 ½ percent,” but his Report, and the trial court’s opinion, use the figure 8.25 percent. The testimony appears to have been in error.

⁵The jury clerk would sometimes manipulate the racial composition of venires by placing African-American jurors into the venires for African-American defendants. (107a.) Interestingly, she recently testified in an evidentiary hearing that she did so at the direction of judges, and although she could not name any particular judges or defendants, she said, “I don’t know what Ramon Bryant was charged with. I have a feeling it was a high profile case, and because we were embroiled in controversy because of our lack of ethnicity . . . that’s probably why I would have a conversation with the judge.” This transcript is publicly available on the docket in *Garcia-Dorantes v. Warren*, E.D. Mich. Case No. 05-10172, Docket Entry No. 47, p.43. Amicus does not suggest that this non-record information should impact the instant case, but merely intends to draw the Court’s attention to a noteworthy development that contradicts a finding by the trial court. (107a.)

⁶Professor Stephenson testified that when looking only at “this particular venire for this particular court case, there was insufficient evidence to demonstrate that [the] venire was systematically underrepresented with . . . African-Americans.” (91a.) This is because even a

STANDARD OF REVIEW

Appellate courts “review de novo questions regarding systematic exclusion of minorities from jury venires.” *People v Bryant*, 289 Mich App 260, 265; 796 NW2d 135 (2010) (citing *People v Hubbard*, 217 Mich App 459, 472; 552 NW2d 493 (1996)).

ARGUMENT

Where the jury in this case was selected from a pool and venire that substantially excluded most zip codes in which African-Americans live, and where the African-American representation within these bodies was therefore between 49% and 81% lower than it should have been, Defendant Ramon Bryant was deprived of his Sixth Amendment right to a jury drawn from a fair cross-section of the community.

The Sixth Amendment to the Constitution demands that “petit juries must be drawn from a source fairly representative of the community” *Taylor v Louisiana*, 419 US 522, 538 (1975). In *Duren v Missouri*, 439 US 357 (1979), the Supreme Court outlined the elements necessary “[i]n order to establish a prima facie violation of the fair-cross-section requirement”:

- (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.

Id. at 364.

perfectly representative jury pool could produce a 45-person venire containing only one African-American. (*Id.*) Appellant interprets this to mean that Professor Stephenson “could not say that there was . . . underrepresentation in the defendant’s venire.” (Appellant’s Brief at 7.) Similarly, the trial court stated that Professor Stephenson “concluded that ‘there is insufficient evidence to conclude’ that African-Americans were underrepresented in the venire” (113a.) In context, Professor Stephenson’s testimony does not support these interpretations. He was merely pointing out that the racial makeup of this venire *in isolation* would not necessarily indicate systematic underrepresentation because it *could have been* the product of a fairly representative pool.

A. African-Americans are a distinctive group in the community

The first prong of this analysis has never been in dispute. (See Appellant's Brief at 16.) African-Americans are without question a "distinctive" group for purposes of the fair cross-section analysis. See, e.g., *Peters v Kiff*, 407 US 493, 498 (1972) ("The exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of related constitutional values"); *People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000) (Cavanagh, J., concurring) ("Black Americans . . . are capable of being singled out for discriminatory treatment . . . and have been held a distinctive group for jury composition challenges") (citations omitted).

B. The percentage of African-Americans in the jury venire and jury pool was not "fair and reasonable"

There is no dispute that Kent County's African-American community was significantly underrepresented in the jury pool in 2001 and 2002. The question for this Court is whether African-American representation in the jury pool and venire was nevertheless "fair and reasonable." As Appellant acknowledges, "the number of African-Americans to whom jury questionnaires were sent was about half of what would be expected." (Appellant's Brief at 21.) *Half*. The daily pool contained at most two African-Americans among 132, and when a 45-person venire was drawn from this tainted pool, it contained only a single African-American. This systematic exclusion of minorities from jury service is not constitutionally tolerable.

The United States Supreme Court has provided little guidance regarding how to measure *Duren's* second prong. In *Duren*, the Court simply compared the proportion of women in "the population eligible for jury service community" (54%) to the proportion of women in jury venires and concluded that "jury venires containing approximately 15% women are [not] 'reasonably

representative' of this community. . . ." *Duren, supra* at 365-66. The Court appears to have found simply that the difference between these numbers was too great to withstand scrutiny. But the Court did not draw any bright lines or provide any meaningful guidance as to the range of acceptable disparities.

It has therefore been up to the lower courts to determine exactly when a jury is "reasonably representative" of a community, and how to reach this conclusion. Although the courts' methods and conclusions differ, they invariably involve some form of statistical comparison between a distinctive group's population in the community and its population in the jury venire or pool.

There are two dominant methods of comparison in fair cross-section cases: absolute disparity and comparative disparity.⁷ The following excerpt from a Tenth Circuit case helpfully illustrates the differences:

Absolute disparity measures the difference between the percentage of a group in the [jury-eligible] population and its percentage in the qualified wheel. For instance, if Asians constitute 10% of the [jury-eligible] population and 5% of the qualified wheel, the absolute disparity is 5%.

Comparative disparity measures the decreased likelihood that members of an underrepresented group will be called for jury service, in contrast to what their presence in the [jury-eligible] community suggests it should be. This figure is determined by dividing the absolute disparity of the group by that group's percentage in the [jury-eligible] population. In the example above, the comparative disparity is 50%: Asians are half as likely to be on venires as they would be if represented in proportion to their numbers in the [jury-eligible population].

United States v Shinault, 147 F3d 1266, 1272 (CA 10, 1998) (internal citation omitted) (paragraphs

⁷A third method of comparison, the standard deviation test, is helpful in determining whether the underrepresentation of a minority group may be the result of chance. Causation is not legitimately in dispute in this case, so the standard deviation test is not discussed in this Brief.

added).⁸

Applying these formulas to the evidence in this case and the 8.25% jury-eligible African-American population in Kent County reveals the following disparity levels:

	African-American Representation	Absolute Disparity	Comparative Disparity
3-month pool (statistical estimate)	$163 / 3898 = 4.17\%^9$	$8.25\% - 4.17\% = 4.08\%^{10}$	$4.08\% / 8.25\% = 49.45\%^{11}$
Daily pool (self-reported) ¹²	$2 / 132 = 1.52\%$	$8.25\% - 1.52\% = 6.73\%$	$6.73\% / 8.25\% = 81.57\%$
45-person venire (visual observation)	$1 / 45 = 2.22\%$	$8.25\% - 2.22\% = 6.03\%$	$6.03\% / 8.25\% = 73.09\%$

Under this Court's case-by-case approach, *see Smith, supra* at 204, the Court should consider the disparity levels within all three of these bodies—notwithstanding that neither the trial court nor

⁸The bracketed language serves an important purpose. The quote as written refers repeatedly to the “general population,” but this is not technically correct, since “the appropriate comparison is between the percentage of group members *who are eligible for jury service . . .*” *United States v Forest*, 355 F3d 942, 954 (CA 6, 2004) (emphasis in original).

⁹This calculation actually results in a figure of 4.18%; Professor Stephenson testified to the figure 4.17, so 4.17 is used here.

¹⁰Appellant calculates the absolute disparity to be 4.05% based on the following equation: “(8.25% - c. 4.3% = 4.2%).” (Appellant’s Brief at 21.) This appears to be incorrect.

¹¹Appellant reaches the 49.4% figure based on the following equation: “(322/163 - 1 = 49.4%).” (Appellant’s Brief at 21.) This appears to be incorrect.

¹²If the individual who identified himself or herself as “multi-racial” was not African-American, the figures for the daily pool would be 0.76% African-American representation, 7.49% absolute disparity, and 90.79% comparative disparity.

the Court of Appeals considered the disparity within the daily pool.

As an initial matter, the Court has specifically asked the parties to address two related issues. First, the Court has asked whether “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.” Second, the Court has asked whether “a defendant’s claim of . . . underrepresentation must always be supported by hard data, or whether statistical estimates are permissible and, if so, under what circumstances.” (May 18, 2011 Order Granting Leave to Appeal.)¹³

Legally, all of the bodies are relevant. The United States Supreme Court emphasized in *Duren* itself that “petit juries must be drawn from a *source* fairly representative of the community,” and has explicitly provided an expansive definition of relevant “sources,” explaining that “the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community” *Duren*, supra at 363-64 (quoting *Taylor*, supra at 538) (emphasis added). This expansive language leaves no question that so long as systematic exclusion is proven under *Duren*’s third prong,¹⁴ underrepresentation may be measured in *any* source of jurors for which the racial composition is known (or can be estimated with confidence).

¹³Both Appellant and the trial court have raised concerns about relying on statistical estimates, albeit for different reasons. As explained below, Appellant and the trial court have misunderstood the statistical evidence in this case, and their objections are misplaced.

¹⁴To be sure, if a defendant were relying only on significant underrepresentation to establish an inference of systematic exclusion, such a showing would be stronger and more reliable if based on a large pool than if based only on a single venire. This is precisely what Professor Stephenson was explaining when he said that even in a fairly representative jury pool, there would be a ten percent chance that a 45-person venire would contain only a single African-American. (91a.) But there is no need for such an inference here, as systematic exclusion is not subject to reasonable dispute.

To answer the Court's first question, therefore, although relief would be appropriate in this case based "only" on "the composition of the defendant's particular jury venire," and there does not appear to be any legal requirement that courts "must always examine the composition of broader pools or arrays of prospective jurors," *see, e.g., United States v Buchanan*, 213 F3d 302, 310 (CA 6, 2000) ("there were two African-Americans in a venire of seventy, constituting 2.86% of the venire"), the Court has an obligation to consider all *available* evidence about underrepresentation within the relevant sources, particularly where the evidence is reliable and uncontested.¹⁵

This is the approach taken by the Court of Appeals—albeit only with respect to the three-month pool and the 45-person venire. That court found that "[s]eventy-three and one tenth percent is a significant comparative disparity and is sufficient to demonstrate that representation of African-Americans in the venire . . . was unfair and unreasonable," and that the "comparative disparity for the three-month period . . . [of] 49.5 percent" "supports [this] conclusion." *People v. Bryant*, 289 Mich App 260, 275; 796 NW2d 135 (2010). It is not clear why the Court of Appeals did not also recognize that the 81.57% comparative disparity within the daily pool provides perhaps the strongest available evidence of unfair underrepresentation, but this Court need not repeat that omission. The Court should consider the levels of disparity within all three available sources.

As to the Court's question about the use of statistical estimates, the Court's concern appears to be that Professor Stephenson's finding about the racial composition of the jury pool may somehow be inherently less reliable than "hard data," by which the Court appears to mean visual observations or self-reported data. This concern would not be well founded.

¹⁵Amicus parts ways with Appellee, who argues that "[t]his Court need not, and should not, examine the composition of broader pools or arrays of prospective jurors in order to decide this case." (Appellee's Brief at 18.)

A survey of the relevant case law reveals the uniform acceptance of statistical evidence in fair cross-section cases in general. “This is, at least in part, a mathematical exercise, and must be supported by statistical evidence.” *United States v Weaver*, 267 F3d 231, 240 (CA 3, 2001) (citing *Duren*, supra at 364). Even more telling, however, is that this Court and others have accepted exactly the same type of statistical estimates as were developed in this case—perhaps out of necessity, because in Michigan, the State File does not include racial information about potential jurors.

In *Smith*, for example, this Court itself was confronted with a statistical estimate of the racial composition of the Kent County jury pool during the five months preceding the defendant’s trial and the specific month in which the trial fell. *Smith*, supra at 211-212 & n.8.¹⁶ The Court did not hesitate to rely on this evidence. Nor did the United States Supreme Court when it reviewed the case in 2010. *See Berghuis v Smith*, 559 US ___; 130 S Ct 1382, 1390 (2010) (“Isolating the month Smith’s jury was selected, Smith’s statistics expert *estimated* that the comparative disparity was 34.8%”) (emphasis added).

Similarly, in the parallel federal court litigation involving exactly the same computer glitch

¹⁶This Court’s opinion does not explain the statistician’s methods in detail, but it appears that the statistician was estimating the racial composition using the same formula as Dr. Stephenson in this case, albeit with one difference:

[T]he statistical estimates in *Smith* were based on census tracts, which are small, while the estimates in this case are based on zip codes, which tend to be quite large. Census tracts had to be used in *Smith* because the 1990 census identified the racial make-up only of census tracts, not zip codes. The 2000 census identified the racial make-up of zip codes

(119a.)

as this case,¹⁷ two separate district court judges have relied—without any objection from the respondents’ counsel, the Michigan Attorney General’s Office¹⁸—on statistical analysis and findings mirroring those of Professor Stephenson, albeit for the entire “glitch pool” spanning from April 2001 until August 2002. *Ambrose v Booker*, 781 F Supp 2d 532, 540 (ED Mich, 2011); *Parks v Warren*, 773 F Supp 2d 715, 721 (ED Mich, 2011).

In sum, the Court should consider the fairness of African-American representation within all three relevant sources: (1) the three-month pool (as determined by statistical analysis), (2) the daily pool (as determined by self-reporting), and (3) the 45-person venire (as determined by visual observation).

The next question is which test of comparison the Court should apply to the disparities within these bodies. “[N]either *Duren* nor any other decision of [the Supreme] Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools.” *Berghuis v. Smith*, *supra* at 1393. Among lower courts, although absolute disparity “seems to be the preferred method of analysis in most cases,” *Weaver*, *supra* at 242, it is often criticized because it “understates the systematic representative deficiencies’ in cases . . . where . . . the groups at issue comprise small percentages of the general population.” *Id.* at 242 (citing *Shinault*, *supra* at 1273). The Eleventh Circuit has therefore suggested that comparative disparity is an appropriate measure

¹⁷Undersigned counsel represents the petitioners in *Ambrose* and *Parks*, as well as other similarly situated habeas corpus petitioners with cases pending before the Eastern District of Michigan and the Sixth Circuit Court of Appeals.

¹⁸The Michigan Attorney General’s Office has taken the position that Professor Rothman’s statistical analysis is the sole appropriate basis for determining the racial makeup of the jury pool. Taking a similar position, Appellant in this case argues that the “operative figure” is “the absolute and comparative disparity for the venires chosen *over a longer section of time*”—evidence of which is unavailable in the absence of statistical analysis. (Appellant’s Brief at 21 (emphasis added).)

when a distinctive group makes up ten percent or less of the population. *United States v Rodriguez*, 776 F2d 1509, 1511 n.4 (CA 11, 1985) (citing *United States v Butler*, 615 F2d 685, 686 (CA 5, 1980)).

While not ignoring absolute disparity entirely, other courts have found that “figures from both methods inform the degree of underrepresentation,” and have “examine[d] and consider[ed] the results of both in order to obtain the most accurate picture possible.” *Weaver, supra* at 243. *See also, e.g., United States v Chanthadara*, 230 F3d 1237, 1257 (CA 10, 2000) (courts “must consider both absolute and comparative disparities”).

That is the approach adopted by this Court in *Smith*, a case that incidentally arose out of Kent County and therefore involved demographic data almost identical to this case.¹⁹ The Court acknowledged the criticisms of both the absolute and comparative disparity tests as applied to small minority groups, noting that “the absolute disparity test produces questionable results,” and that the comparative disparity test can be “distort[ed]” by even “a small change in the jury pool” *Smith, supra* at 203-204. Thus, the Court found, “no individual method should be used exclusive of the others” and that a “case-by-case approach” is most appropriate. *Id.* at 204.

In the jury pool spanning the six months prior to trial, *Smith* involved an absolute disparity figure of 1.28% and a comparative disparity figure of 18%. *Smith, supra* at 217, 218. Faced with this evidence, the Court said that the defendant had “failed to establish a legally significant disparity under either the absolute or comparative disparity tests,” but nevertheless gave him “the benefit of the doubt on underrepresentation” in order to address *Duren*’s systematic exclusion prong, under

¹⁹*Smith* involved Kent County census data from 1990, which showed that the “jury-eligible black population was 7.28 percent,” *Smith, supra* at 217, whereas this case involves 2000 census data reflecting an approximately one percent increase in the jury-eligible African-American population.

which he could not prevail. *Id.* at 204-05. Therefore, this Court's most relevant precedent provides little guidance as to whether the disparities at issue in this case are substantial enough to satisfy *Duren's* second prong.

After this Court rejected his fair cross-section claim, Diapolis Smith pursued federal habeas corpus relief, and although the ensuing litigation did not ultimately generate any binding substantive law on *Duren's* second prong, the opinions by the Sixth Circuit Court of Appeals and the United States Supreme Court are uniquely illuminating in light of the obvious similarities between that case and this one.

In its opinion ordering habeas relief, the Sixth Circuit found that the comparative disparity test was the more appropriate means of measuring measure in light of the relatively small African-American population in Kent County. *Smith v Berghuis*, 543 F3d 326, 337-38 (CA 6, 2008). The court explained that "even if African Americans in Kent County were never called for jury service, the absolute disparity would still fall below the 10 percent figure that courts have found to be a threshold indicator of a constitutionally significant disparity," and thus that "[w]here the distinctive group alleged to have been underrepresented is small, as is the case here, the comparative disparity test is the more appropriate measure of underrepresentation." *Id.* (citations omitted).

Applying that standard, the court noted that beyond the 18 percent figure applicable to the six-month pool preceding trial—the figure upon which this Court focused in its opinion, *Smith, supra* at 217, 218—the comparative disparity "increased to 34 percent" when measured in the specific month in which trial was held. *Smith v Berghuis, supra* at 338. "In other words, the number of African Americans on Kent County venire panels was 18 and 34 percent lower than one would have expected based on random selection factors." *Id.* These figures, in the Sixth Circuit's opinion,

provided ample reason to conclude that the prevalence of African-Americans in the jury pool was not “fair and reasonable” under *Duren*.

The United States Supreme Court subsequently granted certiorari and reversed. *Berghuis v Smith*, *supra* at 1396. Importantly, however, the Court did not base its decision on an application of *Duren*’s second prong. In fact, although the State asked the Court to “adopt the absolute-disparity standard” and “requir[e] proof that the absolute disparity exceeds 10%,” the Court declined this invitation. *Id.* at 1394 n.4.²⁰ Rather, in a unanimous but narrow opinion, the Court expressed no opinion as to *Duren*’s second prong—either as applied by this Court or the Sixth Circuit—but held simply that this Court’s decision as to *Duren*’s third prong did not “involve[] an unreasonable application of[] clearly established Federal law” as required by the federal habeas corpus statute, 28 USC § 2254(d).

Thus, while the United States Supreme Court’s opinion leaves intact this Court’s suggestion that a six-month 18% comparative disparity is not sufficient to satisfy *Duren*’s second prong, it also does not disturb the Sixth Circuit’s finding that when coupled with a one-month comparative disparity of 34%, this level of minority representation was not “fair and reasonable.”

²⁰Appellant does not ask this Court to adopt this standard, and the State is longer pursuing this argument in the federal habeas corpus litigation involving the computer glitch. Amicus welcomes this change in position. As the United States Supreme Court recognized, under the State’s previously-proposed rule, “the Sixth Amendment offers no remedy for complete exclusion of distinct groups in communities where the population of the distinct group falls below the 10 percent threshold.” *Berghuis v Smith*, *supra* at 1394 n.4 (citation omitted). This “would deny the fair-cross-section guarantee to the vast majority of Americans and in the vast majority of American courts,” including in Kent County and almost everywhere else in Michigan. Brief for Social Scientists, Statisticians, and Law Professors, Jeffrey Fagan, Et Al., as Amici Curiae Supporting Respondent, *Berghuis v. Smith*, No. 08-1402 , at 2 (Mar. 30, 2010) available at http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1402_RespondentAmCuSocScientistsandProfs.authcheckdam.pdf.

In light of the absence of binding authority and the inherently fact-specific nature of a fair cross-section analysis, Amicus asks the Court to follow the two precedents that most closely resemble this case: *Ambrose* and *Parks*.

To be sure, although these cases share an identical factual background with the instant case, they involve slightly different statistical evidence. Specifically, in *Ambrose* and *Parks*, the courts relied on a report by Edward D. Rothman, Ph.D., the former Chair of the Department of Statistics and current Director of the Center for Statistical Consultation and Research at the University of Michigan in Ann Arbor.²¹ Unlike Professor Stephenson, who analyzed a three-month window of the tainted jury pool, Professor Rothman assessed minority representation within the entire “glitch pool” spanning from April of 2001 until August of 2002. He found that African-Americans were underrepresented by a rate of 42% under the comparative disparity approach and 3.45% under the absolute disparity approach. *Ambrose, supra* at 540; *Parks, supra* at 721.²²

Based on this evidence, the *Ambrose* court found that the petitioner had satisfied *Duren*’s second prong. The court relied largely on the Michigan Court of Appeals decision in this case, the Sixth Circuit’s decision in *Smith v Berghuis*, and the Eighth Circuit’s opinion in *United States v Rogers*, 73 F3d 774, 777 (CA 8, 1996), in which that court found that a comparative disparity of

²¹Although Professor Rothman was initially retained by counsel for the petitioners, the parties ultimately stipulated to the accuracy of his findings and the admissibility of his report.

²²While not the basis for the courts’ opinions in *Ambrose* and *Parks*, and obviously not supported by the factual record in this case, it is worth noting that Professor Rothman also concluded that Kent County’s Hispanic population tends to live in the same zip codes as the African-American population, and thus that the systematic exclusion of certain zip codes substantially impacted that minority population as well. The absolute disparity of the Hispanic population was 1.66% and the comparative disparity was 27.64%. The Rothman Report is a matter of public record and is available on the docket in the *Ambrose* case, E.D. Mich. Case No. 06-13361, Docket Entry No. 45.

30.96% was sufficient to prove unfair and unreasonable representation under *Duren*'s second prong.²³ *Ambrose, supra* at 544-545. When viewed alongside these persuasive authorities, the court concluded that because "the comparative disparity in this case, 42%, is even higher than the 34% in *Smith*" and "higher than the 31% that the Eighth Circuit concluded was sufficient in *Rogers*," the petitioner had shown unfair representation. *Id.* at 545.

In doing so, the court rejected the respondent's reliance on other cases that have rejected fair cross-section claims, many of which Appellant cites here:

[T]he First Circuit and Second Circuit cases cited by Respondent for 'similar' statistics did not analyze a comparative disparity, *see* [*United States v Royal*, 174 F3d 1, 10 (CA 1, 1999); *United States v Rioux*, 97 F3d 648, 657-58 (CA 2, 1996)], and the Third Circuit case rejecting comparative disparities of 40.01 % and 72.98% was also faced with absolute disparities of only 1.23% and 0.71%, respectively, *see Weaver*, [*supra*] at 241, 243. The absolute disparity in this case was much higher, at 3.45%. While the Seventh Circuit rejected an absolute disparity of 3%, the court noted at the same time that there was nothing to suggest that "this discrepancy amounts to anything more than a statistical coincidence." Here, the discrepancy was indisputably caused by the error in compiling the jury pool. . . .

Of the cases cited by Respondent in its objection, that leaves only the Tenth Circuit's decision in [*United States v Orange*, 447 F3d 792, 798-99 (CA 10, 2006)], wherein the court rejected an absolute disparity of 3.57% and comparative disparity of 51.22%. . . . However, a review of the Tenth Circuit cases does not reveal a persuasive rationale.

Id.

In *Parks* as well, a different judge found that under the case-by-case approach that this Court endorsed in *Smith*, "the statistical evidence taken as a whole as presented by Drs. Stephenson and Rothman was compelling and established underrepresentation" under the second prong of *Duren*.

²³Despite this finding, the Eighth Circuit "reluctantly" denied relief in *Rogers* in light of existing Circuit precedent, but "encourage[d] th[e] court en banc to re-visit the issue . . ." *Rogers, supra* at 775, 778.

Parks, supra at 725.²⁴

In light of these authorities, the well-reasoned analysis of the Court of Appeals below, and most importantly the levels of disparity at issue in this case—which are substantially higher than those of any other case with which Amicus is familiar, including the parallel habeas corpus cases currently pending in federal court—there is little question that Mr. Bryant can satisfy *Duren*'s underrepresentation prong. The evidence shows that for months, *half* of Kent County's sizeable African-American community was excluded from jury service. It shows that on the day of Mr. Bryant's trial, the pool of available jurors contained *at least 81%* fewer African-Americans than it should have. And it shows that the 45-person venire from which Mr. Bryant's petit jury was selected contained *73%* fewer African-Americans than it should have. None of these sources represented a "fair and reasonable" cross-section of the community, particularly where the exceptionally strong evidence of systematic exclusion discussed below justifies "a thumb on the scale when deciding whether representation was fair and reasonable." *Smith, supra* at 218 (Cavanagh, J., concurring) (citing *United States v Osorio*, 801 F Supp 966 (D Conn, 1992)).

C. The underrepresentation of African-Americans was due to "systematic exclusion"

This Court specifically requested that the parties address "whether any underrepresentation . . . was the result of systematic exclusion under the third prong of *Duren* . . ." (May 18, 2011 Order Granting Leave to Appeal.) Appellant has not argued the issue directly, and does not contest

²⁴The *Parks* court ultimately denied habeas relief on the ground that although the jury *pool* systematically excluded African-Americans in violation of *Duren*, there was evidence showing that the petitioner's individual venire contained 4/45 African-Americans, which "reflected almost exactly the proportion of minorities in the community." *Parks, supra* at 726. The court is currently considering a motion to reconsider that holding.

that the computer glitch occurred or that it led to the substantial exclusion of the zip codes in which most of Kent County's minority population resides. Instead, Appellant's attack on statistical evidence in general includes a passing reference to the systematic nature of the underrepresentation in this case.

Appellant maintains that "[a] shortfall of jurors can certainly occur without a computer programming error," and that the statistical evidence in this case may therefore contribute to the "false conclusion" that the "jury selection system resulted in a halving of potential jurors from a distinct group, when in fact there may be many other factors at work depressing the number of potential [African-American] jurors" (Appellant's Brief at 25.) As examples of these non-systematic factors, Appellant speculates that Kent County's African-American community is "distrust[ful] of the system of justice," lives in "general poverty," has a "higher rate of felony convictions," and is a "more transient population." (*Id.* at 24.)

This argument rests on a misunderstanding of the statistical evidence. Professor Stephenson's analysis focused on the people to whom jury summonses were *sent*, not the people who reported for jury service when summoned. Thus, even if Kent County's African-American community is prone to ignore or avoid jury summonses as Appellant suggests, this fact would be irrelevant to the question of whether the correct number of summonses went out in the first place. The problem, as Appellant concedes but does not appear to appreciate, is that the computer glitch (and nothing else) resulted in the "halving of *potential* jurors" from the African-American community. So even if Appellant's speculative statements were correct, they would not explain why half of the African-American community was not even *invited* to participate in the jury process.

The trial court made a more forceful argument as to why the exclusion of African-Americans

was not “systematic,” but rested its conclusion on a more basic misunderstanding of the record. The trial court found that the exclusion of African-Americans was not “systematic” because “[t]he deficient computer setting simply reduced, *but purely randomly*, the number of individuals from whom jurors were selected,” and thus, “because it acted randomly, *a reduced number fully representative of the county was just as likely as the number selected* which overrepresented the rural and suburban areas of the county.” (129a-130a (emphasis added).)

This statement finds absolutely no support in the record. Indeed, as explained above, Professor Stephenson, who the trial court found to be “credible and persuasive” (113a), could hardly have been clearer that the exclusion of jurors was *not* random but was directly correlated with zip codes, and that because zip codes are correlated with race, the exclusion of jurors had a substantially disproportionate impact on the African-American community.²⁵

This was the finding of the Court of Appeals below, as well as the federal district courts in *Ambrose* and *Parks*.²⁶ And it was also the conclusion of the Second Circuit in the strikingly similar case of *United States v Jackman*, 46 F3d 1240, 1241 (CA 2, 1995), which involved a jury wheel that was made up largely of a sub-pool that “inadvertently, but systematically, excluded from petit jury venires all residents of Hartford and New Britain, communities with large minority populations.” The court noted that “[t]he fact that appellant’s venire included some residents of Hartford and New Britain . . . does not defeat appellant’s challenge, since the existence of systematic underrepresentation turns on the process of selecting venires, not the outcome of that process in a

²⁵Tellingly, Appellant does not defend this aspect of the trial court’s analysis.

²⁶In fact, in the pending appeal in *Ambrose*, which is fully briefed before the Sixth Circuit, the State has abandoned its argument relating to the third prong of the *Duren* analysis, thereby conceding that the computer glitch was a systematic problem.

particular case.” *Id.* at 1246.

The same is true here. As the Court of Appeals correctly found, “the underrepresentation . . . was the result of the system by which juries . . . were selected because jurors from zip codes with large minority populations were routinely overselected and jurors from zip codes with large minority populations were routinely underselected” *Bryant, supra* at 274.

CONCLUSION AND RELIEF REQUESTED

For the reasons discussed above, this Court should affirm the decision of the Court of Appeals, or in the alternative dismiss the case for leave improvidently granted.

Respectfully submitted,

 P60260
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