6-18-1986

06-18-1986 Clerk Memo

Pamela S. Karlan
Law Clerk, US Supreme Court

work for Th

June 18, 1986

Mr. Justice:

Re: No. 85-6593-CFH, Allen v. Hardy (June 19 Conf., List 3, Sheet 4)

This is the case in which JUSTICE POWELL has drafted the per curiam on Batson retroactivity. The response has finally arrived.

Resp argues that, first, petr's Equal Protection Clause claim (i.e., his straight Batson claim) is barred because of a procedural default: he declined to raise an equal protection argument to the Illinois courts. With respect to the Sixth Amendment claim (i.e., the denial of a fair cross-section), which was properly raised in the state courts, resp argues that the CA7 did not err in refusing to grant a CPC merely because this Court had granted cert in Batson, since there too, an issue of procedural default was involved. (Did petr's failure to make any offer of proof constitute a waiver of his right to an evidentiary hearing?).

Discussion: The State's response here shows why JUSTICE POWELL should perhaps have waited before deciding which case to use for his per curiam. Even if Batson were to be given full retroactive effect, presumably the waiver rules would still apply, and, in light of Engle v. Isaac, 456 U.S. 107 (1982), petr's failure to raise an equal protection claim before the state courts would bar him from relief.

In fact, the flood of potential habeas petitions raising Batson claims would most likely be stemmed solely by application

of already existing default rules, since most defendants will have failed to raise the necessary arguments to the state courts. I therefore don't see the need for a limited application of Batson.

Be that as it may, I recommend you wait to see what JUSTICE MARSHALL says in his dissent from the per curiam.

Pam