

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM G. ALLEN,

Petitioner,

vs.

CANDICE BATTES and TONY PARKER,

Respondents.

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

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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NO. 73-2215

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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JAMES A. HIGGINS, Clerk

WILLIAM GARRIN ALLEN, II)
v.) Plaintiff-Appellant) APPEAL FROM THE UNITED STATES
JIMMY H. ROSE, Warden,) DISTRICT COURT FOR THE MIDDLE
Tennessee State Prison) DISTRICT OF TENNESSEE,
v.) NASHVILLE DIVISION
Defendant-Appellee)

BEFORE: LIVELY and ENGEL, Circuit Judges; and CECIL, Senior Circuit Judge.

PER CURIAM. The issue on appeal from denial of habeas corpus is whether petitioner's murder conviction in 1968 was invalid because Negroes were systematically excluded from the grand juries of Davidson County, Tennessee at the time of his indictment. We note that the grand jury which indicted petitioner included one black member.

Following the affirmance of his conviction and denial of certiorari by the United States Supreme Court, petitioner sought federal habeas corpus relief, but his petition was dismissed for failure to exhaust state remedies. He then brought a habeas corpus action in a Tennessee court which held an extensive hearing. The state court found no evidence of systematic exclusion of Negroes from the Davidson County grand juries and this holding was affirmed.

In the instant case the district court found that there had

been a full hearing on the issue before him in the state court and denied relief without conducting a hearing. 28 U.S.C. § 2254(d). In his opinion the District Judge noted that the method of selection of grand juries employed in Davidson County at the time of petitioner's indictment did produce a statistical imbalance in that the number of black grand jurors was substantially less than the percentage of the black population of the county. However, the court further found that petitioner had failed to establish that the imbalance resulted from purposeful discrimination in the selection of the grand jury which indicted petitioner. On this holding the petition was denied.

The petitioner contends that he created a *prima facie* case of systematic exclusion by proving the statistical imbalance, and that the respondent failed to carry the burden of overcoming it. Turner v. Fouche, 396 U.S. 346 (1970). An examination of the transcript of the state hearing reveals that grand juries in Davidson County, Tennessee in 1968 were selected by the judges of the criminal court of the County. Two of the three incumbent judges who had selected grand juries under this system were sworn as witnesses and testified at length concerning the procedures employed in securing grand juries. The third criminal court judge, who presided at petitioner's state habeas corpus hearing, made a statement

which appears in the record. These witnesses testified that they made a consistent effort to call a fair cross-section of the population with respect to age and occupation as well as race but observed a marked reluctance on the part of Negroes to serve. This was attributed to the economic hardship involved in ^{grand} jury service which usually lasted for four months. All three of the judges stated positively that any disparity in the composition of grand juries was unintentional. There is no evidence of a system by which prospective black grand jurors were identified and then "culled out" as in Alexander v. Louisiana, 405 U.S. 625 (1972). In fact, the Clerk of the Davidson County Criminal Court, who had custody of the grand jury lists, testified that the lists contained no racial designations. Nor does the record support an inference, as claimed by petitioner, that Negroes were intentionally eliminated at that point in the selection process where subjective decisions were made. Rather, the evidence is that those who made the subjective choices attempted to achieve balanced grand juries which reflected the population of the county and made affirmative efforts to secure black grand jurors. This is "a countervailing explanation" of the statistical imbalance, see Turner v. Fouche, supra at 359, which created an issue for determination by the trier of fact.

On the whole record we believe the finding of the district court that there was no purposeful discrimination in the selection

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of the grand jury which indicted petitioner is supported by substantial evidence and is, therefore, not clearly erroneous.

Affirmed.

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