Jury News

BY PAULA HANNAFORD-AGOR

The fair cross section requirement in the wake of *Berghuis v. Smith*

Those of us at the Center for Jury Studies, who spend our professional lives thinking about effective jury management, have been on the edge of our seats for the past six months — ever since the U.S. Supreme Court granted certiari in the case of *Berghuis v. Smith*.[1] This was the first case since *Duren v. Missouri*[2] that involved the Sixth Amendment right to an impartial jury selected from a fair cross section of the community. And the facts of the case made it a very improbable one for grappling with the fair cross section requirement in any reasonably straightforward way.

We were all very curious about what the U.S. Supreme Court had in mind when it accepted the case. So curious, in fact, that we even arranged a fieldtrip to Washington, D.C., to watch the oral arguments on January 20, 1010. Would the justices decide the case purely on habeas grounds? Or did they intend a significant change in fair cross section jurisprudence? The unanimous opinion, authored by Justice Ruth Ginsberg, was released March 30. The upshot is that the three-pronged approach the court adopted in *Duren* is still good law. Nevertheless, the court did offer some limited guidance to the lower courts on several disputed questions that have arisen over the three decades since *Duren* was decided, while leaving unsettled several other questions.

The facts and procedural history of *Berghuis v. Smith*

Berghuis v. Smith was an appeal from a federal Sixth Circuit Court of Appeals decision granting habeas corpus relief to Diapolis Smith, who was convicted of murder and sentenced to life imprisonment in the Circuit Court of Kent County, Michigan, in 1993. During jury selection for the trial, Smith objected to the jury venire on grounds that it under-represented African Americans. The initial jury panel consisted of 60 to 100 prospective jurors, of which three at most were identified as African American. According to the 1990 Decennial Census, 7.28 percent of the adult population in Kent County was characterized as African American. At a subsequent evidentiary hearing on the jury challenge, the trial court heard expert testimony that during the six-month period preceding Smith's trial, the pool of qualified jurors in the Circuit Court of Kent County consisted of only 6 percent African Americans — approximately 18 percent lower than expected given the proportion of African Americans in the community. The jury that convicted Smith consisted of 12 white jurors.

Two factors were identified as the possible cause of the under-representation. First, in addition to managing its own jury operations, the circuit court managed jury operations for the 12 municipal courts located in Kent County. Until shortly after Smith's trial in 1993, its practice was to allocate jurors from the master jury list to the municipal courts first and only retain the jurors remaining on the master jury list for use in the countywide jury pool. The largest concentration of African Americans in Kent County (85 percent) lived in the city of Grand Rapids. Smith claimed that the allocation process resulted in the "siphoning" of African Americans from the countywide jury pool to the jury pool for the Grand Rapids municipal court. Second, Smith claimed that the circuit court routinely granted jurors' requests to be excused for hardship due to loss of income, lack of transportation, and lack of childcare, which disproportionately released African Americans from jury service. At the time of Smith's trial, the Kent County Circuit Court had a maximum term of service of three weeks and paid jurors only $15 per day.

In deciding the jury challenge, the trial court followed the three-pronged approach adopted in *Duren v. Missouri* to determine whether the composition of the jury pool violated the fair cross section requirement. Under *Duren*, a defendant must establish that (1) a "distinctive group" (2) is not

fairly represented in the jury pool and (3) that "systematic exclusion" accounts for the group's under-representation. After ruling that African Americans were a "distinctive group," the trial court considered two commonly used measures of under-representation. The absolute disparity, which describes the numerical difference between the representation of a distinctive group in the community and its representation in the jury pool, was 1.28 percent, and the comparative disparity, which describes the proportional difference in the group's representation, was 18 percent. Although the trial court found that the amount of under-representation was sufficient to support the jury challenge, it ruled that there was insufficient evidence that either the court's allocation process or the court's excusal policy systematically excluded African Americans from the jury pool.

Based on the subsequent procedural history, it is certainly fair to say that reasonable courts can disagree about the conclusions to be drawn from the facts presented in *Berghuis*. On appeal, the Michigan Court of Appeals agreed that the under-representation was sufficient to support the second prong of the *Duren* test, but also ruled that the allocation process caused the systematic exclusion of African Americans. The Supreme Court of Michigan, in turn, reversed the court of appeals decision on both the second and third prongs of *Duren*. It ruled that Smith's statistical evidence did not establish a "legally significant disparity" using either the absolute or the comparative disparity measures. The Supreme Court of Michigan also considered Smith's allegations of systematic exclusion based on both the allocation process and the excusal policy. With respect to the former, the court found the evidence insufficient to establish that the allocation process significantly contributed to the under-representation of African Americans. It also concluded that although socioeconomic characteristics likely contributed disproportionately to the excusal rates for African Americans, those characteristics were not inherent in the circuit court's jury selection process and thus did not systematically exclude them from jury service.

Having exhausted the state appellate process, Smith sought a writ of habeas corpus from the federal courts. To succeed, however, Smith now had to satisfy Section 2254 of the federal Antiterrorism and Effective Death Penalty Act of 1996, which requires the applicant to show that any claim adjudicated in state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In essence, Smith had to convince the federal courts of the existence of "clearly established Federal law" concerning the appropriate measure of under-representation, the requisite amount of disparity using that measure, and the definition of systematic exclusion, all of which have been disputed questions in both the state and federal courts. Then he would have to show that the Supreme Court of Michigan unreasonably applied that law in deciding his appeal.

Smith was unsuccessful at the federal district court, which dismissed his application, but the Sixth Circuit Court of Appeals was more accommodating. The Sixth Circuit ruled that when the representation of a distinctive group is relatively small, comparative disparity is the appropriate measure to examine. Agreeing with the Michigan Court of Appeals, it found that the juror allocation systematically excluded African Americans. In its opinion, it also took issue with the Michigan Supreme Court's conclusions about the disproportionate exclusion of African Americans due to socioeconomic factors. As the Sixth Circuit stated, "the Sixth Amendment is concerned with social or economic factors when the particular *system* of selecting jurors makes such factors relevant to who is placed on the qualifying list and who is ultimately called to or excused from service on a venire panel." The Sixth Circuit granted Smith's application for habeas relief and ordered that the State of Michigan either retry Smith within 180 days of the opinion or release him from prison. The State of Michigan then appealed to the U.S. Supreme Court, which granted certiorari September 30, 2009.

The U.S. Supreme Court Opinion

On March 30, 2010, the U.S. Supreme Court issued its unanimous opinion in *Berghuis v. Smith*, reversing the Sixth Circuit Court of Appeals. Justice Ginsberg, who argued as counsel before the U.S. Supreme Court on behalf of Duren in *Duren v. Missouri*, authored the opinion. Justice Thomas wrote a concurring opinion. Ultimately, the court decided the case on habeas grounds, ruling that "our *Duren* decision hardly establishes — no less "clearly" so — that Smith was denied his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community." The opinion strongly reaffirms *Duren's* three-prong test as the appropriate analytical framework for considering jury challenges based on fair cross section claims, but disavowed that *Duren* specified a particular method or test that courts should employ to measure under-representation, much less a definitive threshold level that would establish the second prong. It recognized that lower courts had employed a number of different measures of disparity — absolute disparity, comparative disparity, and statistical significance tests were cited as the most common measures — but found that all of them could be misleading, particularly with respect to comparatively small populations of distinctive groups. Indeed, the U.S. Supreme Court's opinion approvingly cited the Michigan Supreme Court's admonition that "provided that the parties proffer sufficient evidence, the results of all of the tests should be considered."

As for the claim of systematic exclusion, the U.S. Supreme Court ultimately agreed with the Michigan Supreme Court that evidence concerning the juror allocation process in Kent County failed to prove that it actually caused the under-representation of African Americans. The testimony offered during the trial court's evidentiary hearing merely established that court officials *believed* the allocation process was the cause of the under-representation. Indeed, after discontinuing the allocation system shortly after Smith's trial, the comparative disparity of African Americans only decreased to 15 percent, which tends to show that even if the juror allocation system was a contributing factor, it was not a substantial factor overall. The opinion concluded by restating one of the caveats propounded in *Duren*: that states retain broad discretion to define eligibility qualifications and exemption criteria for jury service, including hardship exemptions. It explicitly declined to consider whether disproportionate impact of socioeconomic factors could support a fair cross section claim.

Lessons to take from *Berghuis v. Smith*

Court administrators and jury managers may be tempted to conclude that nothing has changed as a result of *Berghuis v. Smith* and they can simply go back to running their jury systems the way they always have. However, I think that would be a premature conclusion. Certainly the law has changed for courts located in states or federal circuits that previously adopted absolute disparity as the only valid measure of representational disparity. The *Berghuis* decision made it abundantly clear, albeit in dicta, that relatively small absolute disparities can potentially reflect differences in representation that would easily establish that a distinctive group is not fairly represented in the jury pool. As convenient as a bright-line rule may be, courts would be well advised to employ multiple measures of under-representation to get a fuller and more accurate assessment of the actual degree of representation for distinctive groups in the community.

State and federal courts would also be wise to avoid complacency concerning the amount of under-representation they consider tolerable — that is, not crossing the line of a constitutional violation. Many courts, particularly in urban areas, routinely experience absolute disparities up to 4 percent and comparative disparities up to 30 percent. Because official case reporters are full of cases involving jury challenges that ultimately failed because those levels of absolute or comparative disparity didn't rise to some previously

established numerical threshold, many courts assume that existing disparities fall within constitutionally acceptable boundaries. The U.S. Supreme Court explicitly rejected the State of Michigan's proposal to adopt a bright-line 10 percent absolute disparity threshold in *Berghuis* and declined to consider the constitutional significance of such a rule, which may suggest that this type of purely mechanical approach to fair cross section jurisprudence might be viewed with disfavor if it were raised in an appropriate case.

Finally, the court declined to address the issue of socioeconomic factors in systematic exclusion analysis. Other state and federal courts have weighed in on this issue, however, coming to the same conclusion as the Sixth Circuit. One of the earliest examples was *People v. Wheeler*,[3] in which the Supreme Court of California found that exclusive reliance on the voter registration list as the sole source of names for the master jury list systematically excluded African Americans and Hispanics from the jury pool. Technological advances had made it possible for courts to merge multiple source lists to create a more inclusive and representative master jury list, making the argument that low voter registration rates by African Americans and Hispanics that lead to under representation no longer justifiable. In *People v. Harris*, the California Supreme Court explicitly warned against under-representation "stemming from negligence or inertia" in the jury selection process, citing cases that recognize that "official compilers of jury lists may drift into discrimination by not taking affirmative action to prevent it."[4] In *U.S. v. Green*,[5] the U.S. District Court for the Eastern District of Massachusetts ruled that the court's failure to take reasonable steps to address undeliverable and failure-to-appear rates for jurors living in predominately minority zip codes violated the federal Jury Selection and Service Act.[6] These cases may suggest a new and growing intolerance for trial court complacency concerning factors that may fall outside of courts' ability to prevent, but for which reasonably effective and cost-efficient remedies exist. In Kent County, for example, the comparatively long terms of service and low juror fees no doubt contributed to the disproportionate excusal rates for African Americans. In other courts, failure-to-appear and undeliverable rates often correlate with lower socioeconomic status, resulting in under-representation of distinct minority groups. Cost-effective remedies exist for all of these conditions, including one-day or one-trial terms of service, increased juror fees, follow-up programs on non-response and FTA jurors, and improved techniques to maintain the accuracy of addresses on the master jury list. Courts that implement these types of practices can greatly improve the demographic representation of the jury pool, thus preventing the likelihood of a successful jury challenge.

ABOUT THE AUTHOR

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NOTES

1. *Berghuis v. Smith*, 559 U.S. ___ (2010).
2. *Duren v. Missouri*, 439 U.S. 522 (1979)
3. *People v. Wheeler*, 503 P.2d 748 (Cal. 1978).
4. *People v. Harris*, 36 Cal. 3d 36, 58 (1984).
5. *United States v. Green*, 389 F. Supp. 2d 29 (D. Mass. 2005).
6. The court proposed over-sampling from predominantly minority zip codes as a remedy in that case. The U.S. Court of Appeals for the First Circuit subsequently overturned the order on grounds that the remedy unlawfully supplemented the Jury Plan for the Eastern District of Massachusetts. *In re U.S.*, 426 F. 3d 1 (1st Cir. 2005). In 2006, the U.S. District Court for the Eastern District of Massachusetts amended its jury plan to respond to an undeliverable summons by sending an additional summons to the same zip code.