

## U.S. Supreme Court rejects habeas claim that Kent County's method of selecting a jury systematically excluded African-Americans.

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Today the United States Supreme Court, in *Berghuis v. Smith*, No. 08-1402, unanimously reversed a decision by the U.S. Sixth Circuit Court of Appeals. In so doing, it concluded that the Michigan Supreme Court had reasonably applied federal law concerning whether a Kent County jury in a murder trial was drawn from a fair cross section of the community. The U.S. Supreme Court, in an opinion by Justice Ginsburg, concluded that the defendant failed to provide evidence that Kent County's method of selecting its jury pool for the Kent County Circuit Court caused the "systemic exclusion" of African-Americans. The U.S. Supreme Court also rejected the defendant's argument that a laundry list of factors (such as the county's practice of excusing potential jurors based on mere allegations of hardship) led to systemic exclusion. The case is discussed in greater detail after the jump.

Diapholis Smith, accused of a shooting at a bar brawl in Grand Rapids, was charged in 1993 with murder and went to trial in Grand Rapids in circuit court. The panel of potential jurors assembled for his trial consisted of between 60 and 100 individuals, and at most 3 members of that pool were, like Mr. Smith, African-American. Mr. Smith challenged the composition of his jury pool as violating his entitlement to an impartial jury drawn from a fair cross section of the community. In particular, he claimed that Kent County's practice of assigning prospective jurors first to local district courts and then, only after filling those needs, assigning remaining prospective jurors to the county-wide circuit court (which hears felony cases) improperly "siphoned" off African-American potential jurors. The trial court rejected his challenge and empaneled an all-white jury, and that jury convicted Mr. Smith of second-degree murder. One month after jury selection in Mr. Smith's trial, Kent County reversed the order in which prospective jurors were assigned, so that the circuit court drew its panels first, and the remaining potential jurors then were available for district-court trials.

Mr. Smith appealed to the Michigan Court of Appeals, which ordered a hearing into whether the jury pool was a fair cross section. At the hearing, Mr. Smith presented evidence that he argued showed African-Americans were underrepresented in the jury pool. The trial court considered two methods of determining the extent of this underrepresentation. First, under the "absolute disparity" method, it subtracted the percentage of African-Americans in the jury pool (here, 6%), from the percentage of African-Americans in the local, jury-eligible population (here, 7.28%). By this measure, African-Americans were underrepresented by 1.28%. Second, under the "comparative disparity" method, the court divided the absolute disparity (here, 1.28%) by the group's representation in the jury-eligible population (7.28%), and the quotient (18%) shows that African-Americans were 18% less likely than the overall jury-eligible population, to be on the jury-service list. Applying this comparative-

disparity method to statistics from after Kent County reversed the assignment order, African-Americans were still 15.1% less likely to be selected. Based on this evidence, the Michigan Court of Appeals concluded underrepresentation had occurred and ordered a new trial. The Michigan Supreme Court, however, reversed that order, concluding that Smith had not presented sufficient evidence to support his fair-cross-section claim. For one, federal law did not specify what method of measuring representation was required, and in any event Mr. Smith's evidence did not establish a "legally significant disparity." And even assuming these statistical differences were sufficient, he did not show how the alleged siphoning affected the jury pool; for example, he did not provide evidence comparing the percentage of minority jurors in the district-court pools with the percentage in the circuit-court pools.

Having exhausted the state appeals process, Mr. Smith filed a habeas claim asking the federal courts to determine whether the state courts had improperly applied federal law. Under a 1996 federal statute, the Antiterrorism and Effective Death Penalty Act (AEDPA), federal courts can grant habeas relief only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The federal district court rejected Mr. Smith's habeas petition, concluding that the Michigan Supreme Court had not unreasonably applied U.S. Supreme Court precedent. The Sixth Circuit, in an opinion by Judge Clay, which was joined by Judge Moore and a senior district judge visiting from the Northern District of California, reversed. The panel concluded that the state courts should have used the comparative-disparity method, and the 18% decrease in likelihood of selection was "unfair and unreasonable."

Reversing, Justice Ginsburg noted that the Michigan Supreme Court had correctly observed that no U.S. Supreme Court decision specified what method of measurement had to be used to measure underrepresentation.

Furthermore, because the comparative-disparity measurement under the revised Kent County method was still 15%, that change (from 18% to 15%) was not sufficient to demonstrate that it was the assignment process that caused the underrepresentation. In the end, the U.S. Supreme Court concluded that "the Michigan Supreme Court not at all unreasonably concluded" that Mr. Smith's "evidence scarcely shows that the assignment order he targets caused underrepresentation."

Justice Thomas concurred, writing separately to indicate that he would be willing to reconsider the Court's precedents imposing the "fair cross section" requirement, given that historically "juries did not include a sampling of persons from all levels of society or even from both sexes."