Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BERGHUIS, WARDEN *v.* SMITH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08–1402. Argued January 20, 2010—Decided March 30, 2010

Criminal defendants have a Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community. See *Taylor* v. *Louisiana*, 419 U. S. 522. To establish a prima facie violation of the fair-cross-section requirement, a defendant must prove that: (1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and (3) "systematic exclusion" in the jury-selection process accounts for the underrepresentation. *Duren* v. *Missouri*, 439 U. S. 357, 364.

At *voir dire* in the Kent County Circuit Court trial of respondent Smith, an African-American, the venire panel included between 60 and 100 individuals, only 3 of whom, at most, were African-American. At that time, African-Americans constituted 7.28% of the County's jury-eligible population, and 6% of the pool from which potential jurors were drawn. The court rejected Smith's objection to the panel's racial composition, an all-white jury convicted him of second-degree murder and felony firearm possession, and the court sentenced him to life in prison with the possibility of parole.

On order of the Michigan Court of Appeals, the trial court conducted an evidentiary hearing on Smith's fair-cross-section claim. The evidence at the hearing showed, *inter alia,* that under the juror-assignment order in effect when Smith's jury was empaneled, the County assigned prospective jurors first to local district courts, and, only after filling local needs, made remaining persons available to the countywide Circuit Court, which heard felony cases like Smith's. Smith calls this procedure "siphoning." The month after Smith's *voir dire*, however, the County reversed course and adopted a Circuit-Court-first assignment order. It did so based on the belief that the district courts took most of the minority jurors, leaving the Circuit

Syllabus

Court with a jury pool that did not represent the entire County. The trial court noted two means of measuring the underrepresentation of African-Americans on Circuit Court venires. First, the court described the "absolute disparity" test, under which the percentage of African-Americans in the jury pool (6%) is subtracted from the percentage of African-Americans in the local, jury-eligible population (7.28%). According to this measure, African-Americans were underrepresented by 1.28%. Next, the court set out the "comparative disparity" test, under which the absolute disparity (1.28%) is divided by the percentage of African-Americans in the jury-eligible population (7.28%). The quotient (18%) indicated that, on average, African-Americans were 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list. In the 11 months after Kent County discontinued the district-court-first assignment policy, the comparative disparity, on average, dropped from 18% to 15.1%. The hearing convinced the trial court that African-Americans were underrepresented on Circuit Court venires. But Smith's evidence, the trial court held, was insufficient to prove that the juror-assignment order, or any other part of the jury-selection process, had systematically excluded African-Americans. The court therefore rejected Smith's fair-cross-section claim.

The state intermediate appellate court reversed and ordered a new trial with jurors selected under the Circuit-Court-first assignment order. Reversing in turn, the Michigan Supreme Court concluded that Smith had not established a prima facie Sixth Amendment violation. This Court, the state High Court observed, has specified no preferred method for measuring whether representation of a distinctive group in the jury pool is fair and reasonable. The court noted that lower federal courts had applied three tests: the absolute and comparative disparity tests and a standard deviation test. Adopting a case-by-case approach allowing consideration of all three means of measuring underrepresentation, the court found that Smith had failed to establish a legally significant disparity under any measurement. Nevertheless giving Smith the benefit of the doubt on underrepresentation, the court determined that he had not shown systematic exclusion.

Smith then filed a federal habeas petition. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prohibits federal habeas relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U. S. C. §2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,"

Syllabus

§2254(d)(2). Finding no infirmity in the Michigan Supreme Court's decision when assessed under AEDPA's standards, the District Court dismissed Smith's petition. The Sixth Circuit reversed. The Court of Appeals ruled, first, that courts should use the comparative disparity test to measure underrepresentation where, as here, the allegedly excluded group is small. The court then held that Smith's comparative disparity statistics demonstrated that African-Americans' representation in County Circuit Court venires was unfair and unreasonable. It next stated that Smith had shown systematic exclusion. In accord with the Michigan intermediate appellate court, the Sixth Circuit believed that the district-court-first assignment order significantly reduced the number of African-Americans available for Circuit Court venires. Smith was entitled to relief, the Sixth Circuit concluded, because no important state interest supported the district-court-first allocation system.

Held: The Sixth Circuit erred in ruling that the Michigan Supreme Court's decision "involv[ed] an unreasonable application o[f] clearly established Federal law," §2254(d)(1). *Duren* hardly establishes—no less "clearly" so—that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community. Pp. 10–16.

(a) The *Duren* defendant readily met all three parts of the Court's prima facie test when he complained of the dearth of women in a county's jury pool. First, he showed that women in the county were both "numerous and distinct from men." 439 U. S., at 364. Second, to establish underrepresentation, he proved that women were 54% of the jury-eligible population, but accounted for only 26.7% of those summoned for jury service, and only 14.5% of those on the postsummons weekly venires from which jurors were drawn. *Id.,* at 364–366. Finally, to show the "systematic" cause of the underrepresentation, he pointed to Missouri's law permitting any woman to opt out of jury service and to the manner in which the county administered that law. This Court noted that "appropriately tailored" hardship exemptions would likely survive a fair-cross-section challenge if justified by an important state interest, *id.,* at 370, but concluded that no such interest could justify the exemption for each and every woman, *id.,* at 369–370. Pp. 10–11.

(b) Neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure underrepresentation. Each of the three methods employed or identified by the courts below—absolute disparity, comparative disparity, and standard deviation—is imperfect. Absolute disparity and comparative disparity measurements can be misleading where, as here, members of the distinctive group compose only a small percentage of the community's

jury-eligible population. And it appears that no court has relied exclusively on a standard deviation analysis. Even absent AEDPA's constraint, this Court would have no cause to take sides here on the appropriate method or methods for measuring underrepresentation. Although the Michigan Supreme Court concluded that Smith's statistical evidence failed to establish a legally significant disparity under either the absolute or comparative disparity tests, the court nevertheless gave Smith the benefit of the doubt on underrepresentation in order to reach the issue ultimately dispositive in *Duren*: To the extent underrepresentation existed, was it due to "systematic exclusion"? See *Duren*, 439 U. S., at 364. Pp. 11–13.

(c) Smith's evidence gave the Michigan Supreme Court little reason to conclude that the district-court-first assignment order had any significant effect on the representation of African-Americans on Circuit Court venires. Although the record established that some County officials *believed* that the assignment order created racial disparities, and the County reversed the order in response, the belief was not substantiated by Smith's evidence. He introduced no evidence that African-Americans were underrepresented on the Circuit Court's venires in significantly higher percentages than on the District Court for Grand Rapids, which had the County's largest African-American population. He did not address whether Grand Rapids had more need for jurors per capita than any other district in Kent County. And he did not compare the African-American representation levels on Circuit Court venires with those on the Federal District Court venires for the same region. See *Duren*, 439 U. S., at 367, n. 25. Smith's best evidence of systematic exclusion was the decline in comparative underrepresentation, from 18 to 15.1%, after Kent County reversed its assignment order. But that evidence indicated no large change and was, in any event, insufficient to prove that the original assignment order had a significantly adverse impact on the representation of African-Americans on Circuit Court venires. Pp. 13–14.

(d) In addition to renewing his "siphoning" argument, Smith urges that a laundry list of factors—*e.g.,* the County's practice of excusing prospective jurors without adequate proof of alleged hardship, and the refusal of County police to enforce orders for prospective jurors to appear—combined to reduce systematically the number of African-Americans appearing on jury lists. No "clearly established" precedent of this Court supports Smith's claim. Smith urges that one sentence in *Duren,* 439 U. S., at 368–369, places the burden of proving causation on the State. But Smith clipped that sentence from its context: The sentence does not concern the demonstration of a prima face case; instead, it speaks to what the State might show *to rebut* the de-

Syllabus

fendant's prima facie case. The Michigan Supreme Court was therefore far from "unreasonable," §2254(d)(1), in concluding that *Duren* first and foremost required Smith himself to show that the underrepresentation complained of was due to systematic exclusion. This Court, furthermore, has never "clearly established" that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim. Rather, the *Taylor* Court "recognized broad discretion in the States" to "prescribe relevant qualifications for their jurors and to provide reasonable exemptions." 419 U. S., at 537–538. And in *Duren*, the Court understood that hardship exemptions resembling those Smith assails might well "survive a fair-cross-section challenge." 439 U. S., at 370. Pp. 14–16.

543 F. 3d 326, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion.