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01-11-1974 Preliminary Memorandum

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G-R sum

PRELIMINARY MEMO

Jan. 11, 1973 Conf.
List 2, Sheet 2

No. 73-5768 - CFH

cert to CA4 (Haynsworth, Widener, Field)
memorandum

FRANCISCO

Federal - civil

v.

GATHRIGHT, Superintendent Timely

1. The issues are (1) whether a state prisoner who has exhausted state remedies is to be denied federal habeas relief because his claim should be resubmitted to state courts in light of an intervening State Supreme Court decision validating that claim; and (2) whether the same prisoner must await federal habeas relief on one claim pending consideration of another independent claim by the state courts.

2. FACTS: Petr was convicted of unlawful possession with intent to distribute heroin. He was arrested late one evening in his apartment by police officers following the purchase of drugs by an informant. Police observed the transaction through a window and then entered the apartment without a warrant and seized heroin on petr's person and from his bedroom. At trial, petr moved to suppress the evidence as the fruit of an unlawful search. The motion was denied.

The State's evidence consisted of testimony from the arresting officer, the informant and a chemist. Petr's evidence showed that petr and the informant were both addicted to heroin and that the informant's reputation for truth and veracity was poor. Petr did not testify in his own defense.

The jury was instructed, over defense counsel's objection, that " a conviction for possession of a controlled drug with intent to distribute may be based solely upon the evidence as to the quantity of the controlled drug possessed." This instruction reflected a statutory presumption.

Petr was convicted and sentenced to eight years' imprisonment. Petr appealed and his conviction was denied review by the Va Sup Ct. Petr sought habeas relief in USDC (E.D. Va. Bryan), arguing that the search and seizure was unlawful and that the statutory presumption reflected in the jury instruction denied him due process.

3. LOWER COURTS: The USDC ruled against petr on the Fourth Amendment claim, but dismissed the instruction claim without prejudice, finding that the instruction claim should be left to the state courts in light of a recent State Supreme Court invalidating the statutory presumption. The CA affirmed, except that it held it improper to reach the merits of the

Fourth Amendment claim. The CA held that the district court was "premature" in reaching the claim since if relief is granted on the state claim, the state will have the option of releasing or retrying petr, and the possibility exists that the claim might become moot. The CA gave petr the right to reassert the claim should state relief not be granted.

4. CONTENTIONS:

A. Petr contends that the CA decision is contrary to Roberts v. LaVallee, 389 U.S. 40 (1967). In Roberts, petr had been denied a preliminary hearing transcript by the state trial court. He had exhausted his state remedies. He applied for federal habeas relief. It was denied. Pending his appeal, the N.Y. Court of Appeals decided that such a denial violated the Constitution. CA2 recommended a state court determination in the first instance on petr's claim. This Court reversed. It found that the denial of a transcript could not meet "the test of our prior decisions." Consequently, "[s]till more state litigation would be both unnecessarily time-consuming and otherwise burdensome. This is not a case in which there is any substantial state interest in ruling once again on petr's case. We can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles." 389 U.S. at 43.

Petr notes that the state court decision ^{here} invalidating the statutory presumption, relied on Leary v. United States, 395 U.S. 6 (1969). Thus, the present case is not significantly different from Roberts.

B. Petr also contends that the CA ruling to hold up federal habeas relief on the Fourth Amendment claim is in error and in conflict with the prevailing disposition of such issues in other circuits. U.S. ex. rel Levy v. McMann, 394 F.2d 402 (CA2 1968); U.S. ex. rel Boyance v. Myers, 372 F.2d 111 (CA3 1967); Tyler v. Swenson, 483 F.2f 611 (CA8 1973); Contra, Wheeler v. Beto, 407 F.2d 816 (CA5 1969). Petr contends that this claim should be reached since it is independent of the other issue and would otherwise waste petr's and the state's time. Moreover, a favorable decision on this issue would in effect preclude the state from trying him. Petr has waited two and one half years in prison and one year for the habeas proceeding. He believes he is entitled to quick action on his claims.

5. DISCUSSION: Petr's claims appear to have merit and a response should be requested.

1/3/73

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Op CA4 in petr's appx.

CFR

JJK

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