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## 06-11-1986 Memorandum to the Conference

Lewis F. Powell  
*US Supreme Court Justice*

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 11, 1986

Batson Retroactivity

MEMORANDUM TO THE CONFERENCE:

I enclose a draft of a proposed Per Curiam in Allen v. Hardy, No. 85-6593, a habeas case pending here on cert to CA7. Both the District Court and CA7 rejected Allen's contention that the prosecutor's exercise of peremptory challenges violated Swain and the Sixth Amendment. In the pending petition for cert, Allen may fairly be viewed as arguing that Batson should be applied retroactively on habeas.

On May 29, 1986, the Conference thought that the Court should use Abrams v. McCray, 84-1426, as the case for deciding whether Batson should be applied retroactively on collateral review of convictions that became final before Batson was announced. In McCray, CA2 - applying Sixth Amendment analysis - concluded that Swain was not a binding precedent because it was decided on equal protection grounds. On reflection, I concluded that the retroactivity issue should not be resolved in McCray, primarily because McCray adopted a Sixth Amendment standard that the Court has not yet considered. It would be difficult to write a decision holding that Batson did not apply retroactively in the context of a case that applied a different constitutional rule, without also saying something about the merits of that rule.

If the Court approves a Per Curiam along the lines of my draft, we then could dispose of McCray - and also Michigan v. Booker, 84-1028 (a CA6 case similar to McCray) - by a GVR in light of both Batson and Allen v. Hardy. That disposition would inform CA2 and CA6 that they should reconsider their Sixth Amendment analysis in light of Batson, and that they should not apply the new standard - whether under the Equal Protection Clause or the Sixth Amendment - to final convictions.

I should note that we called for a response in Allen v. Hardy on May 16, 1986. As the time for a response

does not expire until June 16, we should not act on these cases until the June 19 Conference. It is unlikely that anything in the response will require a change in the enclosed draft.

L. F. P.  
L.F.P., Jr.

SS

SUPREME COURT OF THE UNITED STATES

RAUL ALLEN, PETITIONER, v. STEPHEN L. KARDYANAL

ON PETITION FOR WRIT OF HABEAS CORPUS AND FOR WRIT OF HABEAS CORPUS FOR APPELLATE REVIEW OF A FEDERAL DISTRICT COURT

FILED IN CASE NO. 73-1007

NOTICE

In 1973, petitioner Carl Allen, a black male, was arrested for membership in a white supremacist group. During the trial of the 1973 case, a preliminary hearing was held. The prosecutor asserted that the defendant had conspired to murder a black man and a white woman. Defense counsel moved to discharge the jury on the ground that the "State's use of peremptory challenges amounted to a denial of the defendant's right to a fair trial." The judge denied the motion. The jury returned a verdict of guilty, and the judge sentenced petitioner to life imprisonment. On appeal, the state supreme court affirmed the conviction. The United States Supreme Court granted certiorari. The Court affirmed the conviction. The Court held that the use of peremptory challenges does not violate the defendant's right to a fair trial. The Court cited several cases, including Swain v. Alabama, 380 U.S. 303 (1965), and Batson v. Kentucky, 476 U.S. 559 (1986). The Court also cited several cases regarding the use of peremptory challenges, including Swain v. Alabama, 380 U.S. 303 (1965), and Batson v. Kentucky, 476 U.S. 559 (1986). The Court held that the use of peremptory challenges does not violate the defendant's right to a fair trial. The Court cited several cases, including Swain v. Alabama, 380 U.S. 303 (1965), and Batson v. Kentucky, 476 U.S. 559 (1986).