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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

RUEL ALLEN, JEFFERSON L. RAYDICAL

THE PETITION FOR WRIT OF HABEAS CORPUS IS GRANTED

IN FAVOR OF THE PETITIONER

FOR REHEAR

In 1978, petitioner, Carl Allen, a black male, was arrested for membership in a national and local branch of the Black Panther Party. During the trial of the party, petitioner testified that the prosecution expected to use the Sixth Amendment challenge to exclude the defendant's testimony. Defense counsel argued to discharge the jury on the ground that the "State's use of peremptory challenges amounted to discrimination against a particular jury member. This is a violation of the equality of the system by systematically excluding members from the jury pool." 700 F.2d at 80, 498 U.S. 136, 110 S.Ct. 2178, 22 N.E.2d 1002 (1981). The trial judge denied the motion. The jury returned petitioner's guilty verdict, and the judge sentenced him to the maximum prison term of 20 years.

The appeal before us raised the important question of the State's burden of peremptory challenges. Petitioner sought to exclude under South's Sixth Amendment Court to justify the verdict. The court ruled that in the absence of a showing that peremptory in the jury selection process was used to exclude members of a particular racial group, "a prosecutor's common-sense way not to exclude any who he excludes members of that group from sitting on a particular case by the use of peremptory challenges." 498 U.S. at 136, 110 S.Ct. 2178, 22 N.E.2d 1002. The record in this case did not establish systematic exclusion as required by South. 700 F.2d at 80, 498 U.S. 136, 110 S.Ct. 2178, 22 N.E.2d 1002. The court therefore affirmed petitioner's conviction. 700 F.2d at 80, 498 U.S. 136, 110 S.Ct. 2178, 22 N.E.2d 1002.