IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1492

WALTER E. WASHINGTON, ET AL., *Petitioners*,

v.

ALFRED E. DAVIS, ET AL., GEORGE HARLEY, JOHN D. SELLERS, *Respondents*.

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, George Harley and John D. Sellers, oppose the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on February 27, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 512 F. 2d 956. The opinion of the District Court is reported at 348 F. Supp. 15 (1972). Both opinions are reprinted in the Appendix to the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that the test administered to applicants to the Metropolitan Police Department of the District of Columbia ("Test 21") has an adverse impact on blacks?

2. Whether the Court of Appeals correctly concluded that Test 21 was not shown to be a valid measure of the trainability of police recruits?

COUNTERSTATEMENT OF THE CASE

Respondents Harley and Sellers are two black men who applied for employment with the Metropolitan Police Department of the District of Columbia, and who were disqualified because they did not achieve a passing score on the entrance examination—"Test 21". They maintained this action against the Commissioner and the Chief of Police of the District of Columbia, and against the members of the Civil Service Commission, which developed and administers Test 21, alleging that the test is racially discriminatory.

The District Court granted summary judgment in favor of the defendants. On appeal, this judgment was reversed by the Court of Appeals, which held that Test 21 has disproportionately adverse impact on blacks and that it was not shown to be validly related to the job of policemen, or to training for that job. The District of Columbia defendants have filed a petition for a writ of certiorari to review the judgment of the Court of Appeals. The Solicitor General originally secured an extension of time in which to consider whether to file a petition for a writ of certiorari in behalf of the members of the Civil Service Commission (A-954), but subsequently determined that such a petition would not be filed.

The facts are relatively simple. In order to be considered for appointment to the Department, an applicant must achieve a score of 40 or more on Test 21.[1]

[1] An applicant must also have completed high school. 348 F. Supp. at 16. That requirement is not challenged in this case.

(The text of one version of Test 21 appears in the Appendix to the Petition herein, pp. 22a-45a.) This test was developed by the Civil Service Commission for general use throughout the federal service as a measure of verbal ability.

Applicants who pass Test 21 and who are accepted as police cadets are first assigned to an intensive seventeen-week course in Recruit School. It is the unbroken policy of the Department that all cadets successfully complete Recruit School. The passing score on Recruit School examinations is 70 per cent, and cadets who do not receive that score on any examination are given additional instruction and permitted to retake the examination until a passing score is achieved.

The pass/fail data on Test 21 for all white and all black applicants to the Department from 1968 through 1971 are as follows:

	Pass	Fail	% Fail
Whites	6742	1003	13.0
Blacks	4747	6107	56.3

Appendix in the Court of Appeals at p. 57.

In the face of this statistical data showing the overwhelming adverse impact of Test 21 on black applicants, the only study offered in support of the Test is a 1967 Report by David Futransky of the Civil Service Commission. This Study is reproduced in the Appendix to the Petition at pp. 53a-62a. Futransky examined the relationship between the scores achieved on Test 21 of 361 persons appointed to the force between 1963 and 1967 and the performance of these persons in Recruit School, and later on the job. He also examined the relationship between Recruit School grades and subsequent job performance.

The only portion of the Study on which the defendants relied [2] was that dealing with a correlation between the level of passing scores on Test 21 and the level of passing scores in Recruit School. Specifically, the Study shows that both whites and blacks who scored in the highest passing bracket on Test 21 tended to score in the highest passing bracket in the Recruit School examinations in greater proportions than did persons who scored in the lower passing brackets on Test 21.[3] There is no evidence in the Record of any correlation between Test 21 scores and performance as a police officer. And there is no evidence of any correlation between Recruit School grades and performance as a police officer.[4]

In these circumstances, the Court of Appeals aptly observed that the Futransky Study "tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations, and nothing to counter this hypothesis has been presented to us." 512 F. 2d at 962.

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[2] The Study determined that, at least for blacks, neither Test 21 scores nor Recruit School grades have any correlation with job performance (Petition, 57a-59a), but the petitioners have disclaimed this portion of the study. (See Appendix in the Court of Appeals, pp. 92-94.)

[3] Futransky's findings in this regard are summarized in his study, Petition, p. 55a.

[4] See note 1, *supra*.

REASONS FOR NOT GRANTING THE WRIT

1. The Court of Appeals' Determination of Adverse Racial Impact Is Wholly in Accordance with the Decisions of This Court.

The undisputed facts of record are that black applicants to the Metropolitan Police Department fail Test 21 at a rate four times greater than do white applicants. From this, both the District Court and the Court of Appeals determined that adverse racial impact had been shown and that the burden of showing test validity shifted to the defendants.[5] In this Court, petitioners argue that the determination of racial impact should be made not on the basis of this data, but rather by comparison of the black hire rate and the black population percentage, not in the District of Columbia, where the comparison would be adverse to their position, but in some larger geographic area which petitioners categorize as their "recruitment area".

In *Moody* v. *Albemarle Paper Co.*, 43 U.S.L. Week 4880 (June 25, 1975), decided after the filing of the Petition herein, this Court held that there is a "prima facie case of discrimination—[where it is] shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." 43 U.S.L. Week at 4886. See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, n.14 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Petitioners have not

[5] The Petition erroneously asserts that "the District Court held that [Test 21] did not have adverse racial impact." p. 5. To the contrary, the District Court "accepted [the pass/fail data] as sufficient to shift the burden of inquiry to the defendants . . . ." 348 F. Supp. at 16.

cited a single decision anywhere in which a court declined to make a finding of adverse racial impact on the basis of pass/fail data showing blacks failing a test in significantly higher proportions than whites.[6] There is plainly no reason presented for the further consideration of this question by this Court.

2. The Court of Appeals Properly Concluded that Test 21 Had Not Been Shown To Predict Trainability.

The Court of Appeals did not, as the Petition suggests, decide that an employment test cannot be validated as a measure of trainability. Rather, the Court held that this question does not even arise in this case because, while Test 21 may predict Recruit School exam averages, it was not shown to predict trainability.

> Appellees assert that their validity study establishes that Test 21 is predictive of "trainability,"

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[6] None of the cases on which petitioners rely on this issue (Petition, p. 12) support their position. In *Chance* v. *Board of Examiners,* minority proportions of the general population were never even mentioned in the Court of Appeals' opinion (458 F. 2d 1167 (2d Cir. 1972)), and the lower court specifically rejected population figures as a relevant factor. 330 F. Supp. at 214. Both the district court and the Court of Appeals relied on pass/fail rates in finding adverse racial impact. 330 F. Supp. at 209-212, 458 F. 2d at 1171-72. In *Castro* v. *Beecher,* 334 F. Supp. 930 (D. Mass. 1971), Judge Wyzanski rejected population percentages as a relevant criterion of the adverse impact of an employment test, and relied instead on pass/fail rates. 334 F. Supp. at 936, 942. In affirming, the Court of Appeals followed the same approach. 459 F. 2d 725, 735 (1st Cir. 1972). And in *Western Addition Community Organization* v. *Alioto,* 340 F. Supp. 1351 (N.D. Calif. 1972), the district court noted the extreme disparity between black population percentages in San Francisco and black representation on the San Francisco Fire Department, but in shifting the burden with respect to the employment test to the defendants, the court relied on the disparity in black and white pass/fail rates. 340 F. Supp. at 1353.

> and that therefore the examination survives the *Griggs* standard. Appellants, on the other hand, have convincingly argued that the record evidence does not demonstrate a sufficient relationship between Test 21 scores and trainability. All entrants into Recruit School pass the final examinations with a grade of 70 or above; if a particular candidate has difficulty, he is given assistance until he succeeds in passing the examinations. The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School, but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85. Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures. For these reasons, and because of the departmental policy that nobody fail Recruit School, appellees have not shown that the admission of applicants who score below 40 on Test 21 into Recruit School would necessitate expanded training time or produce Recruit School failures. We might add that the Recruit School averages apparently have not been used by the Department for any purpose other than the attempt to validate Test 21 in this case.

512 F. 21 at 963 (footnotes omitted).

Thus, the issue presented is not whether trainability is a standard against which a test with adverse racial impact can be validated. The question is whether petitioners have shown that Test 21 measures trainability. The court below correctly held, on the particular facts of this case, that no such showing had been made. The Civil Service Commission which prepared the Test and

sponsored the Futransky Study has accepted this conclusion. No question of general importance warranting the attention of this Court is presented.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD B. SOBOL
1520 New Hampshire Avenue, N.W.
Washington, D. C. 20036
Tel.: 483-1470

GEORGE COOPER
415 West 116 Street
New York, New York 10027

RICHARD T. SEYMOUR
1425 H Street, N.W.
Washington, D. C. 20005

Attorneys for Respondents

Of Counsel:

RALPH J. TEMPLE
3000 Connecticut Avenue, N.W.
Washington, D. C. 20008

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