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BERGHUIS V. SMITH:
CONTINUING AMBIGUITY
IN FAIR-CROSS-SECTION CLAIMS

*Natalie A. Pifer**

I. INTRODUCTION

The right to a jury trial is among the nation's most cherished privileges.¹ The jury ensures the accuracy of American conceptions of representative democracy² and the right to a fair trial.³ With these lofty protections in mind, the U.S. Supreme Court has given particular attention to the Sixth Amendment right to an impartial jury and has accordingly mandated that a jury be drawn from "a fair cross section of the community."⁴ By ensuring that the jury is truly representative of the community and "not the organ of any special group or class," the fair-cross-section requirement is essential to protecting the justice system's integrity.⁵

To detect violations of the fair-cross-section requirement, the Court has developed a three-pronged test.⁶ As established in *Duren v. Missouri*,⁷ a defendant must show the following: (1) that the allegedly excluded group is a "distinctive" group in the community; (2) that the representation of this group in jury venires is "not fair and reasonable" in relation to the group's number in the community;

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1. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 867-70 (1994).

2. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (describing the jury trial as the primary vehicle for protecting citizens from their government).

3. See *Smith v. Texas*, 311 U.S. 128, 130 (1940).

4. *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).

5. *Glasser v. United States*, 315 U.S. 60, 85-86 (1942).

6. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

7. 439 U.S. 357.

and (3) that the “underrepresentation is due to systematic exclusion of the group in the jury-selection process.”⁸ However, defining the specific contours of the *Duren* test has proved elusive.

In its most recent fair-cross-section case, *Berghuis v. Smith*,⁹ the Court grappled primarily with *Duren*’s final two prongs.¹⁰ Perhaps most strikingly, the Court flatly refused to adopt a single appropriate mathematical method for measuring underrepresentation,¹¹ despite urging to do so from the state of Michigan¹² and confusion among lower courts.¹³ Rather than confront this statistical disarray in any meaningful manner, the Court instead rested its decision on *Duren*’s third prong—despite the defendant’s failure to prove underrepresentation as required by *Duren*’s second prong.¹⁴ The Court’s willingness to consider evidence of systematic exclusion without any conclusive evidence of underrepresentation marks a departure from the sequential and intertwined application of the *Duren* test’s prongs.

This Comment explores the Court’s missteps in *Berghuis v. Smith*. Part II introduces the relevant facts and traces the case’s procedural posture through both state and federal courts. Part III discusses the Court’s reasoning in rejecting the defendant’s habeas corpus plea. Part IV argues that the Court’s refusal to adopt any single measure of underrepresentation is unfortunate and that its choice to rest its decision on *Duren*’s third prong is an unusual departure from fair-cross-section jurisprudence. Part V concludes that together these outcomes make the ability to protect a defendant’s right to an impartial jury drawn from a fair cross section of the community unnecessarily ambiguous and vulnerable.

8. *Id.* at 364.

9. 130 S. Ct. 1382 (2010).

10. *Id.* at 1388.

11. *Id.* at 1393–94.

12. Reply Brief at 13, *Smith*, 130 S. Ct. 1382 (No. 08-1402).

13. Brief of Respondent at 26–30, *Smith*, 130 S. Ct. 1382 (No. 08-1402).

14. *Smith*, 130 S. Ct. at 1394–96.

II. STATEMENT OF THE CASE

A. The Facts: Kent County's Jury-Selection Procedure

In 1991, Christopher Rumbley was shot and killed during a brawl at a crowded Michigan bar.¹⁵ Soon after, the state charged Diapolis Smith with Rumbley's death.¹⁶ In preparation for Smith's trial in Kent County, Michigan, the state initiated its jury-selection process.¹⁷ In order to fill the courts' venires¹⁸ at the time of Smith's trial,¹⁹ Kent County first mailed questionnaires to prospective jurors.²⁰ The county granted hardship exemptions to some members of the pool of prospective jurors who returned the forms.²¹ After granting hardship exemptions, the county assigned the remaining prospective jurors to the venires of local district courts charged with trying misdemeanors.²² Then, after filling the district court venire, the county assigned the remaining prospective jurors to the circuit court responsible for trying felony cases—such as Smith's murder trial.²³

This procedure resulted in a venire panel of some sixty to one hundred potential jurors for Smith's trial, only three of whom were African American.²⁴ Despite Smith's objection to the venire panel's racial composition,²⁵ his case proceeded to trial in front of an all-white jury, and he was convicted.²⁶

B. Michigan State Court Rulings

Following his conviction, Smith appealed to the Michigan Court of Appeals, alleging that the composition of his trial jury did not

15. *Id.* at 1389.

16. *Id.*

17. *Id.*

18. A venire is "a panel of persons selected for jury duty and from among whom the jurors are to be chosen." BLACK'S LAW DICTIONARY 1590 (8th ed. 2004).

19. One month after voir dire for Smith's trial, the county reversed the order in which it assigned jurors. *Smith*, 130 S. Ct. at 1389.

20. *Id.*

21. *Id.* For example, hardship exemptions were granted for lack of transportation or childcare. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

represent a fair cross section of the community, thereby violating the Sixth Amendment.²⁷ During the evidentiary hearing ordered by the court of appeals, Smith provided statistical evidence challenging the validity of Kent County's juror-assignment procedure.²⁸ Smith's statistics expert testified that during the month in which Smith's jury was selected, the comparative disparity²⁹ of African Americans was 34.8 percent.³⁰ Smith argued that the Kent County's juror-selection procedure had systematically resulted in this underrepresentation.³¹

First, Smith provided evidence explaining this statistical underrepresentation of African Americans as the result of social and economic factors further exacerbated by Kent County's juror-selection process.³² These factors made African Americans less likely than whites to receive or return the county's prospective-juror questionnaires and more likely than whites to request hardship exemptions.³³ Second, Smith argued that the refusal of Kent County police to enforce orders for prospective jurors to appear and Kent County's practice of granting hardship-exemption requests without adequate proof also reduced the representation of African Americans on jury venires.³⁴ Finally, Smith argued that Kent County's siphoning-juror-assignment procedure—entirely filling district court venires before circuit court venires—resulted in an unacceptable underrepresentation of African Americans on circuit court venires.³⁵ Ruling in Smith's favor, the Michigan Court of Appeals found that the county's juror-assignment procedure resulted in the systematic underrepresentation of African Americans.³⁶

The state then appealed to the Michigan Supreme Court. Before turning to Smith's evidence, the court discussed the different

27. *See id.*

28. *See id.*

29. Here, comparative disparity was determined by dividing the absolute disparity by African Americans' representation in the jury-eligible population. The absolute disparity was "determined by subtracting the percentage of African-Americans in the jury pool . . . from the percentage of African-Americans in the local, jury-eligible population." *Id.* at 1390.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1388–89.

35. *Id.* at 1388.

36. *Id.* at 1390; Brief of Respondent, *supra* note 13, at 11.

statistical methods employed to determine underrepresentation.³⁷ While concluding that each method presented its own set of strengths and weaknesses, the court declined to adopt any measure as the prevailing test.³⁸ Rather, the court held that courts should—so long as parties provide sufficient evidence—consider the results of all statistical measures in determining whether representation was fair and reasonable.³⁹ In evaluating Smith’s statistical evidence, the court found that Smith had failed to show a legally significant disparity.⁴⁰ Even assuming that Smith had shown unfair and unreasonable underrepresentation, the court found that Smith had not shown systematic exclusion of African Americans.⁴¹

C. Smith’s Habeas Corpus Petition in Federal Court

In the face of the Michigan Supreme Court’s denial of his fair-cross-section claim, Smith filed a habeas corpus petition in federal district court, reasserting his fair-cross-section claim.⁴² The district court dismissed Smith’s petition,⁴³ finding that the Michigan Supreme Court’s ruling did not involve a contrary or unreasonable application of federal law.⁴⁴ Smith then appealed to the U.S. Court of Appeals for the Sixth Circuit.⁴⁵

There, Smith’s fair-cross-section claim found traction. The court of appeals reversed, ruling that when the allegedly excluded group is

37. Specifically, the court discussed the absolute disparity test, the comparative disparity test, and the standard deviation test. *People v. Smith*, 615 N.W.2d 1, 2–3 (Mich. 2000), *rev’d sub nom.* *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), *rev’d*, 130 S. Ct. 1382 (2010).

38. *Id.* at 3.

39. *Id.*

40. There, the court evaluated both comparative and absolute disparity. *Id.*

41. First, the court noted that Smith did not show how the alleged siphoning of African American jurors to district court venires affected the circuit court juror pool. Second, Smith’s statistical evidence did not show “whether the district court jury pools contained more, fewer, or approximately the same percentage of minority jurors as the circuit court jury pool.” Finally, the court held that Smith’s evidence of social and economic influences on the pool of prospective jurors did not establish a systematic exclusion of African American jurors. *Id.* at 3–4.

42. *Berghuis v. Smith*, 130 S. Ct. 1382, 1391 (2010).

43. *Id.*

44. Under 28 U.S.C. § 2254(d) (2006), a federal court may only grant a habeas corpus petition on behalf of a person in custody pursuant to a state court judgment if it finds that state court decision: (1) was contrary to or involved an unreasonable application of law of clearly established federal law, as determined by the U.S. Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

45. *Smith*, 130 S. Ct. at 1391.

small—as was Kent County’s African American population—courts should measure underrepresentation using only the comparative disparity test.⁴⁶ Applying that measure, the Sixth Circuit found that Smith’s statistical evidence was sufficient to demonstrate an unfair and unreasonable representation of African Americans in Kent County’s venire pool.⁴⁷ As to *Duren*’s third prong, the Sixth Circuit found that Kent County’s juror-assignment procedure significantly reduced the number of prospective African American jurors available for Kent County circuit court venires.⁴⁸ Since Smith had established *Duren*’s three prongs, the Sixth Circuit held that the Michigan Supreme Court’s rejection of Smith’s appeal constituted an unreasonable application of clearly established federal law, as established by the Supreme Court in *Duren*.⁴⁹

The state petitioned the Supreme Court for certiorari. First, the state claimed that the Sixth Circuit’s decision to adopt the comparative disparity test as the exclusive measure to determine if a small but distinctive group was underrepresented in the jury pool was erroneous.⁵⁰ Second, the state argued that, regardless of the statistical measure used to determine if African Americans were underrepresented in Kent County’s venires, there was no systematic exclusion of African Americans.⁵¹

III. THE SUPREME COURT’S REASONING: A FLAT REJECTION OF ALL THINGS CONSIDERED

In a unanimous decision, the Supreme Court reversed the Sixth Circuit, holding that Smith had failed to make out the prima facie case necessary to successfully assert his fair-cross-section claim.⁵² Citing its landmark ruling in *Duren*, the Court focused its analysis on the *Duren* test’s final two prongs.⁵³ The most challenging elements of the *Duren* analysis, these prongs determine whether the allegedly “distinctive” group is unfairly and unreasonably represented in the

46. *Smith v. Berghuis*, 543 F.3d 326, 338 (6th Cir. 2008), *rev’d*, 130 S. Ct. 1382 (2010).

47. *Id.*

48. *Id.* at 342.

49. *Id.* at 345.

50. *Smith*, 130 S. Ct. at 1392.

51. *Id.*

52. *Id.* at 1395–96.

53. *Id.* at 1388.

jury venire and, if so, whether “systematic exclusion” in the jury selection caused that underrepresentation.⁵⁴

First, in response to the Sixth Circuit’s adoption of the comparative disparity test, the Court noted that neither *Duren* nor any other precedent mandates a test that courts must use in measuring a distinctive group’s representation in jury pools.⁵⁵ Noting that no single method is perfect,⁵⁶ the Court declined to endorse any particular test as the appropriate method to determine a group’s representation.⁵⁷ Rather than focusing on whether Smith had satisfied *Duren*’s second prong, the Court dedicated a substantial portion of its analysis to whether Smith had satisfied *Duren*’s third prong: whether the alleged underrepresentation of African Americans in Kent County’s jury pool resulted from “systematic exclusion.”⁵⁸

The Court’s analysis here was twofold. First, the Court rejected Smith’s statistical evidence, finding that the evidence did not substantiate his claim that Kent County’s juror-assignment procedure resulted in the systematic exclusion of African Americans from circuit court venires.⁵⁹ After citing several types of evidence that Smith *could* have produced, the Court evaluated Smith’s “best evidence” of systematic exclusion—that the comparative underrepresentation of African American in circuit courts declined from 18 percent to 15.1 percent after Kent County reversed its juror-assignment procedure.⁶⁰ Noting that even Smith’s counsel recognized the change as trivial, the Court agreed with the Michigan Supreme Court’s finding that this evidence failed to establish that Kent County’s district-court-first assignment procedure caused any significant underrepresentation of African Americans.⁶¹

Second, the Court evaluated Smith’s claim that to prove systematic exclusion under *Duren* a defendant need only show that the “underrepresentation is persistent and ‘produced by the method

54. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

55. *Smith*, 130 S. Ct. at 1393.

56. *Id.*

57. *Id.* at 1393–94.

58. *Id.* at 1394.

59. *Id.*

60. *Id.*

61. *Id.* at 1394–95.

or “system” used to select [jurors],’ rather than by chance.”⁶² As evidence of “‘systematic’ causes,” Smith pointed not only to Kent County’s district-court-first assignment procedure but also to a “laundry list” of additional factors.⁶³ In response, the Court rejected Smith’s argument that he could satisfy *Duren*’s prima facie case requirement “merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group’s underrepresentation.”⁶⁴ The Court instead stated that *Duren* requires the defendant to carry the burden of proving that systematic exclusion had caused the alleged underrepresentation.⁶⁵ In addition, the Court noted that its precedents have never established that the jury-selection procedures included in Smith’s “laundry list” can give rise to a fair-cross-section claim.⁶⁶ Rather, the Court noted that its past holdings have granted the states broad discretion to create their jury-selection procedures and that, in particular, hardship exemptions may very well “survive a fair-cross-section challenge.”⁶⁷

IV. AN ANALYSIS OF THE COURT’S DECISION

While *Berghuis v. Smith* contributes very little clarity to fair-cross-section precedent, the decision is notable for its missteps. First, this part argues that the Court’s failure to confront the confused jurisprudence surrounding the appropriate measure of underrepresentation necessary to satisfy *Duren*’s second prong is particularly unfortunate for small populations of distinctive groups. Second, this part contends that the Court’s willingness to evaluate Smith’s evidence of systematic exclusion—even after finding that Smith had failed to show underrepresentation—is a strange and potentially irresponsible departure from fair-cross-section jurisprudence.

62. *Id.* at 1395.

63. *Id.* This list included Kent 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.

Id.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* (internal quotation marks omitted).

A. The Numbers Game in Fair-Cross-Section Claims

Rather than select a single methodology to determine fair and reasonable representation,⁶⁸ the *Smith* Court demurred, merely noting that each statistical test is “imperfect.”⁶⁹ Given the muddled jurisprudence surrounding *Duren*’s measure of underrepresentation jurisprudence and the second prong’s importance, the Court’s silence here is particularly frustrating.

Under the *Duren* test, a defendant cannot successfully demonstrate a prima facie case alleging a violation of the fair-cross-section requirement unless the defendant can show that the distinctive group was underrepresented on the venire panel as compared to its representation in the community.⁷⁰ The test’s language, however, is unclear regarding the proper method of measuring underrepresentation to meet *Duren*’s requirement.⁷¹ In the face of this ambiguity, lower courts must grapple with a bevy of statistical measures to calculate whether the degree of underrepresentation is substantial enough to meet *Duren*’s requirement.⁷²

While four different mathematical measures have emerged as dominant means of calculation,⁷³ courts have failed to apply them consistently.⁷⁴ Additionally, even courts that have elected to rely heavily on one particular measure in deciding underrepresentation have recognized their chosen approach to be problematic.⁷⁵ For example, although the Fifth Circuit professed a preference for one method,⁷⁶ the court in its next breath advised against “an intractable use” of that measure, fearing that such an allegiance might produce “distorted results.”⁷⁷

68. *Id.* at 1394 n.4.

69. *Id.* at 1393.

70. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

71. Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1917 (1994).

72. *Id.*

73. *Id.* at 1918 (describing absolute disparity, absolute impact, comparative disparity, and statistical decision theories as the four major mathematical measures used to determine underrepresentation for *Duren*’s purposes).

74. *Id.*

75. Brief of Respondent, *supra* note 13, at 27 n.10.

76. *Foster v. Sparks*, 506 F.2d 805, 834 (1975) (“[T]he preferable view is that an absolute measure should be employed . . .”).

77. *Id.* at 835.

While the inconsistent and unclear application of various statistical measures has resulted in a confused body of fair-cross-section case law and unpredictable outcomes,⁷⁸ the Supreme Court had offered little guidance regarding the standards for measuring the underrepresentation required to establish a *Duren* violation.⁷⁹ Against this backdrop of ambiguity, *Smith* presented the Court an opportunity to provide clarity. Perhaps in recognition of this possibility, a focus on the proper measure of underrepresentation necessary to satisfy *Duren* was evident in both the briefs and at the oral argument.⁸⁰ In particular, the justices' eagerness to elicit the state's preferences regarding the appropriate measure of determining underrepresentation foreshadowed that the Court's ruling would finally clarify the ambiguity surrounding *Duren*'s second prong.⁸¹

However, since the Court was unwilling to indicate a preference for any one method of determining underrepresentation or to provide any guidance in distinguishing methods,⁸² a prudent defendant is left to use all available tests in arguing *Duren*'s second prong.⁸³ The Court's silence enables courts to pick and choose among the varied statistical outcomes when determining if a distinctive group is underrepresented, maintaining an element of unnerving unpredictability⁸⁴ inherent to the judicial discretion⁸⁵ in fair-cross-section claims. The Court's blanket refusal to clarify the appropriate standards surrounding underrepresentation represents a missed opportunity to add clarity to—and to eliminate the unnecessary confusion surrounding—*Duren*'s second prong.

78. Detre, *supra* note 71, at 1918.

79. Richard Seltzer et al., *Fair Cross-Section Challenges in Maryland: An Analysis and Proposal*, 25 U. BALT. L. REV. 127, 134 (1996).

80. See James Bickford, *Court Rejects Sixth Amendment Habeas Challenge to the Representation of African Americans in the Jury Pool*, SCOTUSBLOG (Apr. 1, 2010, 2:21 PM), <http://www.scotusblog.com/?p=18197>.

81. See Transcript of Oral Argument at 9, *Berghuis v. Smith*, 130 S. Ct. 1382 (2010) (No. 08-140).

82. *Smith*, 130 S. Ct. at 1393.

83. This strategy would follow the Michigan Supreme Court's direction that courts should consider the results of all statistical measures for which parties provide evidence. *People v. Smith*, 615 N.W.2d 1, 3 (Mich. 2000), *rev'd sub nom. Smith v. Berghuis*, 543 F.3d 325 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1382 (2010).

84. See Detre, *supra* note 71, at 1918.

85. See *Foster v. Sparks*, 506 F.2d 805, 835 (5th Cir. 1975) (holding that the decision to measure underrepresentation using an absolute or comparative measure should be "flexible").

This failure resonates as particularly disappointing given that *Smith* implicated a distinctive group of relatively small size as compared to Kent County's overall population.⁸⁶ Under the currently muddled approach to determining underrepresentation, small populations of distinctive groups are left particularly vulnerable under *Duren*'s second prong.⁸⁷ As the Sixth Circuit explained, it is unlikely that using an absolute measure⁸⁸ to determine whether a small minority population is underrepresented will ever find a constitutionally significant level of underrepresentation.⁸⁹ In contrast, the use of comparative disparity to determine a small distinctive group's measure of underrepresentation is much more "meaningful."⁹⁰ However, given the Court's failure to adopt comparative disparity—or even highlight the particular vulnerabilities of small distinctive groups under an absolute measure⁹¹—courts have retained the discretion to entirely exclude such groups by manipulating statistical measures.

B. A New Order of Fair-Cross-Section Claims?

Further, the Court's willingness to consider evidence of systematic exclusion even after finding that Smith had failed to show underrepresentation is a curious departure from fair-cross-section jurisprudence. Rather than reach *Duren*'s third prong, the Court could have easily found that the Michigan Supreme Court's denial of Smith's fair-cross-section claim was reasonable⁹² simply because

86. *Smith v. Berghuis*, 543 F.3d 326, 337 (6th Cir. 2008), *rev'd*, 130 S. Ct. 1382 (2010).

87. *See* *Detre*, *supra* note 71, at 1921 (explaining that when analyzing the distinctive group in a small percentage of the population, the use of absolute disparity or absolute impact may produce distorted results regarding that group's underrepresentation).

88. Absolute disparity measures the difference between the percentage of a particular group in the general population and the percentage of that group in the pool of prospective jurors on a venire. Absolute impact is the product of the absolute disparity and the total number of persons in the pool of prospective jurors on a venire. It evaluates the effect of underrepresentation in terms of the reduction in the number of a particular group in the pool of prospective jurors on a venire from the number that would be expected absent underrepresentation. *See* *United States v. Yazzie*, 660 F.2d 422, 426 n.3 (10th Cir. 1981).

89. *See* *Smith*, 543 F.3d at 338 ("Indeed, 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.").

90. *Id.*

91. *Berghuis*, 130 S. Ct. at 1393.

92. As is the standard when reviewing state court decisions under a habeas corpus petition. 28 U.S.C. § 2254(d) (2006).

Smith had failed to satisfy *Duren*'s second prong by establishing underrepresentation.⁹³ Instead, the Court reviewed Smith's evidence of systematic exclusion, ultimately finding that Smith had failed there as well.

The Court ruled that a defendant cannot show systematic exclusion "merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation."⁹⁴ Perhaps more interesting, however, the Court temporarily assumed Smith had met *Duren*'s second prong in order to reach its systematic-exclusion analysis. This approach is illogical when considered in light of the *Duren* test's analytical ordering.

The language of *Duren*'s prongs implies a sequential order since the successful establishment of each preceding prong is necessary before the defendant can attempt to establish the next. Thus, a defendant cannot attempt to prove a group is underrepresented without first proving that the group is distinctive. Similarly, and more central to the Court's analysis in *Smith*, a defendant cannot attempt to demonstrate that a jury-selection procedure results in systematic exclusion without first proving underrepresentation. Evaluating evidence of systematic exclusion when a defendant has not first established underrepresentation is a meaningless exercise in futility since the defendant will have ultimately failed to establish the prima facie case necessary to carry a fair-cross-section claim.

Given the sequential nature inherent in *Duren*'s prongs, the Court's willingness to move to *Duren*'s third prong based solely on a temporary assumption that the defendant has established underrepresentation makes for curious analytical precedent. The Court's eagerness to emphasize that systematic exclusion is not "a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation"⁹⁵ is the most likely explanation for this analytical reordering. However, a more strategic motivation may be behind the Court's *Smith* decision.

Allowing courts to proceed to *Duren*'s third prong without conclusively establishing underrepresentation would cause more fair-cross-section claims to fail on systematic exclusion without ever

93. *Smith*, 130 S. Ct. at 1394.

94. *Id.* at 1395.

95. *Id.*

requiring the conclusive exposure of problematic disparities in jury venires. Such an analytical reordering would allow a court to avoid confirming that a state's jury venires were afflicted with underrepresentation before denying a fair-cross-section claim if a defendant cannot establish systematic exclusion.

This would not be the first time the Court has proceeded through analytical prongs out of sequence in order to prevent probing unnecessarily at institutional sensitivities. For example, for a criminal defendant to show ineffective assistance of counsel, he must show that, but for counsel's unprofessional errors, the proceeding's result would have been different.⁹⁶ Though Justice O'Connor reviewed performance before prejudice in her *Strickland* opinion,⁹⁷ she stated that courts need not remain faithful to her analytical ordering if reviewing prejudice first would dispose of the case—and the need to review too closely defense counsel's performance and, by implication, the criminal justice system's equity.⁹⁸ This flexible ordering allows courts to avoid both a determination as to counsel's skill⁹⁹ and an examination of systemic inadequacies in the criminal justice system¹⁰⁰ unless absolutely necessary.

In the context of fair-cross-section claims, the Court's reordering in *Smith* would be preferable for both the judiciary and the state. By leaving the issue of underrepresentation undecided, neither institution would need to confront the uncomfortable reality that judicially recognized disparity has been left unremedied.

Of course, since *Smith* reached the Court on a habeas petition, the Court has ultimately only decided whether the Michigan Supreme Court's application of the *Duren* test to the facts presented in *Smith* was reasonable.¹⁰¹ Accordingly, the Court's analysis here can just as easily be understood as explaining the reasonableness of the Michigan Supreme Court's *Duren* analysis, rather than as a substantive departure from the fair-cross-section analytical order. Regardless, contributing any additional ambiguity to fair-cross-

96. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

97. *Id.* at 698–700.

98. *See id.* at 697.

99. *Id.*

100. Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 417 n.188 (2007).

101. As is the standard of review set forth in 28 U.S.C. § 2254(d) (2006).

section jurisprudence is irresponsible—especially in a decision that abjectly failed to impart clarity in measuring underrepresentation.¹⁰²

V. CONCLUSION

On its face, *Smith* is a relatively simple rejection of a habeas corpus petition asserting a fair-cross-section claim. In terms of the opinion's clearest holdings, the Court instructed that it has no preference for any particular method of establishing underrepresentation¹⁰³ and that a defendant cannot show systematic exclusion "merely by pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation."¹⁰⁴ However, in addition to issuing these unelaborated holdings, the Court has committed serious missteps. First, the Court's failure to meaningfully confront the muddled jurisprudence surrounding the appropriate measure of underrepresentation necessary to satisfy *Duren*'s second prong is disappointing. The Court's silence here is particularly frustrating for small populations of distinctive groups because they are left vulnerable to total exclusion from jury venires should courts irresponsibly exercise the statistical discretion the *Smith* Court has left to them. Second, the Court's willingness to evaluate Smith's evidence of systematic exclusion even after finding that he had failed to show underrepresentation represents a curious and potentially irresponsible departure from fair-cross-section jurisprudence. Although the Court's flexibility in applying *Duren*'s prongs may not endure, it is an unfortunate injection of additional ambiguity to an area already muddled by competing statistical measures. Together, these failures have combined to make adjudicating and protecting a defendant's right to an impartial jury drawn from a fair cross section of the community unnecessarily vague and vulnerable to abuse.

102. *See supra* Part IV.A.

103. *Berghuis v. Smith*, 130 S. Ct. 1382, 1393–94 (2010).

104. *Id.* at 1395.