No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM G. ALLEN,

Petitioner,

vs.

CANDICE BATTS and TONY PARKER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether Petitioner is entitled to habeas corpus relief where he was indicted by a grand jury from which African-Americans were systematically excluded in violation of the Fourteenth Amendment, where that same grand jury has been found unconstitutional in *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir. 1992).

2. Whether Petitioner is entitled to de novo review of, and relief on, his grand jury discrimination claim because the state court judgment denying relief was contrary to, or an unreasonable application of, *Alexander v. Louisiana*, 405 U.S. 625 (1972), and its predecessors.

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The United States Court of Appeals for the Sixth Circuit denied Mr. Allen relief on his grand jury discrimination claim in an unpublished Opinion filed June 22, 2020. *Allen v. Batts*, 818 Fed.Appx. 437 (6th Cir. 2020) 2020 WL 3412690. *See* Appendix. The Tennessee Court of Criminal Appeals opinion denying Mr. Allen relief on his grand jury discrimination claim is unreported. *Allen v. State*, (unpublished) (Tennessee Court of Criminal Appeals Feb. 1, 1973). *See* Appendix.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On June 22, 2020, the Sixth Circuit disposed of Mr. Allen's appeal. *See* Appendix. No rehearing petition was filed. Pursuant to Rule 11, Rules Governing Section 2254 Cases in the United States District Courts, the District Court issued a certificate of appealability on Mr. Allen's grand jury discrimination claim. (Case No. 3:12-cr-00242, D.E. 115, PageID #4853.)

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

"[T]his is an unusual habeas case, one that seems flatly unmeritorious at first blush. … Scrape aside the unusual veneer, however, and one is left with a highly compelling case for habeas relief." *Allen v. Batts*, No. 19-5691 (6th Cir. 2020) (Moore, J., dissenting).

William Allen was charged in 1968 with first degree murder in Case No. A-1004 in Nashville, Davidson County, Tennessee. Prior to trial he filed a plea in abatement challenging under the Fourteenth Amendment the under-representation of African-Americans in the selection of the grand jury in Davidson County, Tennessee. Mr. Allen was convicted at trial in 1968. Mr. Allen filed a post-conviction petition in December 1971. On March 28, 1972, an evidentiary hearing was held in the post-conviction proceedings on his grand jury discrimination claim in which the three sitting Criminal Court judges of Davidson County testified, as did the Criminal Court Clerk. Statistical evidence was presented by agreed stipulation and also from judicial notice of the grand jury numbers from a prior case before the same trial judge, the *Givens* case. That evidence established that in the decade prior, although they made up 19.9% of the population of Davidson County, African-Americans represented only 2.4% of the grand jurors, or a disparity of 17.5%. At that time, to select members of the grand jury, Davidson Count used the "key man" system where judges personally selected grand jurors from the community. *See Jefferson v. Morgan*, 962 F.2d 1185, 1187 (6th Cir. 1992).

Despite this evidence, on April 13, 1972, the trial court denied Mr. Allen's post-conviction petition. That denial was affirmed by the Tennessee Court of Criminal Appeals on February 1, 1973, citing one Supreme Court case on this issue. Mr. Allen filed a petition for habeas corpus in federal court in the Middle District of Tennessee in June 1973 – Civil Case No. 7057 – which was denied by the District Court on September 24, 1973. The District Court's decision was affirmed April 30, 1974, by the Sixth Circuit Court of Appeals in Case No. 73-2215 in a "brief unpublished order lacking in persuasive reasoning."[1]

[1] *Allen v. Batts*, No. 19-5691 (6th Cir. 2020) (Moore, J., dissenting).

James Thomas Jefferson was also indicted in Davidson County in 1968. *Jefferson*, 962 F.2d at 1187. He too challenged Davidson County's use of the "key man" system to select grand jury members. *Id.* He presented much the same evidence as Mr. Allen did, including testimony by two of the judges involved in Mr. Allen's post-conviction evidentiary hearing. *Id.* at 1191. The Sixth Circuit found that, with those statistics, Jefferson had established a prima facie case of discrimination that was not rebutted by the testimony of the judges who testified in Mr. Allen's case that they had not intended to discriminate.[2] *Id.* at 1187.

Mr. Allen filed a subsequent post-conviction petition in 1989 under the original case number in which he raised his grand jury discrimination claim. That petition was denied, though the trial court entered a new judgment in 2007 setting aside Mr. Allen's ninety-nine-year sentence and imposing a sentence of life imprisonment. Following exhaustion of his state court remedies, Mr. Allen filed a habeas corpus petition in 2012 – Case No. 3:12-cv-00242 – which included his grand jury discrimination claim. In 2017, the Sixth Circuit Court of Appeals found that, under *Magwood v. Patterson*, 561 U.S. 320 (2010), and *King v. Morgan*, 807 F.3d 154 (6th Cir. 2015), the petition containing Allen's grand jury discrimination claim was not "second or successive" under 28 U.S.C. § 2244(b) based on the new judgment entered in 2007. *Allen v. Westbrooks*, 700 Fed.Appx. 406 (6th Cir. June 23, 2017). The District Court ultimately denied that claim June 5, 2019, in an unpublished Memorandum Order. (Case No. 3:12-cr-00242, D.E. 115, PageID #4840-54.) The Sixth Circuit Court of Appeals affirmed the District Court's decision, with one judge dissenting, in 2020. *Allen v. Batts*, 818 Fed.Appx. 437 (6th Cir. 2020) 2020 WL 3412690. (*See* Appendix.)

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[2] The Court of Appeals, using a standard deviation analysis, found that "the odds that the county would have *randomly* selected only 20 blacks for the 338 grand jury positions are approximately 1,000,000,000 to 1." 962 F.2d at 1190. (emphasis in original)

ARGUMENT

I. Petitioner is entitled to habeas corpus relief where he was indicted by a grand jury from which African-Americans were systematically excluded, where that same grand jury has been found unconstitutional in *Jefferson v. Morgan*, 962 F.2d 1185 (6th Cir. 1992).

A. Merits of Allen's Claim

In an evidentiary hearing on Mr. Allen's post-conviction petition, Mr. Allen established that Davidson County employed the "key man" system to choose grand jurors. Under that system, the Criminal Court judges were given wide latitude to personally select the members of the grand jury. There were no objective criteria which the judges had to use. One of the judges testified that he met with the prospective members prior to their being appointed, and the other judge testified that he selected grand jurors from people he knew because of his social connections. Both denied that they had intentionally discriminated against African-Americans in the selection of grand jurors. At the time of the evidentiary hearing, Judge Cornelius had changed to random selection process.

The parties stipulated that African-Americans made up 19.9% of the population of Davidson County, Tennessee. Mr. Allen established that Davidson County called three grand juries per year with thirteen members per grand jury. The trial court in that proceeding took notice of an order it had entered in an earlier case (*Givens*) in which the same grand jury discrimination challenge was made establishing that from September 1958 to March 1967, eight African-Americans had served in the 338 positions of the twenty-six grand juries, or 2.4%. The three Criminal Court trial judges testified that on the twenty-four grand juries from September 1, 1959, to December 31, 1967, six grand jurors were African-American, and that there was one African-American on the January 1968 grand jury that had indicted Mr. Allen, for a total of 7

grand jurors for the 325 positions on the 25 grand jury panels, or 2.2%.[3] The *Givens* Order thereby established a disparity of 17.5%. The testimony of the judges established a disparity of 17.7%.

At that time, this Court had previously found grand jury proceedings with disparities of 14.7%, *Jones v. Georgia*, 389 U.S. 24, 25 (1967), 18%, *Whitus v. Georgia*, 385 U.S. 545, 552 (1967), and 19.7%, *Sims v. Georgia*, 389 U.S. 404,407 (1967), to be discriminatory.

B. Jefferson v. Morgan

James Thomas Jefferson was also indicted by a Davidson County grand jury in 1968 whose members were chosen under the "key man" system. He also made a grand jury discrimination challenge which was denied by the trial court and the Tennessee appellate courts. *Jefferson v. Morgan*, 962 F.2d 1185, 1187 (6th Cir. 1992). His proof established that "no more than" 5.9% of the grand jurors in Davidson County were African-American. *Id.* at 1189. The Sixth Circuit Court of Appeals, using a standard deviation analysis, found that "the odds that the county would have *randomly* selected only 20 blacks for the 338 grand jury positions are approximately 1,000,000,000 to 1." *Id.* at 1190. (emphasis in original.) The Sixth Circuit found that Jefferson had established a prima facie case of racial discrimination. In so doing, the Court of Appeals found that the "key man" system was susceptible to abuse and that Jefferson's statistical evidence satisfied the "rule of exclusion." *Id.* at 1189. Addressing the state's claim that it had rebutted Jefferson's prima facie case through the testimony of Judges Leathers and Draper (both of whom were involved in Mr. Allen's post-conviction evidentiary hearing), the Court of Appeals found that the judges' denials of excluding jurors on the basis of race and their

[3] Judge Leathers didn't testify from the witness stand because he was conducting the hearing, but he did put on the record the names of those African-American residents of Davidson County who where called when he (Judge Leathers) had the grand jury. He did not allow cross-examination.

explanations were no more than affirmations of good faith, which were insufficient to rebut the prima facie case. *Id.* at 1191. The Court affirmed the District Court's grant of the writ and ordered a new trial.

C. Allen's Legal Claim

In *Alexander v. Louisiana*, 405 U.S. 625, 630-31 (1972), this Court found that the combination of statistical information concerning the participation of African-Americans on the grand jury as compared to their numbers in the general, local population and a selection system that was not racially neutral could establish a prima facie case of discrimination, which this Court found was established in *Alexander*. Mr. Allen proved through the "rule of exclusion," *see*, *Hernandez v. Texas*, 347 U.S. 475, 479 (1954), that African-Americans in Davidson County were under-represented on the grand juries of that county for the preceding ten years, up to and including the grand jury that indicted Mr. Allen. He also proved that during the selection process there was a point at which the race of the potential grand juror became known and that there were no objective criteria for selection of the grand jurors. Under this Court's cases, Mr. Allen made out a prima facie case of discrimination.

II. Petitioner is entitled to de novo review of, and relief on, his grand jury discrimination claim because the state court judgment denying relief was contrary to, or an unreasonable application of, *Alexander v. Louisiana*, 405 U.S. 625 (1972), and its predecessors.

A. Opinion of the Tennessee Court of Criminal Appeals

The 1973 decision of the Tennessee Court of Criminal Appeals denying Mr. Allen relief on his grand jury discrimination claim, based on the evidentiary hearing described above, is contrary to, and an unreasonable application of, this Court's decisions in *Alexander v. Louisiana*, 405 U.S. 625, 630-31 (1972), and its predecessors. (Court of Criminal Appeals Opinion, RE 32-2, PageID #398-415.)

As noted above, and contrary to the opinion of the Court of Criminal Appeals, Mr. Allen produced reliable evidence substantiating his claim. Although the Court of Criminal Appeals paints the testimony of the judges as less than accurate, their testimony is consistent with, and corroborated by, the evidence from the *Givens* Order. The Court of Criminal Appeals opinion never even mentions the *Givens* Order. The Court never set out the legal standard for a grand jury discrimination claim. The only federal case the Court cited was *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970), which did not involve a grand jury composition challenge by a criminal defendant, but by potential grand jurors. The cases cited in footnote 8 of that opinion – referenced by the Court of Criminal Appeals – actually support Mr. Allen's claim, and not the position of the Court. *See, e.g., Eubanks v. Louisiana*, 356 U.S. 584 (1958) (granting relief based on fact that jury commissioners chose names from a list, interviewed the prospective jurors before making a choice, and only one African-American had served on the grand jury); *Reece v. Georgia*, 350 U.S. 85 (1955) (out of 534 names on the grand jury list, only 6 were African-American, and none served on the grand jury made a prima facie case of discrimination). In addition, the Court of Criminal Appeals never discussed *Alexander v. Louisiana*, 405 U.S. 625, 630-31 (1972), in which this Court held that statistical evidence of under-representation coupled with a process that provided an "opportunity for racial discrimination" established a prima facie case of discrimination. Addressing statements by one of the judicial commissioners that no consideration was given to race during the selection process, this Court stated that "affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion. 'The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.'" *Id.* at 632, quoting *Hernandez v. Texas*, 347 U.S. 475, 482 (1954). (citations omitted)

"Tellingly, the majority [of the Sixth Circuit panel] does not try to defend the state court's reasoning on its own terms. Rather, the majority chooses to defend the state court's bottom-line conclusion – to deny Allen relief – with reasons of its own making." *Allen v. Batts*, p. 18 (Moore, J., dissenting).

B. Opinion of the Sixth Circuit Court of Appeals

In affirming the District Court's denial of relief to Mr. Allen, the Court of Appeals first holds that Mr. Allen's proof was insufficient to establish a prima facie case of discrimination because 1) prior to 1977 this Court had never said that proof of a "system that was susceptible to abuse" was sufficient to make a prima facie case, 2) *Alexander v. Louisiana* could reasonably be viewed to require a "'physical, even mechanical, aspect of the jury-selection process" to prove that a system was "not racially neutral," quoting *Turner v. Fouche*, 396 U.S. 346, 355 n. 13 (1970), and 3) even if Allen's proof did make out a prima facie case, the State rebutted that case with the testimony of the trial court judges.

1. "Susceptible to abuse"

The Court of Appeals states that in *Castaneda v. Partida*, 430 U.S. 482 (1977), "the Supreme Court squarely held that a petitioner could make a prima facie case by demonstrating that a substantial disparity arose from a jury-selection system that was susceptible to abuse. Before then, the Supreme Court never said that was sufficient to make a prima facie case." *Allen v. Batts*, pp. 4-5. In *Smith v. Texas*, 311 U.S. 128, 131 (1940), describing the Texas statutory scheme for selecting grand jurors, this Court stated, "But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable." What is that except a system that is susceptible to abuse? In fact, describing a later Texas grand jury selection system, this Court said, "But as this Court has held, the system is

susceptible to abuse and can be employed in a discriminatory manner." *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (emphasis added). In *Whitus v. Georgia*, 385 U.S. 545, 552 (1967), this Court stated, "Under such a system the opportunity for discrimination was present and we cannot say on this record that it was not resorted to by the commissioners." In *Alexander v. Louisiana*, 405 U.S. 625, 630 (1972), found discriminatory a process that "provided a clear and easy opportunity for racial discrimination" even though "there is no evidence that the commissioners consciously selected by race." As such, the Court of Appeals' ruling is an unreasonable application of these cases.

2. "Physical, even mechanical aspect"

The Court of Appeals also held that *Alexander v. Louisiana* can be read to require a "physical, even mechanical aspect" to the jury selection process before it can be found to be constitutionally violative. This Court has never so held. It is true that many of this Court's grand jury discrimination cases involve selection systems that do have that aspect. But that is not the same as this Court ruling that a grand jury selection system *must* have such an aspect before it can be found to violate the Fourteenth Amendment.

At the time of the State court decision, this Court recognized that discrimination is unlawful irrespective of whether a State actor accomplishes it easily, with difficulty, or through normal effort. *See Smith v. Texas*, 311 U.S. at 132 ("If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand"). The relevant question is whether the selection system is susceptible to abuse, not the effort a State actor must expend to take advantage of the system. Clearly established federal law at the time of the State court decision established that when a selection system gives a State actor wide discretion, it is susceptible to abuse. *Smith*, 311 U.S. at 130-31 & n.5. The undisputed evidence establishes that the Tennessee "key man" selection system did just that.

In her dissent, Judge Moore addresses the majority's holding that "the state court could reasonably have concluded that the county's system did not provide selectors with the kind of 'clear and easy opportunity for racial discrimination' to which Alexander referred." *Allen v. Batts*, at 19, (Moore, J., dissenting). She notes, "But this conclusion makes little sense. ... Davidson County's system allowed for that, and then some: judges couldn't just *see* a person's race when soliciting grand jurors, they could *rely* on that person's race when selecting those jurors, and none would be the wiser." *Id.* at 19-20 (emphasis in original). "Allen showed that, because Davidson County allowed its judges to handpick grand jurors without *any* oversight, its selection system 'provided a clear and easy opportunity for racial discrimination' and therefore could not fairly be described as 'racially neutral'." *Id.* p. 17 (emphasis in original).

3. State's rebuttal proof

The Court of Appeals finally held that, if Mr. Allen had proved a prima facie case, then the State had rebutted it by the testimony of the judges that they "preferred to work with grand jurors who would serve voluntarily rather than those who had to be compelled." Op. p. 7.

First, under the facts of this case, that is not a "permissible racially neutral selection criteria" when the judges knew the race of the prospective jurors before they were confirmed. Second, this was not offered by the judges as the reason there were so few African-Americans on the grand jury. As Judge Moore noted in her dissent, "But that simply is not what the judges said at the hearing (or, for that matter, what Tennessee has ever argued at any point in this dispute)." Op. p. 20.

Judge Draper did acknowledge that he had the power to compel people to serve, but he had not done so. He never, however, suggested that was the justification for the disparity proven between the number of African-Americans in the county and those serving on grand juries for the previous decade. When asked if he had discriminated against African-Americans in picking

the grand juries, Judge Draper responded, "I certainly did not intend to, and if I have, it would be error of the head and not of the heart."

Judge Cornelius testified that it was his limited "social connections" that was the reason more African-Americans weren't on those grand juries. When asked whether he had discriminated in the selection of the grand jury, Judge Cornelius answered, "In my own conscious [sic] I did not actually discriminate, but I will recognize Senator Williams' contention that probably there's some white that were picked for the Grand Jury that had they been black they would not have been picked." *Id.* At the time of the evidentiary hearing, Judge Cornelius had changed his selection process to a random drawing, rather than what was done at the time Mr. Allen was indicted.

These explanations amount to nothing more than the kind of "good faith affirmations" that this Court had clearly refused to find as rebuttal to a prima facie case of discrimination in the selection of a grand jury. *See, e.g. Smith v. Texas*, 311 U.S. at 132 (testimony of jury commissioners that they did not "select negroes [ ] because they did not know the names of any who were qualified" or were "not personally acquainted with any member of the negro race" rejected, finding "If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."); *Whitus v. Georgia*, 385 U.S. at 551 ("While the commissioners testified that no one was included or rejected on the jury list because of race or color this has been held insufficient to overcome the prima facie case."); *Hernandez v. Texas*, 347 U.S. at 481-82 (testimony of five jury commissioners that they had not discriminated against persons of Mexican descent, and their only objective had been to select those most qualified found to be "mere generic assertions by officials of their performance of duty" which, if accepted, would render the constitutional provision "a vain and illusory requirement.")

The Sixth Circuit in *Jefferson*, in fact, found that the testimony of Judges Draper and Leathers that they depended on first-hand knowledge and the recommendation from friends to recruit grand jurors "constitutes no more than affirmations of good faith, which are insufficient to rebut the prima facie case established by Jefferson." *Jefferson v. Morgan*, 962 F.2d at 1191. "At bottom, then, Tennessee offered the state court just one reason to believe that the yawning disparity between Davidson County's African-American population and Davidson County's African-American grand juror population resulted from something *other than* discrimination – "good faith affirmations" of non-discriminatory intent – and that reason was *not* a legally sufficient one. *See, Alexander*, 405 U.S. at 632 (collecting cases)." *Allen v. Batts*, at p. 21 (Moore, J., dissenting) (emphasis in original).

For these reasons, the review by the Court of Appeals should have been de novo and not pursuant to 28 U.S.C. § 2254(d).

CONCLUSION

For the foregoing reasons, petitioner William Allen respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

October 9, 2020

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