6-11-1986

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Lewis F. Powell
US Supreme Court Justice

HAB

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.

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