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# A BURDEN TOO HEAVY: *BERGHUIS v. SMITH* AND THE FADING RIGHT TO A JURY FROM A FAIR CROSS-SECTION OF THE COMMUNITY

THOMAS R. NEUMEIER\*

**Abstract:** In November of 1993, Diapolis Smith was convicted of second degree murder by an all-white jury in Kent County, Michigan. On appeal, Smith challenged the constitutionality of Kent County's jury-selection procedure, claiming he had not been afforded his Sixth Amendment right to a jury drawn from a fair cross-section of the community. This Comment examines Smith's claim and argues that the Supreme Court ultimately erred in ruling that Smith failed to make a prima facie case for a Sixth Amendment claim. First, this Comment argues that Smith presented sufficient evidence for the Court to draw a reasonable inference, under *Duren v. Missouri*, that Kent County's jury-selection procedures systematically excluded African Americans. Second, in the face of extensive academic research that demonstrates the nexus between socioeconomic disparity and minority underrepresentation on juries, this Comment argues that the Supreme Court should be more amenable to claims that hinge on the presence of socioeconomic factors. Finally, this Comment addresses the consequences of the *Berghuis v. Smith* decision and the solutions to minority underrepresentation in jury venires.

## INTRODUCTION

On March 30, 2010, the U.S. Supreme Court in *Berghuis v. Smith* (*Berghuis II*) reversed the Sixth Circuit's decision in *Smith v. Berghuis* (*Berghuis I*).<sup>1</sup> Almost twenty years prior to the Court's decision, Diapolis Smith was convicted of second-degree murder by an all-white jury in Michigan's Kent County.<sup>2</sup> He was sentenced to life with the chance of parole.<sup>3</sup> At voir dire, Smith challenged the racial composition of the venire panel from which the jury was selected.<sup>4</sup> The court denied his

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<sup>1</sup> *Berghuis v. Smith* (*Berghuis II*), 130 S. Ct. 1382, 1396 (2010), *rev'g* 543 F.3d 326 (6th Cir. 2008).

<sup>2</sup> *Id.* at 1387.

<sup>3</sup> *Id.* at 1389.

<sup>4</sup> *Id.*

objection, and on appeal, Smith claimed a violation of his Sixth Amendment right to a jury drawn from a fair cross-section of the community.<sup>5</sup> Specifically, Smith alleged that Kent County's jury-selection procedure lent itself to the consistent underrepresentation of African Americans in jury venires.<sup>6</sup> The Sixth Circuit Court of Appeals granted Smith a new trial because the Michigan Supreme Court failed to follow clearly established federal law.<sup>7</sup> The U.S. Supreme Court, however, relying on *Duren v. Missouri*, ruled that Smith had failed to prove a crucial prong of the *Duren* test, namely that the exclusion of African Americans in Kent County was systematic.<sup>8</sup>

This Comment argues that the Supreme Court erred in holding that Smith failed to make a prima facie case for a Sixth Amendment claim. Part I provides an overview of the *Berghuis* decision. Part II discusses the errors in the decision.<sup>9</sup> First, it argues that Smith provided

<sup>5</sup> *Id.* at 1387, 1389; see U.S. CONST. amend. VI. The Supreme Court made its first reference to the right to be tried by a jury composed of a fair "cross-section" of the community in *Thiel v. South Pacific Co.* See 328 U.S. 217, 220 (1946). In *Taylor v. Louisiana*, the Court repeated the key phrase from *Thiel* and solidified it as a constitutional principle, stating that "the fair-cross-section requirement is violated by the systematic exclusion of women . . ." See 419 U.S. 522, 531 (1975).

<sup>6</sup> *Berghuis II*, 130 S. Ct. at 1388.

<sup>7</sup> *Smith v. Berghuis (Berghuis I)*, 543 F.3d 326, 345 (6th Cir. 2008), *rev'd* 130 S. Ct. 1382 (2010). The standard that governs a federal court's review of a state court's decision is limited by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, § 104, 110 Stat. 1218, 1219 (codified as amended at 28 U.S.C. § 2254(d) (2006)); *Berghuis I*, 543 F.3d at 334. The relevant language from the AEDPA is as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) 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; or (2) 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.

28 U.S.C. § 2254(d). The Sixth Circuit found that the Michigan Supreme Court had unreasonably applied U.S. Supreme Court precedent, namely, *Duren v. Missouri*. *Berghuis I*, 543 F.3d at 345; see also *Duren v. Missouri*, 439 U.S. 357, 369 (1979) (holding that Missouri's practice of allowing all women an automatic exemption from jury service violated the defendant's constitutional right to a jury drawn from a fair cross-section of the community); *infra* Part II (discussing the Supreme Court's holding in *Duren*).

<sup>8</sup> *Berghuis II*, 130 S. Ct. at 1395; see also *Duren*, 439 U.S. at 366 (defining "systematic exclusion" as exclusion that is inherent in the particular jury-selection process utilized); *infra* Part II.

<sup>9</sup> See *Berghuis II*, 130 S. Ct. at 1395 (indicating the defendant-respondent bears the burden of demonstrating unequivocally the nexus between factors contributing to underrepresentation and actual underrepresentation); *infra* Part II.

sufficient evidence to link Kent County's jury-selection procedures with undisputed and consistent underrepresentation of African Americans in jury venires.<sup>10</sup> Second, in light of the extensive research connecting minority underrepresentation in jury venires with socioeconomic disparity, Part II argues that the Court should be amenable to Sixth Amendment claims that hinge on the presence of socioeconomic factors.<sup>11</sup> Finally, Part III addresses the consequences of *Berghuis II* and potential solutions to the problem of minority underrepresentation in jury venires.<sup>12</sup>

### I. FACTUAL AND PROCEDURAL BACKGROUND IN *BERGHUIS*

The State charged Smith with a variety of felony offenses after his involvement in a shooting during a nightclub brawl in Grand Rapids, Michigan on November 7, 1991.<sup>13</sup> Almost two years later, an all-white jury convicted Smith of second-degree murder as well as possession of a firearm during the commission of a felony.<sup>14</sup> Before the jury was sworn, Smith's lawyer challenged the racial composition of the jury venire, a pool of sixty to one-hundred potential jurors, of whom no more than three were African Americans.<sup>15</sup> The trial court denied the challenge; after his conviction, Smith appealed the trial court's ruling on the issue, arguing that it violated his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community.<sup>16</sup>

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<sup>10</sup> See *Berghuis I*, 543 F.3d at 344.

<sup>11</sup> See Hayward R. Alker et al., *Jury Selection as a Biased Social Process*, 11 LAW & SOC'Y REV. 9, 10 (1976) (discussing findings that support the hypothesis that jury-selection procedures discriminate against racial minorities).

<sup>12</sup> See *Ballard v. United States*, 329 U.S. 187, 195 (1946) (discussing consequences of systematic underrepresentation); SEYMOUR WISHMAN, ANATOMY OF A JURY: THE SYSTEM ON TRIAL 268 (1986) (discussing remedies to systematic underrepresentation of minorities in jury venires).

<sup>13</sup> *Berghuis I*, 543 F.3d 326, 329–30 (6th Cir. 2008), *rev'd* 130 S. Ct. 1382 (2010). That night, Christopher Rumbley was shot during a bar brawl. *Berghuis II*, 130 S. Ct. 1382, 1389 (2010). As the Supreme Court noted, witness accounts of the event were numerous, if not consistent: "Thirty-seven witnesses from the bar, including Smith, testified at the trial. Of those, two testified that Smith fired the gun. Five testified that the shooter was not Smith, and the remainder made no identifications of the shooter." *Id.*

<sup>14</sup> *Berghuis I*, 543 F.3d at 329. Significantly, a panel of fourteen venirepersons, including two alternates, as well as the twenty-three who had been excused, were all white. Brief of Respondent at 3, *Berghuis II*, 130 S. Ct. 1382 (2010) (No. 08-1402).

<sup>15</sup> *Berghuis I*, 543 F.3d at 330.

<sup>16</sup> *Id.*; see also *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975) (applying the fair cross-section requirement to a Sixth Amendment claim); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (invoking, for the first time, the "cross-section" concept).

During an evidentiary hearing ordered by the Michigan Appeals Court, the trial court applied the appropriate standard for a Sixth Amendment claim set out in *Duren*.<sup>17</sup> In order to have satisfied his burden of proof under *Duren*, Smith would have been required to show the following:

“(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.”<sup>18</sup>

The trial court found that, although African Americans did constitute a distinctive group and were consistently underrepresented in Kent County venires, Smith failed to show that their underrepresentation was systematic.<sup>19</sup>

The Michigan Court of Appeals reversed the trial court’s ruling, finding that Smith had satisfied all three prongs of the *Duren* test.<sup>20</sup> Specifically with regard to whether systematic exclusion of African Americans had occurred, the Michigan Court of Appeals found that the jury-selection process in Kent County had contributed to the underrepresentation.<sup>21</sup> The State then appealed to the Michigan Supreme Court, which unanimously reversed the Michigan Court of Appeals’ decision.<sup>22</sup> Reluctant even to grant Smith the first two elements of the *Duren* test, the Michigan Supreme Court stated it would give him “the benefit of the doubt on unfair and unreasonable underrepresentation.”<sup>23</sup> Nevertheless, the court then ruled unequivocally that Smith had failed to sat-

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<sup>17</sup> *Berghuis II*, 130 S. Ct. at 1389; see also *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (laying out the prima facie case for a Sixth Amendment claim).

<sup>18</sup> *Berghuis II*, 130 S. Ct. at 1388 (quoting *Duren*, 439 U.S. at 364).

<sup>19</sup> *Berghuis II*, 130 S. Ct. at 1385; see also *Duren*, 439 U.S. at 366 (applying the systematic exclusion prong of the test). In *Duren*, the petitioner met the requirement of showing systematic underrepresentation. 439 U.S. at 366. The petitioner demonstrated that the substantial underrepresentation of women occurred “in every weekly venire for a period of nearly a year,” which indicated to the Court that “[the] cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized.” *Id.*

<sup>20</sup> *People v. Smith*, No. 172558, 1999 WL 33445050, at \*3–5 (Mich. Ct. App. May 07, 1999), *rev’d* 615 N.W.2d 1, 4 (Mich. 2000).

<sup>21</sup> *Id.* at \*5.

<sup>22</sup> *People v. Smith*, 615 N.W.2d 1, 4 (Mich. 2000).

<sup>23</sup> *Id.* at 3.

isfy the third prong of *Duren*.<sup>24</sup> As Justice Cavanagh noted in his concurrence, the dearth of evidence showing that the Michigan circuit courts were, in fact, more afflicted by minority underrepresentation than the state's district courts was fatal to Smith's claim.<sup>25</sup>

Smith filed a petition for habeas corpus, claiming that he had been denied his constitutional rights to equal protection and due process because the Michigan Supreme Court upheld a systematically exclusionary jury-selection process in Kent County.<sup>26</sup> The Federal District Court for the Western District of Michigan denied Smith relief and, like the Michigan Supreme Court, found that Smith had failed to prove systematic exclusion in Kent County.<sup>27</sup>

Smith appealed, and the Sixth Circuit reversed the district court's decision.<sup>28</sup> According to the Sixth Circuit, Smith had satisfied each of the three prongs of the *Duren* test.<sup>29</sup> Specifically with respect to the systematic exclusion prong, which the Michigan Supreme Court held Smith failed to satisfy, the Sixth Circuit ruled that Smith's showing of consistent underrepresentation of African Americans on Kent County jury venires, combined with evidence that the underrepresentation was not random, was enough to demonstrate systematic exclusion under

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<sup>24</sup> *Id.* The Michigan Supreme Court stated, "[T]he 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." *Id.* A hypothetical posed in the Brief of the Respondent, however, tends to rebut this presumption. Brief of Respondent, *supra* note 14, at 54 (arguing that if a jury-selection system notified potential jurors strictly via e-mail, even though it could be proven that minorities had less access to the internet, the system would be exclusionary regardless of any contributing socioeconomic factors). Simply because the source of exclusion is rooted in socioeconomic factors does not make the procedure itself any less exclusionary. See *Berghuis I*, 543 F.3d at 341–42.

<sup>25</sup> See *Smith*, 615 N.W.2d at 12 (Cavanagh, J., concurring). Smith alleged that so-called "siphoning" of African American jurors from circuit to district court venires contributed to the underrepresentation of African Americans in Kent County juries. *Berghuis II*, 130 S. Ct. at 1388; *Berghuis I*, 543 F.3d at 332. According to the juror-selection procedure in Kent County, inner-city district courts received jurors before the surrounding circuit courts, without subsequent replenishment of the jury pool. *Berghuis II*, 130 S. Ct. at 1388. The Kent County Court Administrator corroborated that this procedure led to underrepresentation of African Americans in jury venires when she testified to her belief that the specific arrangement of jury selection between district and circuit courts contributed to the underrepresentation. *Berghuis I*, 543 F.3d at 342.

<sup>26</sup> Petition for Habeas Corpus, *Smith v. Berghuis*, No. 1:03-CV-87, 2006 WL 461248 (W.D. Mich. Feb. 23, 2006).

<sup>27</sup> *Berghuis*, 2006 WL 461248, at \*1, *rev'd* 543 F.3d 326 (6th Cir. 2008), *rev'd* 130 S. Ct. 1382 (2010).

<sup>28</sup> *Berghuis I*, 543 F.3d at 345.

<sup>29</sup> *Id.* at 344.

*Duren*.<sup>30</sup> Citing *United States v. Rogers*, the Sixth Circuit reasoned that it was highly improbable that African American underrepresentation on juries was a mere coincidence, and this improbability created a reasonable inference of systematic exclusion.<sup>31</sup> The State of Michigan appealed and the U.S. Supreme Court granted certiorari.<sup>32</sup>

The U.S. Supreme Court's review of Smith's claim was necessarily limited in scope.<sup>33</sup> Because Smith's Sixth Amendment claim came within the purview of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court merely had to decide if the Michigan Supreme Court's ruling was either (1) contrary to clearly established federal law, as construed in Supreme Court precedent, or (2) based on an unreasonable determination of the facts presented at trial.<sup>34</sup> On the crucial issue of systematic exclusion, the Court stated that *Duren* "hardly establishes . . . that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community."<sup>35</sup> The facts presented at trial, however, contradict this conclusion.<sup>36</sup> Although the underrepresentation of African Americans in jury venires in *Berghuis II* was not as severe as that in *Duren*, Smith's evidence of consistent underrepresentation sufficed to show that it was inherent in Kent County's jury-selection process.<sup>37</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 340; *see also* *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996) ("The extremely low probability that the underrepresentation would have occurred by chance alone provides further evidence that the system itself contributed to the lack of African American participation in the venire pools.").

<sup>32</sup> *Berghuis II*, 130 S. Ct. at 1382.

<sup>33</sup> *Id.* at 1385.

<sup>34</sup> *See id.*; *see also* 28 U.S.C. § 2254(d) (2006); *supra* note 7.

<sup>35</sup> *Berghuis II*, 130 S. Ct. at 1392.

<sup>36</sup> *See* Petition for Habeas Corpus, *supra* note 26. Smith linked African American underrepresentation in jury venires with Kent County's practice of sending potential jurors to district courts before circuit courts. *Berghuis I*, 543 F.3d at 332. Smith also demonstrated that Kent County's leniency in granting hardship excuses disproportionately affected African American representation in jury venires. *Id.* at 332–33.

<sup>37</sup> *See Berghuis I*, 543 F.3d at 344; *see also Duren*, 439 U.S. at 366. In *Duren*, the petitioner argued that women were underrepresented in the Jackson County, Missouri, jury pool. 439 U.S. at 360. The petitioner proved that, although women made up 54% of the jury-eligible population, they accounted for only 26.7% of the summoned jurors, and only 14.5% of those on the postsummons weekly venires. *Id.* at 362. Concededly, the underrepresentation of African Americans in Kent County was not as severe, but this does not render Smith's case incapable of coming within the scope of *Duren*, on account of the AEDPA's limitations. *See Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) ("[The AEDPA] permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.").

## II. APPLYING *DUREN* AND DRAWING A FAIR INFERENCE

In *Duren v. Missouri*, the Court defined systematic exclusion as “inherent in the particular jury-selection process utilized.”<sup>38</sup> Accordingly, evidence that consistent underrepresentation of a particular group in jury venires is not random supports an inference that systematic exclusion exists.<sup>39</sup> The proof of systematic exclusion that Smith presented at trial demonstrated a causal link between the jury-selection process and the underrepresentation of African Americans in Kent County jury venires.<sup>40</sup>

### A. Evidence at Trial and Smith’s Arguments

In his Supreme Court brief, Smith linked the underrepresentation of African Americans in Kent County jury venires with particular characteristics of the county’s jury-selection process.<sup>41</sup> First, Smith argued that Kent County’s practice of assigning jurors to inner-city district courts prior to assigning them to the surrounding circuit courts caused consistent underrepresentation of African Americans in the circuit courts’ venires.<sup>42</sup> Because renewal of the jury pool did not occur at any point during the process, fewer African Americans were available to serve as jurors for circuit courts.<sup>43</sup>

Second, Smith argued that Kent County’s particular leniency in granting excuses for those who wished to opt out of jury service disproportionately affected African American representation in jury venires.<sup>44</sup> Smith argued that African Americans were more likely to seek

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<sup>38</sup> See *Duren v. Missouri*, 439 U.S. 357, 366 (1979).

<sup>39</sup> See *United States v. Rogers*, 73 F.3d 774, 777 (8th Cir. 1996).

<sup>40</sup> See *Berghuis I*, 543 F.3d 326, 340 (6th Cir. 2008), *rev’d* 130 S. Ct. 1382 (2010).

<sup>41</sup> See *Berghuis II*, 130 S. Ct. 1382, 1394 (2010); Brief of Respondent, *supra* note 14, at 3–11. In his brief, Smith provided convincing statistical evidence that African Americans were consistently underrepresented in jury venires. See Brief of Respondent, *supra* note 14, at 11. Smith demonstrated that in the seventeen months before his trial, African Americans were underrepresented on Kent County venire panels by at least fifteen percent, in the six months before his trial by eighteen percent, and in the month of his trial by thirty-four percent. *Id.* at 10–11.

<sup>42</sup> Brief of Respondent, *supra* note 14, at 46.

<sup>43</sup> See *id.* at 47.

<sup>44</sup> See *Berghuis II*, 130 S. Ct. at 1389. Smith’s statistician and demographics expert testified that in Kent County, sixty-four percent of African American households with children were headed by single parents, while only nineteen percent of Caucasian households were run by single parents. *Berghuis I*, 543 F.3d at 340–41. Therefore, as the Sixth Circuit reasonably concluded, allowing an excuse for the “inability to find child care with no questions asked” would likely affect African American representation in jury venires. *Id.* at 341.



and receive excusals from service and that Kent County failed to take any action to counteract this incongruity.<sup>45</sup>

As to Smith's first argument regarding the order of selection between district and circuit courts, the Supreme Court found that Smith failed to show that African Americans were represented any less in state circuit court venires than district court venires.<sup>46</sup> For the Court, Smith's attempt to demonstrate a nexus between the lack of African Americans in the circuit court venires and Kent County's jury-selection process fell short.<sup>47</sup> Indeed, the Court questioned how Smith could make a siphoning argument at all when he provided no evidence of a disparity.<sup>48</sup>

Perhaps such an empirical showing would have helped Smith's argument, but its absence is hardly fatal to his claim.<sup>49</sup> Eighty-five percent of the African Americans living in Kent County resided in Grand Rapids, Michigan, where municipal courts' jury pools were filled first.<sup>50</sup> After the jury pools at the district court level were filled, the pool of potential jurors was not renewed, despite the fact that many African Americans had already been selected to serve on district court juries.<sup>51</sup>

The Circuit Court Administrator's revision of the jury-selection procedure a month after Smith's trial corroborated the allegation that inner-city district courts siphoned African Americans away from circuit court venires.<sup>52</sup> The procedural correction reversed the priority between district and circuit courts so that circuit courts received jurors first.<sup>53</sup> The change was motivated by the administrator's observation of consistent underrepresentation of African Americans in circuit court venires.<sup>54</sup> From these two factors—the county's failure to take into con-

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<sup>45</sup> *Berghuis I*, 543 F.3d at 332, 340–41.

<sup>46</sup> See *Berghuis II*, 130 S. Ct. at 1394.

<sup>47</sup> See *id.* at 1388, 1394.

<sup>48</sup> See *id.*

<sup>49</sup> See *Duren*, 439 U.S. at 363, 366–67; *Berghuis I*, 543 F.3d at 342–43 (“The systematic exclusion requirement as discussed in *Duren* . . . does not mean that a defendant's proof must be unequivocal . . . but instead, the proof must be sufficient to support an inference that a particular process results in the underrepresentation of a distinctive group.”).

<sup>50</sup> *Berghuis I*, 543 F.3d at 330–31.

<sup>51</sup> See *id.* at 342. The effects of this practice were compounded by the fact that “once an individual was assigned to a district court venire, he or she was not placed back on the qualified list for the circuit court because of a statutory exclusion for individuals who served on a jury in the previous twelve months.” *Id.*

<sup>52</sup> *Berghuis II*, 130 S. Ct. at 1384; *Berghuis I*, 543 F.3d at 332.

<sup>53</sup> *Berghuis I*, 543 F.3d at 332.

<sup>54</sup> *Id.* at 342. Kim Foster, the Kent County Court Administrator, stated during the evidentiary hearing that Kent County “revised the juror assignment policy ‘based on the belief that the respective districts swallowed up most of the minority jurors, and [the] circuit court was essentially left with whatever was left, which did not represent the entire coun-

sideration the geographical distribution of African Americans and the deliberate *ex post* revision of the jury-selection process—the Court should have drawn a reasonable inference of systematic underrepresentation.<sup>55</sup> The Supreme Court erred in refusing to make this inference by substituting its own assessment of the underrepresentation for that of the Circuit Court Administrator who recognized and corrected it.<sup>56</sup>

As to Smith’s second argument alleging an overly lenient excuse policy and procedure, the Supreme Court similarly found his reasoning unconvincing.<sup>57</sup> Again, the Court did not believe that Smith had demonstrated a sufficient nexus between the underrepresentation and the jury-selection procedures.<sup>58</sup> The Court stated, “No ‘clearly established’ precedent of this Court supports Smith’s claim that he can make out a *prima facie* case merely by pointing to a host of factors that . . . *might* contribute to a group’s underrepresentation.”<sup>59</sup>

Unfortunately, however, the Court’s rejection of Smith’s second argument is a mischaracterization of both his reasoning and Supreme Court precedent.<sup>60</sup> Implicit in the Court’s opinion is the principle that Smith had to prove unequivocally that Kent County’s willingness to grant hardship excuses disproportionately affected African American representation in jury venires.<sup>61</sup> The appropriate inquiry, however,

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ty . . . .” *Id.* Richard Hillary, director of the Kent County Public Defender’s Office and Co-Chair of the Jury Minority Representation Committee of the Grand Rapids Bar Association, also testified at the evidentiary hearing that he repeatedly noticed a paucity of African Americans in Kent County jury venires. *Id.* at 332. Specifically, Hillary testified that the Jury Minority Representation Committee had “studied the phenomenon and determined that [Kent County was] losing minorities by choosing the District Court jurors first and not returning the unused ones to the . . . pool that the Circuit Court was taken from.” *Id.* at 342. The Supreme Court provided no clear explanation as to why it chose to substitute its own judgment of the causes of underrepresentation for that of the court personnel who observed underrepresentation firsthand, had grounds to believe it was systematic, and acted deliberately to counteract the system’s flaws. *See Berghuis II*, 130 S. Ct. at 1394.

<sup>55</sup> *See Duren*, 439 U.S. at 363, 366–67; *Berghuis I*, 543 F.3d at 342–43.

<sup>56</sup> *See Berghuis II*, 130 S. Ct. at 1394; *Duren*, 439 U.S. at 363, 366–67; *Berghuis I*, 543 F.3d at 342–43. In *Duren*, the petitioner never provided unequivocal proof that the jury-selection procedures led to women’s underrepresentation in venires. *See* 439 U.S. at 363, 366–67. Instead, it was the petitioner’s “undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year [which] manifestly indicat[ed] that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized.” *Id.* at 366. Thus, the Court in *Duren* inferred that the underrepresentation of women was systematic because it was consistent. *See id.*

<sup>57</sup> *Berghuis II*, 130 S. Ct. at 1395.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*

<sup>60</sup> *See id.*; *Duren*, 439 U.S. at 357; *Berghuis I*, 543 F.3d at 339–41.

<sup>61</sup> *See Berghuis II*, 130 S. Ct. at 1395.

should have been whether the presence of certain procedural factors created a reasonable inference that the system itself led to African American underrepresentation.<sup>62</sup>

### B. Academic Support

A wealth of academic research exists that demonstrates the tendency of American jury-selection procedures to exclude minorities from venires.<sup>63</sup> Although the Supreme Court could not have considered this research independently of the specific facts in *Berghuis II*, its existence certainly supports a reasonable inference that Kent County's processes resulted in the underrepresentation of African Americans in jury venires.<sup>64</sup> If the Supreme Court had applied its precedent properly, it would have found that Kent County's practice of filling district court before circuit court juries, coupled with its lenient juror-excuse policy, created a reasonable inference of systematic exclusion of African Americans from circuit court juries.<sup>65</sup> In so doing, the Court would have confirmed what academics have known for decades.<sup>66</sup>

The major hypothesis in the relevant research is the so-called "Middle American Bias."<sup>67</sup> Essentially, research shows that middle-class Caucasians are historically overrepresented in jury venires.<sup>68</sup> The reasons for this phenomenon are numerous, but many are systematic in nature.<sup>69</sup> For example, according to Alker, Hosticaka, and Mitchell, two of the more problematic features of jury systems, which contribute to minority underrepresentation, are reliance on voter registration lists—an issue not present in *Berghuis*—and the discretionary excuses granted

<sup>62</sup> See *Duren*, 439 U.S. at 357; *Berghuis I*, 543 F.3d at 339–41.

<sup>63</sup> See Alker et al., *supra* note 11, at 10 (discussing findings in support of the hypothesis that jury-selection procedures discriminate against racial minorities); Robert A. Carp, *Federal Grand Juries: How True a "Cross Section of the Community,"* 7 JUST. SYS. J. 257, 261 (1982) (compiling evidence that African Americans and Hispanics are underrepresented to a statistically significant degree in jury venires); Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, 22 J. BLACK STUD., 196, 197–201 (1991) (discussing racial discrimination in jury-selection procedures); David Kairys, *Juror Selection: The Law, a Mathematical Method of Analysis, and a Case Study*, 10 AM. CRIM. L. REV. 771, 771 (1972) (discussing the fundamental flaws in juror selection and the reasons for underrepresentation of the black, poor, and young in jury venires).

<sup>64</sup> See *Berghuis II*, 130 S. Ct. at 1396; *Berghuis I*, 543 F.3d at 342–43.

<sup>65</sup> See *Berghuis I*, 543 F.3d at 342–43.

<sup>66</sup> See Alker et al., *supra* note 11, at 10; Carp, *supra* note 63, at 261; Fukurai et al., *supra* note 63, at 197–201; Kairys, *supra* note 63, at 771.

<sup>67</sup> Alker et al., *supra* note 63, at 10.

<sup>68</sup> See *id.*

<sup>69</sup> *Id.*

to jurors who wish to opt out of service.<sup>70</sup> Relevant to Smith's argument, in particular, is that "[s]election procedures that result in a spate of hardship excuses and exemptions" demonstrably undermine the fair cross-section requirement.<sup>71</sup> Unless properly accounted for and policed, such excuses introduce non-random factors that can chip away at a fair cross-section of the community.<sup>72</sup> Additionally, because African Americans, such as those in Kent County, generally fall within a lower socioeconomic class than Caucasians, they tend to be underrepresented to a statistically significant degree in jury venires.<sup>73</sup>

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<sup>70</sup> *Id.*; see also Joseph L. Gastwirth & Qing Pan, Statistical Measures and Methods for Assessing the Representativeness of Juries: A Reanalysis of the data in *Berghuis v. Smith* 14 (Columbian College of Arts and Sciences, George Washington University, Working Paper July 3, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1529442](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529442) ("[T]he master jury list in Kent County was not based on voter registrations but combined lists of holders of driver's licenses or identification cards issued by the Department of Motor Vehicles (DMV) to non-drivers.").

<sup>71</sup> Joanna Sobol, *Hardship Excuses and Occupational Exemptions*, 69 S. CAL. L. REV. 155, 159 (1995); see also *Hirst v. Gertzen*, 676 F.2d 1252, 1261 n.25 (9th Cir. 1982) ("The disproportionate utilization of juror excuses by a given group may have clear importance where the Sixth Amendment's fair-cross section requirement is involved."). The Sixth Circuit recognized the systemic implications of juror excuse policies in the following manner in *Berghuis I*:

If, for example, a county created a juror exemption or an excuse for renters where 90 percent of African-Americans in the county fell into that category, any resulting underrepresentation would clearly be "inherent in the system" inasmuch as the system made a socio-economic factor (i.e., renting) relevant to the makeup of the jury pool.

See 543 F.3d at 341–42. In contrast, the Michigan Supreme Court implied that notifying jurors to appear by e-mail, even if African Americans have less access to e-mail than whites, would prove nothing because "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." Brief of Respondent, *supra* note 14, at 54 (quoting *People v. Smith*, 615 N.W.2d 1, 3 (Mich. 2000)).

<sup>72</sup> See *Berghuis I*, 543 F.3d at 341. Hardship excuses are often sought because of the length of time required for jury service as well as the "inefficiency and discomfort of the time spent at the courthouse." Brief of Respondent, *supra* note 14, at 10.

<sup>73</sup> See *id.* at 9, 10 (stating that 31.5 percent of African Americans in Kent County lived in "Poverty Households," compared to 6.7 percent of Caucasians); Sobol, *supra* note 71, at 159 (arguing that overly lenient excuse policies can dramatically affect the fair cross-section of a jury pool); see also WISHMAN, *supra* note 12, at 271; AJAMU DILLAHUNT ET AL., STATE OF THE DREAM 2010: DRAINED, JOBLESS AND FORECLOSED IN COMMUNITIES OF COLOR, 9–11 (2010), available at [http://www.faireconomy.org/files/SoD\\_2010\\_Drained\\_Report.pdf](http://www.faireconomy.org/files/SoD_2010_Drained_Report.pdf) (stating that, as of 2009, African Americans earned sixty-two cents for every dollar of white income on average and that, as of 2007, African American families' median income was almost thirty-thousand dollars less than white families' median income). As Seymour Wishman noted,

The small fees mean that few people making more than the minimum wage can afford the low income imposed by jury service. . . . Only those with an employer who will continue to pay their salary can participate in jury service without a

In addition to generally being of a lower economic class, other socioeconomic characteristics of African Americans in Kent County could have contributed to their underrepresentation in jury venires.<sup>74</sup> At trial, Smith's demographics and statistics expert presented evidence that fifty-nine percent of African Americans in Kent County were renters as opposed to homeowners, compared to only twenty-seven percent of Caucasians.<sup>75</sup> Also, thirty-two percent of African Americans in Kent County had moved within the last fifteen months, compared to twenty percent of Caucasians.<sup>76</sup> Research demonstrates that mobility, as a characteristic of African Americans, is not unique to those in Kent County.<sup>77</sup>

As to the effects of mobility, Seymour Wishman writes, "[S]ome groups, like the poor, the young, and blacks, are more mobile than others and as a result of their mobility the jury-selection process is less inclusive."<sup>78</sup> Being more mobile increases the likelihood that an individual will not receive a summons to serve on a jury or that the address the State has on record is no longer current.<sup>79</sup> Thus, such research supports an inference that African Americans in Kent County, as a result of their higher mobility, are less likely to serve on jury panels than Caucasians.<sup>80</sup>

The extensive research in the area certainly corroborates the evidence that Smith's demographics and statistics expert presented at trial.<sup>81</sup> Indeed, Smith's arguments reflected the conclusions to which countless social scientists have come on the issue of minority underrep-

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major economic sacrifice. This reduces the representativeness of the jury pool . . . .

WISHMAN, *supra* note 12, at 9–11.

<sup>74</sup> WISHMAN, *supra* note 12, at 270; Fukurai et al., *supra* note 63, at 201–02.

<sup>75</sup> Brief of Respondent, *supra* note 14, at 10.

<sup>76</sup> *Id.*

<sup>77</sup> WISHMAN, *supra* note 12, at 270.

<sup>78</sup> *Id.* ("A study in the eastern part of Massachusetts found 41 percent fewer blacks on juries than justified by their population, and attributed this discrepancy, at least in part, to the residency requirement in the voter registration lists and the higher mobility of blacks.").

<sup>79</sup> *Id.*; see Fukurai et al., *supra* note 63, at 202.

<sup>80</sup> See WISHMAN, *supra* note 12, at 270; Fukurai et al., *supra* note 63, at 202.

<sup>81</sup> See WISHMAN, *supra* note 12, at 270 (finding that African Americans are typically more mobile than other races and therefore are less represented in jury venires); DILLAHUNT ET AL., *supra* note 73, at 4, 9–11; see also Hayward R. Alker & Joseph J. Barnard, *Procedural and Social Biases in the Jury Selection Process*, 3 JUST. SYST. J. 220, 230 (1977) (finding that, from the total eligible pool of black jurors, only three-quarters are actually selected for jury venires).

resentation on juries.<sup>82</sup> Because Smith's evidence was enough to establish a reasonable inference that Kent County's jury-selection process systematically excluded African Americans, the Supreme Court should have allowed his Sixth Amendment claim.<sup>83</sup>

### III. CONSEQUENCES AND SOLUTIONS

The consequences of the Supreme Court's error in *Berghuis II* are difficult to quantify.<sup>84</sup> The Supreme Court's statements in *Ballard v. United States*, however, provide valuable insight into the psychological influences of systematic underrepresentation in jury venires:

[R]eversible error does not depend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . The injury is not limited to the defendant—there is an injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts.<sup>85</sup>

As the Court in *Ballard* intimates, when African Americans, or members of any other minority group, “find virtually no ‘peers’ on American juries,” they (quite understandably) lose confidence in the system.<sup>86</sup>

*Ballard* also suggests that there are practical legal consequences for defendants who face systematic underrepresentation within jury venires.<sup>87</sup> A fair cross-section of the community helps protect “against the exercise of arbitrary power” and “make[s] available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.”<sup>88</sup> The Supreme Court's rul-

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<sup>82</sup> See Alker et al., *supra* note 11, at 10; Carp, *supra* note 63, at 261; Fukurai et al., *supra* note 63, at 203; Kairys, *supra* note 63, at 771.

<sup>83</sup> See *Berghuis I*, 543 F.3d at 344.

<sup>84</sup> See *Berghuis II*, 130 S. Ct. 1382, 1394 (2010); *Ballard v. United States*, 329 U.S. 187, 195 (1946).

<sup>85</sup> *Ballard*, 329 U.S. at 195.

<sup>86</sup> Kairys, *supra* note 63, at 771; see also Paul D. Butler, *Race-Based Jury Nullification: Case-In-Chief*, 30 J. MARSHALL L. REV. 911, 920 (1996) (stating that the presence of African American jurors serves a symbolic role, representing “the fairness and the impartiality of the law,” which works to counteract the already-prevalent “racial critiques” of the U.S. criminal justice system).

<sup>87</sup> See *Ballard*, 329 U.S. at 195.

<sup>88</sup> *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

ing in *Berghuis II*, however, threatens to strip the fair cross-section requirement of any practical significance.<sup>89</sup>

In essence, *Berghuis II* places a heightened burden of proof upon criminal defendants for Sixth Amendment claims.<sup>90</sup> This heightened burden is especially problematic for criminal defendants when socio-economic factors are inextricably linked to issues of proof.<sup>91</sup> Requiring a criminal defendant to prove that minority underrepresentation on juries is the result of state procedures rather than simply providing sufficient evidence from which a reasonable inference of systematic exclusion may be drawn undermines the purpose of a right to a jury trial and renders the Sixth Amendment hollow.<sup>92</sup>

There are remedies that can impact jury-selection procedures, despite *Berghuis II*, if courts are willing to apply *Duren* in a more meaningful way.<sup>93</sup> One remedy is to limit the number of excuses granted to potential jurors, and instead allow for jurors to postpone their service to a time that is less taxing.<sup>94</sup> On this point, Wishman has argued, “Where a request, even for hardship, really appears to focus on the inconvenience or imposition caused by a certain date, a postponement rather than an excuse should be granted.”<sup>95</sup> Postponement accomplishes the twin goals of achieving a fair-cross section of the community as well as “increasing citizen satisfaction in the criminal justice system.”<sup>96</sup>

Other solutions are more technical; for instance, if a jury service “questionnaire is returned marked ‘deceased,’ ‘moved,’ or ‘addressee unknown,’ or if a questionnaire is not returned after a reasonable time, another questionnaire could be sent to an alternative first name at the next address on the list.”<sup>97</sup> Also, eligible juror lists can be expanded and supplemented with other helpful lists, such as presidential registries, to include a broader cross-section of the community.<sup>98</sup> Finally, at the very least, enforcement of summons for those who fail to return their jury questionnaires or show up for their day of service can be of great help.<sup>99</sup>

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<sup>89</sup> See *Berghuis II*, 130 S. Ct. at 1395; *Ballard*, 329 U.S. at 195.

<sup>90</sup> See *Berghuis II*, 130 S. Ct. at 1395.

<sup>91</sup> See *id.*; *Berghuis I*, 543 F.3d 326, 342–44 (6th Cir. 2008), *rev'd* 130 S. Ct. 1382 (2010).

<sup>92</sup> See *Berghuis II*, 130 S. Ct. at 1395; *Ballard*, 329 U.S. at 195.

<sup>93</sup> WISHMAN, *supra* note 12, at 268.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Alker et al., *supra* note 11, at 39 (“A major source of bias against certain groups may be the use of outdated lists” because “neighborhoods tend to be racially homogenous”).

<sup>98</sup> *Id.*

<sup>99</sup> Sobol, *supra* note 71, at 228.

Not only will enforcement ensure a better cross-section of the community, but it will provide a higher rate of compliance in the future.<sup>100</sup>

#### CONCLUSION

The U.S. Supreme Court erred in its decision in *Berghuis II*. Diapolis Smith provided sufficient evidence for the Court to draw a reasonable inference of the systematic exclusion of African Americans from jury venires in Kent County, Michigan. Furthermore, extensive research corroborates the connection alleged by Smith—that socioeconomic disparity contributes to minority underrepresentation in jury venires. Rather than requiring Smith to prove the nexus between minority underrepresentation in jury venires and state procedures, the Court should have properly applied its precedent in *Duren v. Missouri* and acknowledged Smith’s argument—an argument that mirrors the pertinent social science literature. Finally, the Court’s decision in *Berghuis II* signals a continuation of the decline in confidence in the justice system and a heightened burden of proof for those alleging Sixth Amendment violations. Viable solutions, however, do exist for the problem of minority underrepresentation in jury venires, including postponement of service for those asserting hardship and enforcement of summons. These are only a few of the possible remedies, but small changes can go far in helping secure the right to a fair cross-section of the community in the jury box. The *Berghuis II* ruling confirms the need for change, and, in the wake of the Supreme Court’s decision, court personnel must take every measure to restore confidence in every defendant’s right to a fair trial.

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<sup>100</sup> See *id.* at 228–29.



