

No. 08-1402

IN THE
Supreme Court of the United States

MARY BERGHUIS, Warden,
Petitioner,
vs.

DIAPOLIS SMITH,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

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 v. Missouri*, 439 U. S. 357 (1979), where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community compared to the venire), which this Court has never applied and which four circuits have specifically rejected.

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**BRIEF *AMICUS CURIAE* OF THE
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IN SUPPORT OF PETITIONER**

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the Sixth Circuit Court of Appeals declared the jury selection process unconstitutional

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

because of a minor and unintended variation between the racial composition of the venire and that of the jury-eligible population, even though this variation had no discernible effect on the fairness of the trial or the reliability of the verdict. This result is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts and history of this case are described in detail in the Brief for Petitioner at pages 2-18. We recap them here briefly to frame the issues discussed in this brief.

Diapolis Smith shot and killed Christopher Rumbly on November 7, 1991, during a fight in a bar in Grand Rapids, Michigan. He was convicted of second-degree murder in a jury trial and sentenced to life imprisonment. *Id.*, at 4-5.

Smith appealed, and the Michigan Court of Appeals remanded for an evidentiary hearing. *People v. Smith*, 463 Mich. 199, 208-209, 615 N. W. 2d 1, 5 (2000) (Cavanagh, J., concurring).² This hearing produced the details of the jury selection process.

The source list for jury selection is the list of persons who have been issued driver's licenses or identification cards. Brief for Petitioner 6. Of the mailed notices, four to five percent are returned as undeliverable. Another 15 to 20 percent do not respond. About half of the latter group respond to a second notice. For those who do not respond to the second notice, a "show cause" order is issued, but no further action is taken to enforce it. *Id.*, at 7, and n. 10.

2. The concurring opinion is more detailed than the majority opinion.

After applying statutory exemptions, which are not challenged in this case, the list is further reduced by random selection, and the county issues summonses to those selected. The persons summoned may request to be excused for hardship, such as difficulties with child care, transportation, or employment. *Id.*, at 7-8. The defendant's expert testified that black prospective jurors are more likely to seek to be excused because far greater percentages are single parents or have no vehicle in the family. *Id.*, at 8-9.

There was also testimony regarding the allocation of jurors between the circuit and district courts. The circuit court in Michigan is the trial court of general jurisdiction. See Mich. Const., Art. VI, § 13. Kent County is one circuit. See Mich. Comp. Laws § 600.518. The district courts are courts of limited jurisdiction. In criminal cases they have jurisdiction of misdemeanors and violations of city ordinances. See Mich. Comp. Laws § 600.8311. Kent County has multiple districts, one of which is the City of Grand Rapids. See Mich. Comp. Laws § 600.8130. The present case, being a felony, was tried in the circuit court.

At the time of the present case, jurors were assigned to the district court first, and those not needed by the district court were then assigned to the circuit court. This order of assignment was reversed in the following year based on the perception “that the respective districts essentially swallowed up most of the minority jurors” Brief for Petitioner 9 (quoting the court administrator). In practice, though, reversing the order of assignment made little difference. See *Smith*, 463 Mich., at 225, n. 15, 615 N. W. 2d, at 12, n. 15 (concurring opinion).

For the period April 1993 to October 1993, a period including *Smith*'s trial, the defense expert calculated that a genuinely representative sample would have had

67.6 black jurors out of 929, or 7.28%. Because information on the race of the jurors actually summoned was not available, he had to estimate that figure at 55.4. See Brief for Petitioner 12. That comes to 5.96%. The difference is about one and one-quarter percent. Using the “comparative disparity” method, the defense expert calculated that the representation of black persons among the prospective jurors was 18% below the expected value of a random sample: $(67.6 - 55.4) / 67.6 \times 100 = 18.0$. No testimony was presented using the “standard deviation” method. See *Smith*, 463 Mich., at 205, n. 1, 615 N. W. 2d, at 3, n. 1.

The trial court found no Sixth Amendment violation, but the Court of Appeals reversed. See *id.*, at 212-213, 615 N. W. 2d, at 6-7 (concurring opinion). The Michigan Supreme Court granted leave to appeal, reversed, and remanded for consideration of remaining issues. *Id.*, at 207, 615 N. W. 2d, at 4. On remand, the Court of Appeals affirmed in an unpublished opinion, *People v. Smith*, 2001 Mich. App. LEXIS 1644 (2001), and the Michigan Supreme Court denied leave to appeal. *People v. Smith*, 465 Mich. 951, 640 N. W. 2d 873 (2002).

On federal habeas corpus, the Federal District Court denied relief in an unpublished opinion. See *Smith v. Berghuis*, 543 F. 3d 326, 329 (CA6 2008). The Sixth Circuit reversed, finding the Michigan Supreme Court’s decision to be unreasonable within the meaning of 28 U. S. C. § 2254(d). See Brief for Petitioner 16-18. This Court granted certiorari on September 30, 2009.

SUMMARY OF ARGUMENT

The question presented in this case concerns the fair-cross-section requirement of the Sixth Amendment. Fairly included in that question is whether the Sixth

Amendment really has a fair-cross-section requirement. It did not at the time it was adopted.

Until *Taylor v. Louisiana*, it was established that the cross-section requirement existing in the federal courts was not constitutional and was not binding on the States. Also, at that time, the jurisprudence of equal protection presented obstacles for defendants objecting to the exclusion of women from juries. *Taylor* read a cross-section requirement into the Sixth Amendment to avoid these limitations, but the limitations have long since crumbled.

The groups considered “distinctive” for the purpose of the Sixth Amendment are essentially the same as the classifications considered “suspect” for the Equal Protection Clause. Defendants are no longer required to be in the same group as the excluded jurors to make an equal protection objection. In this case, as in *Montejo v. Louisiana*, we have two constitutional provisions covering largely the same ground, with one of them having a very shaky foundation.

The Sixth Amendment cross-section requirement provides little benefit that is not already provided by the Equal Protection Clause. As the present case illustrates, it carries a cost of federal court intervention in matters that should be left to local administration.

Taylor v. Louisiana meets the criteria for overruling a precedent. It was poorly reasoned to begin with, and there is no reliance interest whatever at stake. Most importantly, *Taylor* is inconsistent with recent developments in the jurisprudence of the Sixth Amendment. In both the *Apprendi* and *Crawford* lines of decisions, this Court has held that the historical understanding of the Sixth Amendment is controlling.

Taylor v. Louisiana was useful in its day, but that day is long since past. It is time to give the *Taylor* rule

a respectful burial and rely solely on the Equal Protection Clause as the constitutional basis for protection against discrimination in the selection of juries.

ARGUMENT

The petitioner in this case argues that the Michigan Supreme Court's application of this Court's precedents regarding the "fair-cross-section" requirement of the Sixth Amendment to the facts of this case was reasonable within the meaning of 28 U. S. C. § 2254(d)(1), Brief for Petitioner 22-38, 49-62, and, even more, that it was correct. Brief for Petitioner 38-48.

These arguments are valid and provide more than sufficient justification to reverse the decision of the Sixth Circuit in this case.³ However, a more fundamental question is fairly included in the questions posed by the petitioner. Does the Sixth Amendment really have a fair-cross-section requirement at all? That requirement was established at a time when (1) the original understanding of the Sixth Amendment had been relegated to a minor place in this Court's jurisprudence, and (2) limitations on the Equal Protection Clause rendered it ineffective for dealing with the exclusion of women from juries. Neither of those conditions is true today. We now have two bodies of jurisprudence, developed under two different sections of the Constitu-

3. The Sixth Circuit noted, "Courts across the country have held [as the state court in this case did] that absolute disparities in this range are not constitutionally significant." *Smith v. Berghius*, 543 F. 3d 326, 337 (CA6 2008). That fact alone is sufficient to dispose of the case under 28 U. S. C. § 2254(d)(1). See *Carey v. Musladin*, 549 U. S. 70, 76-77 (2006); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey v. Musladin*, No. 05-785, pp. 13-16, <http://www.cjlf.org/briefs/Musladin.pdf>.

tion, covering the same territory. As in *Montejo v. Louisiana*, 556 U. S. ___, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009), it is time to reconsider whether we can dispense with one of them.

I. The Sixth Amendment “cross-section requirement” is a fiction that has outlived its usefulness.

A. Twelve Good Men and True.

Beyond dispute, at common law neither the trial jury nor the panel from which it was derived was a representative cross-section of the community as that term is used by modern pollsters and social science researchers. Blackstone referred to the jury as “a tribunal composed of twelve good men and true” 3 W. Blackstone, Commentaries 349 (1st ed. 1768). The most obvious way in which the common law jury was not representative of the whole society is that it consisted only of men. Also, in a society formally separated into social strata, a jury of one’s peers was a jury selected from the defendant’s stratum, so that lords were tried by a jury of lords, see *ibid.*, a far cry from a representative slice of the community.

Property qualifications also made the jury unrepresentative. In England, the property ownership requirement “disqualified at least three-quarters of the adult male population from becoming jurors.” Alschuler & Diess, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 877 (1994). A property ownership requirement was not considered contrary to the fundamental right of jury trial, but just the opposite. For treason cases, the freeholder requirement was among the *protections* specified in the original Bill of Rights. See 1 W. & M., 2d sess., c. 2, § 11 (1689).

In early America, every state except Vermont had a property or taxpaying qualification. Alschuler & Diess, 61 U. Chi. L. Rev., at 877. While greater availability of land made the disqualified segment smaller than in England, the property requirement still disqualified somewhere in the range of one quarter to half. See *ibid.*

Another significant source of nonrepresentativeness was the directions to the officer charged with summoning the veniremen. The officer was not directed to summon a representative sample. A direction to the marshal to summon “a number of honest and lawful men,” see *United States v. Fries*, 3 Dall. (3 U. S.) 515, 515 (CC Pa. 1799), on its face excludes dishonest and unlawful men, surely a substantial portion of any population. In 1930, a Philadelphia judge described how he did his additional duty as a jury commissioner:

“In actually selecting the names, I was guided by the occupations or businesses of the electors, taking by preference those who were designated as householders and who lived on the chief streets; for, in a big city like Philadelphia, where thousands of names must be marked every year, it is impossible, for those fixed with the responsibility, to select jurors known to them personally.” R. von Moschzisker, *Trial By Jury* 76 (2d ed. 1930).

It would have been much easier to simply pick names at random, but this judge/commissioner did not see that as his duty. He perceived his duty to be selecting jurors who would be better than average in providing a fair trial. It is fair to infer from the common expressions of “good and lawful men” and “twelve good men and true” that this was the prevailing view of what a jury should be at the time the Sixth Amendment was adopted. Not only was a *representative* cross-section not considered required for “an impartial jury,”

it was not considered desirable. See Tucker, Of the Trial by Jury in Virginia, in 4 W. Blackstone, Commentaries, Note F, Appendix 64-69 (S. Tucker ed. 1803) (decrying methods of selection then in use and proposing a statute for selecting “such as be of the best fame, reputation, and understanding, and credit, in their county”).

More subtly, the officer is likely to select people known to him personally or by reputation. The “key man” system of selecting jurors persisted in many states into the late twentieth century, and it is obviously less likely than random selection methods to produce a representative cross-section. See *Castaneda v. Partida*, 430 U. S. 482, 497, and n. 18 (1977).

What did the First Congress, the people who drafted and approved the Sixth Amendment and submitted it to the states for ratification, think of juries that were not entirely representative of the community? While surely aware that the practices of the states for qualifying and selecting jurors did not produce a representative cross-section of the community, the First Congress nonetheless adopted the state practices for the federal court. Judiciary Act of 1789, § 29, 1 Stat. 88; see also *Taylor v. Louisiana*, 419 U. S. 522, 536, and n. 18 (1975).

Beyond genuine question, the Sixth Amendment as originally understood did not require that the jury be drawn from a representative cross-section of the community.

B. From Reconstruction to Hoyt v. Florida.

The Bill of Rights was adopted to preserve pre-existing liberties from future encroachment. See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797, 171 L. Ed. 2d 637, 657 (2008). In the wake of the Civil War, three amendments of an entirely different charac-

ter were adopted. They were intended to make massive changes to the status quo and to clear-cut large areas of existing law. The Thirteenth Amendment eliminated the institution of slavery, the laws authorizing it, and even a part of the Constitution itself. See U. S. Const., Art. IV, § 2, cl. 3. The Fourteenth Amendment was aimed directly at the Black Codes adopted by the Southern States. See McConnell, *The Importance of Humility In Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *Fordham L. Rev.* 1269, 1281 (1997). The Fifteenth Amendment invalidated existing laws denying the franchise on the basis of race. See *Slaughter-House Cases*, 16 Wall. (83 U. S.) 36, 71 (1873). If the Constitution contains any provision that invalidates a jury selection practice that was common at the time of the Founding, that provision is more likely to be found in the Civil War Amendments than in the Bill of Rights.

It did not take long to apply the Fourteenth Amendment to jury selection. In the Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, § 4, 18 Stat. 336-337, Congress enacted the predecessor of 18 U. S. C. § 243. The Equal Protection Clause of the Fourteenth Amendment authorized this statute and invalidated contrary state statutes. *Strauder v. West Virginia*, 100 U. S. 303, 310-312 (1880); see also *Ex Parte Virginia*, 100 U. S. 339, 347-348 (1880). However, the *Strauder* Court expressly disclaimed any implication that the prohibition of the Fourteenth Amendment extended beyond racial discrimination. The State “may confine the selection [of jurors] to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this Its aim was against discrimination because of race or color.” *Strauder, supra*, at 310.

From *Strauder* to the mid-twentieth century, most of this Court's jury selection cases involved claims of intentional exclusion of blacks from the venire. The very next year *Neal v. Delaware*, 103 U. S. 370, 397 (1881), presented a case where no black person had ever been summoned to serve as a juror, even though the black population was 26,000 out of 150,000, over 17%. This complete exclusion of a major segment of the population, by itself, established a *prima facie* case. *Ibid.* Half a century later, *Norris v. Alabama*, 294 U. S. 587, 598-599 (1935), presented very similar facts. The Court did not question the requirements that a juror be a "freeholder or householder," be "esteemed in the community for . . . integrity, good character and sound judgment," be able to read, and not be "an habitual drunkard." See *id.*, at 590-591 (quoting statute). Citing *Neal*, the Court did not find "the uniform exclusion of negroes from juries, during a period of many years" to be a credible consequence of the valid, neutral criteria. See *id.*, at 598-599.

On its facts, *Smith v. Texas*, 311 U. S. 128 (1940), was a straightforward application of the principles in *Neal* and *Norris*. In a county where blacks were 20% of the population, a total of 5 had served on 32 grand juries of 16 men each, about 1%. The evidence on the whole sustained an inference of discrimination. See *id.*, at 131-132. If *Smith* had said no more than needed to be said to decide the case, it would be simply one entry in the long and sorry history of intentional racial discrimination in jury selection. However, in a gratuitous bit of *obiter dictum*, unsupported by citation, the *Smith* Court dropped this bomb: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative* of the community." *Id.*, at 130 (emphasis added).

If “truly representative” is taken to mean what it means in modern social science research—the kind of sample one would get with a genuinely random selection process that gives every member of the community an exactly equal chance of selection—then this statement is false. The selection criteria recognized as legitimate in *Neal* and *Norris* and those employed in England and early America as described in Part I-A, *supra*, intentionally excluded many members of the community. The statute that *Smith* cited as authority in the next sentence, *id.*, at 130, n. 4, expressly recognized that there are legitimate qualifications for jury service and only barred “race, color, or previous condition of servitude” as criteria. A jury or a panel with no felons, no “habitual drunkards,” and no illiterates, cf. *Norris*, 294 U. S., at 590-591, would not be “truly representative of the community” but would be fully within the “established tradition.”

The representative cross-section notion received another boost from dicta in *Glasser v. United States*, 315 U. S. 60 (1942). In this corruption prosecution, the defendants challenged the composition of both the grand jury and trial jury. Because of the timing of a change in statutory juror qualifications, the two challenges were handled quite differently.

The governing federal statute at that time adopted the juror qualifications specified by state law. *Id.*, at 64-65. The Illinois Legislature had amended the law to allow women jurors before the grand jury was drawn, but it had allowed most of the counties extra time to update their source lists. The Court rejected the contention that the jury was illegally constituted. See *id.*, at 65. There is no hint that the complete exclusion of women was a constitutional problem when it was ultimately based on a statutory requirement.

For the trial jury, there were women in the pool, but the defendants alleged that the clerk had used a list consisting only of members of the League of Women Voters. The holding of the case is that the defendants had failed to produce evidence to support this allegation. Citing an article in the ABA Journal is not sufficient. See *id.*, at 84, 87. Given this holding, the three pages of discussion that precedes it is *obiter dicta*. The opinion discusses how “[o]ur notions of what a proper jury is have developed” since the common law, see *id.*, at 85, and, although it does not say so, since the Sixth Amendment was adopted. The opinion does not say that the “cross-section of the community” requirement is a constitutional one. Indeed, it could not, given how easily the same opinion upheld the complete exclusion of women from the grand jury when it was authorized by statute.

In *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 220 (1946), a federal civil case, the cross-section requirement is the basis of an actual holding, citing *Smith* and *Glasser*, but it is not a constitutional holding. The Seventh Amendment is not mentioned in the opinion, and Justice Frankfurter notes in the dissent, “No constitutional issue is at stake. The problem is one of judicial administration.” *Id.*, at 227. *Thiel* held that daily wage earners could not be excluded as a class from those summoned for jury duty on the theory they would be excessively burdened, *id.*, at 222-223, even though the judge could excuse them individually on that basis. See *id.*, at 224.

Ballard v. United States, 329 U. S. 187 (1946), disapproved the exclusion of women from the grand and petit juries in a federal criminal trial, but again the basis of the holding was not constitutional. The Court took care to note that the California jury eligibility rules, adopted by the federal statute, made women

eligible for jury service. The basis of the holding was the perceived intent of Congress and the prudent use of the Court's supervisory power. See *id.*, at 193. One of the defendants was a woman, see *id.*, at 194, so the case did not involve a standing problem.

Given that *Glasser* and *Thiel* relied on the dictum in *Smith*, it was not surprising that defendants in state cases would try to raise the cross-section rule to a constitutional mandate binding on the States, but the Court soon rejected that notion. *Fay v. New York*, 332 U. S. 261, 264 (1947), was “a challenge to the constitutionality of the special or so-called ‘blue-ribbon’ jury” The deficiencies alleged included underrepresentation of “laborers and such” and women, see *id.*, at 273, and preference for women recommended by organizations such as the League of Women Voters. See *id.*, at 277-278. The claims would have been valid under *Thiel* and *Ballard* in a federal trial, but those nonconstitutional precedents were inapplicable to state courts. See *id.*, at 287.

Brown v. Allen, 344 U. S. 443 (1953), considered a claim more along the lines of the jury cross-section claim in the present case. The claim was that the use of tax rolls as source lists produced an underrepresentation. Black persons made up 33.5% of the population but 16% of the listed taxpayers. *Id.*, at 467-468. The Court rejected the challenge.

“We recognize, too, that we are now reviewing a constitutional objection to a state court conviction, and we may not act to alter practices of a state which are short of a denial of equal protection or due process in the selection of juries.²³ States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.

“Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

“23. Rules dealing with the selection of juries in federal courts as announced in *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 221, are not applicable in state court proceedings. *Fay v. New York*, 332 U. S. 261, 287.” *Id.*, at 473-474.

In *Hoyt v. Florida*, 368 U. S. 57 (1961), the Court rejected a Fourteenth Amendment attack on a statute very similar to the one later struck down in *Taylor v. Louisiana*. The statute provided that men would be included in jury lists in the usual way, but women would be included only if they affirmatively requested to be included. See *Hoyt, supra*, at 58. Not surprisingly, “only a minimal number” did. *Ibid.*

The Court required only that this gender-based classification be “based on some reasonable classification and . . . the manner in which it is exercisable rest[] on some rational foundation.” *Id.*, at 61. At the time, rational basis review was close to a rubber stamp of constitutionality. See 3 R. Rotunda & J. Nowak, *Constitutional Law* § 18.3(a)(ii), p. 307 (4th ed. 2008).

“Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be

relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.” *Hoyt*, 368 U. S., at 61-62.

As strange as it sounds to us a half century later, *Hoyt* was typical of a long line of cases upholding different treatment of men and women based on rationales along the lines that a woman’s place was in the home. See *Nevada Dept. of Human Resources v. Hibbs*, 538 U. S. 721, 729 (2003) (collecting cases); see also 4 Rotunda & Nowak, *supra*, § 18.21, at 15-20. This era would soon come to an end. Just three years after *Hoyt*, Congress included a ban on sex discrimination in employment in the most important act of the twentieth century, the Civil Rights Act of 1964. See 42 U. S. C. § 2000e-2(a). A seismic shift in this Court’s review of statutes treating men and women differently followed a few years later.

C. Creation of the Sixth Amendment Cross-Section Requirement.

Four years after the Civil Rights Act, Congress passed the Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, 28 U. S. C. § 1861 *et seq.* “It is the policy of the United States that all litigants in *Federal* courts entitled to jury trial shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes.” 28 U. S. C. § 1861 (emphasis added). Congress chose not to impose this requirement on the States. Language imposing the cross-section requirement on the States had been included in earlier versions of this legislation but not in the bill finally enacted. See Williams, *Jury Source Representativeness and the Use of Voter Registration Lists*, 65 N. Y. U. L. Rev. 590, 601, n. 70 (1990).

The same year, the Sixth Amendment was held to be incorporated in the Fourteenth and applicable to the States in *Duncan v. Louisiana*, 391 U. S. 145, 148-149 (1968). Almost immediately, though, the Court held that the “incorporated” Sixth Amendment did not include requirements that were regarded as essential to jury trial in the eighteenth and nineteenth centuries. *Williams v. Florida*, 399 U. S. 78, 100 (1970), approved a six-man jury, while noting that “the number should probably be large enough . . . to provide a fair possibility for obtaining a representative cross-section of the community.” *Apodaca v. Oregon*, 406 U. S. 404, 410-411 (1972) (plurality opinion), upheld a nonunanimous jury while repeating the *Williams* dicta about cross-section.

In *Peters v. Kiff*, 407 U. S. 493 (1972), the standing requirements for a Fourteenth Amendment challenge to the exclusion from jury service of a group different from the defendant were left unclear. Three Justices believed that a white defendant had standing to raise a due process challenge to the exclusion of black jurors. *Id.*, at 496-498 (opinion of Marshall, J.). Three Justices would give the defendant standing to “implement the strong statutory policy of [18 U. S. C.] § 243,” *id.*, at 507 (opinion of White, J.), a rationale limited to racial discrimination. Three Justices dissented on grounds of a lack of prejudice to the defendant, an argument related to the question of standing. See *id.*, at 507-509 (opinion of Burger, C.J.).

In *Taylor v. Louisiana*, 419 U. S. 522, 523, and nn. 1-2 (1975), the Court was presented with a state law and constitutional provision essentially identical to the law upheld in *Hoyt*. See *supra*, at 15. Only 14 years had elapsed since *Hoyt*, but they had been 14 years of dramatic change in America. There could be little doubt that laws of the type that seemed reasonable to

the *Hoyt* Court in 1961 were by 1975 “an anachronism, inappropriate at this ‘time or place.’ ” *Id.*, at 542 (Rehnquist, J., dissenting) (quoting majority opinion at 537).

Two obstacles stood in the way of a straightforward extension of existing equal protection doctrine to cover gender as well as race and ethnicity in jury selection. First, *Hoyt* was an on-point precedent, relatively recent, squarely holding that an indistinguishable law does not violate the Equal Protection Clause. Second, Taylor, unlike Hoyt, was a man, and his standing to object under equal protection doctrine was doubtful.

The *Taylor* Court chose to get around these problems by invoking the Sixth Amendment instead of the Fourteenth Amendment. *Taylor* considered this sufficient to distinguish rather than overrule *Hoyt*, saying, “The right to a proper jury cannot be overcome on merely rational grounds,” 419 U. S., at 534, the basis of the *Hoyt* ruling. *Taylor* also held that the defendant need not be a member of the excluded group to make a cross-section claim, *id.*, at 526, but the only authority cited for the proposition is *Peters*, a case in which only a minority of the Court found standing on a ground that would apply to gender discrimination.

After a summary of the cases discussed above, *Taylor* makes a remarkable statement. “The unmistakable import of the Court’s opinions, at least since 1940, *Smith v. Texas*, *supra*, and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial.” *Id.*, at 528. But that is *not* the “unmistakable import” of the opinions. Other than dicta in *Williams* and *Apodaca*, none of the opinions relied on says *anything at all* about the Sixth Amendment. All of the cases actually holding a jury selection process to be

improper were decided under the Equal Protection Clause, a statute, or a judicially created policy where there was no contrary statute. The *Taylor* Court created the Sixth Amendment cross-section requirement out of nothing but dicta in two cases decided on other grounds.

In footnote 13, the *Taylor* opinion concedes that its holding is contrary to the understanding of the right to trial by jury at common law and in the United States through the nineteenth century. The contrast with recent Sixth Amendment jurisprudence, where historical understanding is controlling, is striking. See *infra*, at 30.

A fundamental principle of constitutional jurisprudence requires that courts form constitutional rules no broader than necessary to resolve the question before them. See, e.g., *Liverpool, New York & Philadelphia S. S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885). The *Taylor* Court did just the opposite, announcing a rule that was much broader than what was needed to strike down this explicitly different treatment of men and women. The rule was restated in a more succinct form in *Duren v. Missouri*, 439 U. S. 357, 364 (1979):

“In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (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 the jury is 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 a systematic exclusion of the group in the jury-selection process.”

Potentially, this test could have involved the federal courts in a nearly complete takeover of state jury selection processes. A wide variety of groups, far beyond classifications of race, ethnicity, and gender, might be considered “distinctive.” “Not fair and reasonable” might be construed to mean nearly exact proportions. “Systematic exclusion” might be construed to include any practice that causes the demographic composition of the venire to vary from that of the general population, no matter how benign its purpose. Once the *prima facie* case was established, *Duren* directed that “it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross-section to be incompatible with a significant state interest.” *Id.*, at 368. This amorphous and subjective determination amounts to little more than the substitution of the court’s policy preference for that of the State and its officials.

Fortunately, most courts did not interpret the distinctive group prong to extend beyond the same groups that would be considered suspect or quasi-suspect classifications in an equal protection analysis. “Decisions are now to be found holding various age, occupation, and disability groups among others, not distinctive under *Taylor*.” 6 W. LaFave, J. Israel, N. King, & O. Kerr, *Criminal Procedure* § 22.2(d), p. 56 (3d ed. 2007).

Astonishingly, the California Supreme Court came within one vote of holding that convicted felons are a distinctive group and declaring unconstitutional a statutory exclusion consistent with the common law and existing in most states to this day.⁴ See *Rubio v.*

4. Kalt, The Exclusion of Felons from Jury Service, 53 Am. U. L. Rev. 65, 150-156 (2003), lists the laws as of the date of the article.

Superior Court, 24 Cal. 3d 93, 97-100, 593 P. 2d 595, 597-599 (1979). Felons would, of course, be a “distinctive” group if nothing more than “‘a flavor, a distinct quality’” were required. See *Taylor*, 419 U. S., at 532 (quoting *Ballard*, 329 U. S., at 194). The *Rubio* majority’s theory that the viewpoint of robbers, rapists, and murderers can be represented by petty thieves, see 24 Cal. 3d, at 99-100, 593 P. 2d, at 599, is very doubtful as a factual matter. In addition, the *Rubio* dissent correctly noted a complete absence of authority for the majority’s representation exception to *Taylor*. See *id.*, at 107, 593 P. 2d, at 604 (Tobriner, J., dissenting). *Rubio* is properly viewed as a *reductio ad absurdum*. If a conclusion that follows from a premise is preposterous on its face, the premise must be wrong. It is difficult to imagine a conclusion more preposterous than a claim that the Constitution requires that murderers must sit in judgment on a murder case.

Unlike the wide agreement on distinctive groups, the methodology for deciding what is “fair and reasonable” for the second prong of the *Duren* test has produced much more disagreement. The variations on the theme are presented in the opinions and the other briefs in the present case and need not be repeated here. See, e.g., *People v. Smith*, 463 Mich. 199, 216-221, 615 N. W. 2d 1, 8-10 (2000) (Cavanagh, J., concurring).

Perhaps the most insidious part of the *Taylor/Duren* test, though, is the holding that nonrepresentativeness need only be the result of something “inherent in the particular jury selection practice utilized,” *Duren*, 439 U. S., at 366, rather than the intentional discrimination requirement of equal protection analysis. Under this prong, procedures and criteria adopted by a State or its officials in good faith for the purpose of obtaining jurors who are conscientious in their duties or for the purpose of lessening the burden of jury service on those least

able to bear it are subject to challenge merely because they have the incidental side-effect of altering the demographic composition of the venire.

In the three decades since *Duren*, this Court has not returned to the venire selection question, leaving all the dangling questions from *Taylor* and *Duren* to be thrashed out by the lower courts. What this Court's later cases have addressed, though, is that, after being mandated to provide a representative cross-section in the venire, the State is then free to intentionally make the final trial jury nonrepresentative. The State may exclude from a capital case those persons whose views on capital punishment would interfere with their function in the sentencing phase. See *Lockhart v. McCree*, 476 U. S. 162, 176-177 (1986); *Buchanan v. Kentucky*, 483 U. S. 402, 415 (1987). Even the intentional use of peremptory challenges to exclude all jurors of a particular race does not violate the *Taylor/Duren* rule, *Holland v. Illinois*, 493 U. S. 474, 478 (1990), although of course it does violate the Equal Protection Clause. See *id.*, at 479. It is an odd rule of law that creates a right to representativeness only at the stage where it does not matter.

These oddities bring us back to the point of origin. The Sixth Amendment cross-section requirement was a fiction from the beginning. See *Duren*, 439 U. S., at 370-371 (Rehnquist, J., dissenting); see also Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 Geo. L. J. 945, 950 (1998) ("lacks a solid intellectual foundation"). It was a useful fiction at the time, but, as we will describe in the next section, that time is past.

D. The Robust Equal Protection Clause.

The irony of *Taylor* is that it made an end-run around obstacles to relief under the Equal Protection Clause at the very time when those obstacles were crumbling. The changes in equal protection jurisprudence that would have been needed to strike down the Louisiana law in *Taylor* were already in the process of being made.

In the 1970s, the standard for review of gender classifications in statutes was in flux, but it was something more than the toothless rational basis review epitomized by *Hoyt*. See 4 Rotunda & Nowak, *supra*, § 18.22, at 20-27. In *Reed v. Reed*, 404 U. S. 71, 76-77 (1971), a presumption that men were more fit to administer estates was struck down. *Frontiero v. Richardson*, 411 U. S. 677, 678 (1973), involved a military benefits statute that presumed married men were the breadwinners of their families, and thus entitled to an extra allowance, but required married women to affirmatively show that their husbands were dependent on them in order to qualify. This presumption was the flip side of the presumption underlying the statute in *Hoyt* that women were the caregivers of the family, but while *Hoyt* affirmed on that basis, see *supra*, at 15, *Frontiero* struck the statute down, without agreement on the standard of review. See *id.*, at 688-691 (plurality opinion); *id.*, at 691-692 (Powell, J., concurring in the judgment). In *Craig v. Boren*, 429 U. S. 190, 197 (1976), differential treatment of men and women for the purpose of the minimum age for buying beer was struck down under a standard that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” The statutes in *Hoyt* and *Taylor* would not come close to passing that test. The

application of this test to a statute that disadvantaged men left no doubt that the test was symmetrical.

Craig is also significant for another change in equal protection law. The complaint of the original primary plaintiff, Craig, was moot because he had aged out of the disadvantaged 18-20 category. See *id.*, at 192. The case went forward on the theory that a seller of beer had standing. See *id.*, at 192-194. The thinness of support for this holding did not go unnoticed. See *id.*, at 216 (Burger, C.J., dissenting). Less than two years after *Taylor*, then, it was apparent that neither the standing issue nor the standard of review would have prevented the same result under an equal protection analysis.

When this Court's focus in jury selection cases shifted from the summoning of the venire to the selection of the trial jury, the Equal Protection Clause reemerged as the primary source of constitutional protection. Discriminatory use of peremptory challenges on the basis of race violates the Equal Protection Clause, *Batson v. Kentucky*, 476 U. S. 79, 96 (1986), but not the Sixth Amendment. *Holland v. Illinois*, 493 U. S., at 478. *Powers v. Ohio*, 499 U. S. 400, 415 (1991), eliminated any doubt that the defendant need not be a member of the same group as the excluded jurors to have standing to raise an equal protection claim. *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 130-131 (1994), extended the *Batson* framework to discrimination on the basis of gender.

As far as this Court's precedents go, the Sixth Amendment cross-section requirement is now completely superfluous. There are no cases where a defendant prevailed on such a claim who would not prevail with an equal protection claim under current law. This is largely true of decisions in other courts as well. As noted in Part I-C, *supra*, attempts to define groups as

“distinctive” for cross-section claims beyond the classifications considered “suspect” for equal protection claims have been overwhelmingly rejected. This case presents the question of whether this largely superfluous requirement is worth keeping at all.

II. *Stare decisis* does not require keeping a fabricated rule that breeds litigation, intrudes into local administration, and provides little benefit not already secured by another rule.

With intentional discrimination in jury selection on all suspect classifications barred by the Equal Protection Clause and with a remedy available to every defendant, what is left for the Sixth Amendment cross-section requirement? It is mostly cases such as this one, where benign practices are challenged in federal court on the ground that they had some incidental, unintended, marginal effect on the demographic composition of the venire. If the claim is unsuccessful, it consumes judicial resources that could have been spent on the many backlogged cases involving substantial claims of injustice. If the claim is successful, it means that every case tried to a jury then pending on appeal in the jurisdiction affected must be reversed for a reason having little or no bearing on the reliability of the guilt verdict. As a practical matter, the Court must ask whether the game of such litigation is “worth the candle.” Cf. *Kansas v. Ventris*, 556 U. S. ___, 129 S. Ct. 1841, 1846, 173 L. Ed. 2d 801, 808 (2009). As a doctrinal matter, the Court must ask whether *stare decisis* alone justifies the continuation of a constitutional requirement that was a transparent fiction from the beginning.

A. *High Cost and Slim Benefit.*

Given the complete absence of a textual or historical basis for the Sixth Amendment cross-section requirement, *Taylor v. Louisiana*, 419 U. S. 522 (1975), must be seen as a pure policy decision. As such, it can be justified, if at all, only on the basis that its benefits exceed its costs. The benefits today are not what they were in 1975. The benefits today are only the benefits, if any, for the selection of juries that the cross-section rule provides but the now-robust Equal Protection Clause does not. Cf. *Montejo v. Louisiana*, 556 U. S. ___, 129 S. Ct. 2079, 2090, 173 L. Ed. 2d 955, 969 (2009).

The present case illustrates the burden of litigation on the local government and on the judicial system. Five courts already have examined the Kent County Administrator's practices of assigning jurors to the district courts before the circuit courts and granting excuses to people who have problems with child care and transportation. See *Smith v. Berghuis*, 543 F. 3d 326, 331-333 (CA6 2008). No one suggests that there is anything inherently nefarious in these practices. The complaint is merely that the demographic composition of the resulting venires differs from the general population with "disparities . . . larger than could be accounted for by mere chance." *Id.*, at 332. So court after court must decide whether this constitutes a systematic exclusion within the meaning of *Taylor*. The state trial court says no; the state appellate court says yes; the state supreme court says no; the federal district court says no; the federal court of appeals says yes. See *id.*, at 333, 340-342. Now the Supreme Court of the United States must decide if the Kent County Administrator has violated the Nation's fundamental law by being excessively generous to single parents with child care problems.

All this judicial examination of local administrative minutia is for the purpose of enforcing a rule that is not really in the Constitution to begin with and has little or no impact on the fairness of the trial beyond what the Equal Protection Clause already requires. The notion that Smith’s trial was unfair because about 6 percent of the veniremen were black when that figure “should” have been 7.28 percent, see *id.*, at 337, borders on absurd. See Brief for Petitioner 41.

While litigating a jury selection challenge in which the State ultimately prevails is a burden, a successful challenge is a disaster. A successful challenge results in a finding of “structural error,” causing reversal with no showing whatever of any prejudice to the defendant. See *Vasquez v. Hillery*, 474 U. S. 254, 262 (1986); see also *Neder v. United States*, 527 U. S. 1, 8 (1999) (listing structural errors, including *Hillery*). Moreover, when the practice challenged is used in every trial in the jurisdiction, then every defendant who preserved the objection gets a new trial, again with no showing of prejudice whatever. If the boundaries of what is acceptable were crisply defined so that administrators knew in advance what practices were invalid, this might be a penalty worth imposing.⁵ With the boundaries defined as vaguely as the present case illustrates, though, the penalty imposed on the local government is grossly disproportionate to the offense.

A vaguely defined constitutional rule with drastic consequences for violation may cause administrators to avoid getting anywhere close to the line, to the detriment of other important policy considerations. Had this Court not granted certiorari in the present case, the decision would have sent a message to administra-

5. To this end, Petitioner proposes a 10% absolute disparity safe-harbor rule. See Brief for Petitioner 45.

tors nationwide that they must be stingy with hardship exemptions and tough on those who do not respond to the summons. See 543 F. 3d, at 341-342, and n. 5.

The downside of cracking down on single parents who are already struggling with being both breadwinner and caregiver by themselves is obvious. There is also a downside to aggressively dragging in those who ignore repeated notices to appear. As discussed in Part I, the common law ideal jury was “twelve good men and true.” A sense of civic responsibility above the mean is a desirable quality in a juror. Subpar irresponsibility is an undesirable trait. Those who respond to the call to duty will, on average, have a greater sense of responsibility than those who have to be dragged to the courthouse. Having responsible jurors is more important to a fair trial for both parties than having a jury that precisely mirrors the composition of the community, cf. *Holland v. Illinois*, 493 U. S. 474, 483-484 (1990), but *Taylor*’s fabricated cross-section requirement places responsibility in a subordinate position. Another disadvantage of aggressive enforcement is simply the expense, which may have been the motivating factor in this case. Added expense at one point in the system will inevitably cause cutbacks somewhere else, such as greater pressure to plea bargain.

The cross-section requirement relieves the challenger of the burden of proving discriminatory intent in cases where discrimination is suspected but cannot be proved. Is the danger of hidden, unprovable discrimination so large as to justify the costs of this litigation? Perhaps it was in 1975, but America is a far different place today. Any group large enough to form a substantial share of the jury venire is large enough to wield significant political clout. Nearly half a century after the Voting Rights Act of 1965, the disenfranchised minority is history. See *Northwest Austin Municipal*

Util. Dist. No. One v. Holder, 557 U. S. ___, 129 S. Ct. 2504, 2511, 174 L. Ed. 2d 140, 149 (2009) (noting historic accomplishments of the Voting Rights Act). The political consequences of discriminating against a minority group provide a greater disincentive to discriminate today than they did in times past and thereby reduce the need for extraordinary judicial intervention. Indeed, Kent County voluntarily changed the order of assignment of jurors to the district and circuit courts based on a mere perception of disparate impact, even though the perception turned out to be mistaken. See *supra*, at 3.

On a purely utilitarian basis, the costs of keeping *Taylor* exceed the benefits. The only reason for keeping it would be *stare decisis*.

B. Stare Decisis.

The criteria for deciding whether to overrule a precedent are familiar. They include the workability of the rule in light of subsequent experience, “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” *Montejo v. Louisiana*, 129 S. Ct., at 2088-2089, 173 L. Ed. 2d, at 967. Also, precedents may be ripe for overruling “when subsequent cases have undermined their doctrinal underpinnings” *Dickerson v. United States*, 530 U. S. 428, 443 (2000).

As *Payne v. Tennessee*, 501 U. S. 808 (1991), demonstrates, workability is not limited to the literal sense of a rule being impossible to implement. It is sufficient that the rule “ha[s] defied consistent application by the lower courts.” *Id.*, at 830. The fact that courts remain deeply divided on fundamental questions of determining representativeness 35 years after *Taylor*, see *supra*, at 21, demonstrates that *Taylor* meets the unworkability criterion as that term was used in *Payne*.

In terms of age, *Taylor* is neither antique nor recent. *Montejo* referred to the precedent at issue as “only two decades old.” 129 S. Ct., at 2089, 173 L. Ed. 2d, at 967. At 35 years, *Taylor* is older than that but much younger than the century-old precedent overruled in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U. S. 877, 899 (2007). This factor is neutral.

No reliance interest at all inhibits the overruling of *Taylor*. In this respect, the case is exactly like *Montejo*. States that have implemented jury selection systems to sample a representative cross-section of the community may continue to do so if they wish. We can be confident that no one has committed a crime in reliance on the *Taylor* rule. Any defendant, including Smith, who asserted a Sixth Amendment claim instead of an equal protection claim in reliance on *Taylor* can be allowed to substitute the equal protection claim if he wishes. Cf. *Montejo*, 129 S. Ct., at 2091-2092, 173 L. Ed. 2d, at 970-971. This factor favors overruling.

The factor of whether the decision was well reasoned is covered in Part I, *supra*. *Taylor* created a constitutional requirement out of whole cloth that beyond question was not in the constitutional provision as originally understood. It did so when only a modest extension of the existing jurisprudence under a more applicable provision would have been sufficient to correct the problem.

Closely related to this factor is the inconsistency of *Taylor* with recent Sixth Amendment doctrine. This Court has recently required both the state and federal courts to make major changes in sentencing and evidence. In the sentencing area, a major reform enacted with a broad bipartisan consensus—an uncommon occurrence in the criminal law—was disrupted. See *United States v. Booker*, 543 U. S. 220, 297-298 (2005) (Stevens, J., dissenting) (discussing history of Sentenc-

ing Reform Act). This result was dictated by a line of cases that was based not on evolving ideas of enlightened policy but rather to insure that “the jury would . . . exercise the control that the Framers intended.” *Blakely v. Washington*, 542 U. S. 296, 306 (2004). Similarly, in the admissibility of prior statements of a crime victim, recent attempts to relax the rules based on modern knowledge about domestic violence must yield to the conclusion of a historical examination of what the Confrontation Clause was understood to require at the time the Sixth Amendment was adopted. See *Davis v. Washington*, 547 U. S. 813, 822-826, 832-833 (2006).

How is it that the historical understanding can be controlling on these aspects of the Sixth Amendment and yet irrelevant on the cross-section requirement? If the Confrontation Clause cannot have “an *exception* . . . unheard of at the time of the founding or for 200 years thereafter,” *Giles v. California*, 554 U. S. ___, 128 S. Ct. 2678, 2693, 171 L. Ed. 2d 488, 506 (2008) (plurality opinion) (emphasis added); *id.*, 128 S. Ct., at 2694, 171 L. Ed. 2d, at 507 (Souter, J., concurring in part) (“as understood at the Framing”), how can the Jury Trial Clause have a *requirement* of similarly recent vintage, equally unknown in 1791? Can this Court legitimately turn the historical understanding on and off like a faucet, declaring it to be controlling in one case and irrelevant in the next?

Despite its deficiencies, *Taylor v. Louisiana* served a useful function in its day. It helped sweep away the last vestiges of laws that relegated women to a secondary place in society. That legal regime is now a distant and fading image in the rear-view mirror. Today, the *Taylor* cross-section rule is unnecessary for the enforcement of equality. It intrusively involves federal courts in details of local administration for no good purpose.

The litigation it breeds wastes scarce judicial resources better spent on more important matters. As a matter of constitutional legitimacy, the cross-section requirement can now be seen to be a fabrication, inconsistent with the recent jurisprudence that has restored the original understanding to its rightful place. It is time to give the *Taylor* rule a respectful burial and rely on the Equal Protection Clause alone as the foundation for protection against discrimination in jury selection.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit should be reversed.

November, 2009

Respectfully submitted,

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