5-8-1986

05-08-1986 Preliminary Memorandum

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Law Clerk, US Supreme Court

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PRELIMINARY MEMORANDUM

May 15, 1986 Conference
List 4, sheet 2

No. 85-6593 – CFH

ALLEN (denied cpc despite Batson claim)	Cert to CA7 (Eschbach, Posner, Flaum) (Order denying cpc)	
v.		
HARDY, ATTY. GEN., Illinois, et al.	Fed./Civ. (habeas)	Timely

1. SUMMARY: Petr contends that (1) CA7 erred in refusing to issue a certificate of probable cause in a case that presents an issue currently pending before this Court; and (2) the DC erred in requiring him to show "cause" for his failure to produce studies detailing systematic exclusion of minority jurors.

2. FACTS AND DECISIONS BELOW: Petr was convicted of two murders in Ill. state court and sentenced to concurrent 100-to-300-year prison terms. He argued in state court that he had been denied his constitutional right to an impartial jury because the prosecutor exercised his peremptory challenges to exclude all

blacks and hispanics from the jury. Relying on Swain v. Alabama, 380 U.S. 202 (1965), the Ill. App. Ct. rejected this claim on the ground that petr had not shown that the State systematically excluded blacks and hispanics from juries.

Having exhausted his state court remedies, petr brought this habeas action in Federal District Court (N.D. Ill., Shadur). In the series of four opinions, the DC (1) postponed consideration of the Batson/Swain claim until the Ill. Sup. Ct. decided a then pending case concerning the continued vitality of Swain; (2) concluded that petr's failure to make even an offer of proof at trial of systematic exclusion of minorities over time is a state procedural default; (3) held that petr had failed to show "cause" for such failure--petr's claims that his attorneys were unaware of the state's attorney's alleged de facto policy of using peremptory challenges for the systematic exclusion of minorities, and that he lacked the resources to compile and analyze the necessary statistics, are not sufficient cause for petr's failure to have tendered any evidence at all; and (4) adhered to its view that petr had waived or abandoned any claim based on systematic exclusion of jurors, but reached the merits of that claim "in any event," observing that CA7 had twice in the past 60 days rejected the identical claim that Swain was no longer good law or did not apply to Sixth Amendment challenges, and concluding that petr's claim was without merit.

In a separate order, the DC denied petr's motion for a certificate of probable cause, noting again that CA7 had twice reconfirmed the continuing validity of Swain. The court

therefore concluded that petr's appeal was not taken in "good faith" and was "legally frivolous."

CA7 likewise declined to issue a cpc, concluding that petr has failed to meet the standards set out in Barefoot v. Estelle, 463 U.S. 880, 893 n. 4 (1983).

3. CONTENTIONS: (1) The refusal of the courts below to permit petr to appeal flies in the face of the standards enunciated by this Court in Barefoot v. Estelle, supra. This Court's grant of certiorari in Batson v. Kentucky, No. 84-6263, cannot be squared with the DCs "legally frivolous" conclusion. In Barefoot, the Court made plain that in order to appeal an adverse decision a habeas petr is not required to "show that he should prevail on the merits. ... Rather he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the issues are 'adequate to deserve encouragement to proceed further.'" 463 U.S., at 893 n. 4. Each of these standards was met in this case, and the refusal of CA7 to permit petr to appeal should be summarily reversed.

(2) The novel waiver rule applied by the DC in this case warrants plenary review, either by CA7 or by this Court. At trial, petr's counsel objected to the prosecutor's use of peremptory challenges to exclude minorities from the petit jury. The state appellate court rejected this claim because petr had failed to establish the kind of systematic exclusion required by Swain. Petr sought an opportunity in this habeas proceeding to establish such systematic exclusion. It is far from clear that a

DC may require a showing of "cause and prejudice" when, as here, the state courts have addressed the merits of a prisoner's claims. Ulster Co. Court v. Allen, 442 U.S. 140, 149 (1979). The appropriateness of review is underscored by the refusal of the DC to accept as "cause" petr's unrebutted allegation that at the time of trial his attorneys were unaware of the prosecutor's long-standing practice of systematically excluding minority jurors. That this alleged unfamiliarity with an unlawful practice should constitute cause is the teaching of Reed v. Ross, 104 S.Ct. 2901 (1984).

4. DISCUSSION: This petn might be treated in one of several different ways. It seems clear that CA7 would have viewed the cpc motion differently had Batson already come down at that time. (As far as I can tell, the DC's procedural bar holding only went to petr's Swain systematic exclusion claim; the Batson claim was rejected on the ground that Swain was still good law.) One option, therefore, would be a CFR and then a GVR in light of Batson.

Four members of the Court (THE CHIEF JUSTICE and JUSTICES WHITE, REHNQUIST, and O'CONNOR), however, expressed the view in Batson that the decision should not be applied retroactively. In addition, JUSTICES POWELL and BRENNAN indicated in internal memoranda that they agreed or might agree with that view. If the Court plans to take a case in order to decide the retroactivity question, it probably should hold this case (following a CFR). Depending on what else is out there, I think that this might not be the best case to take for that purpose, since CA7 denied cpc

and therefore never gave plenary consideration to petr's claims. If the Court decides to leave the retroactivity question to the lower courts for the time being, then I suppose a CFR and then a GVR would be the best course.

I recommend a CFR in anticipation of either a hold or a GVR.

IFP status is proper.

There is no response.

May 8, 1986 Moulton opns in petn

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