

08-1402 BERGUIS V. SMITH

DECISION BELOW:543 F.3d 326

LOWER COURT CASE NUMBER: 06-1463

QUESTIONS PRESENTED:

In *Duren v. Missouri*, this Court established a three-prong standard for determining whether a defendant was able to demonstrate a prima facie violation of the Sixth Amendment right to have a jury drawn from a fair cross section of the community. The circuits have split on the issue about the proper test for determining what constitutes a fair and reasonable representation of a distinct group from the community within the venires (jury pool) under the second prong of *Duren*. The Michigan Supreme Court ultimately concluded that the small disparities at issue here for African Americans (7.28% in the community as against 6% in the venires during the time period measured) did not give rise to a constitutional violation. The question presented is:

Whether the U.S. Court of Appeals for the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren* where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which this Court has never applied and which four circuits have specifically rejected.

CERT. GRANTED 9/30/2009