4/22/03

SPRING 2003 Volume 16

Sentinel

NEWS FROM THE COURTHOUSE

New District Judge

On April 14, 2003, Shelly Watkins took over the reins of the Honorable R. O. Hughes who recently retired. I know we all welcome Judge Watkins to the bench.

Congratulations to the Honorable Caryl P. Privett on her recent appointment to the Circuit Civil position replacing retiring Judge Wayne Thorn. Caryl brings to the bench a wealth of knowledge and experience.

Congratulations to the Honorable Helen Shores Lee on her recent appointment to the Circuit Civil position replacing the retiring Judge N. Daniel Rogers.

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There have been no judges' meetings in the past few months.

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MISCELLANEOUS

Anyone wishing to submit an article for publication in The Sentinel should submit it to Virginia P. Meigs at 2320 Arlington Ave., Birmingham, AL 35205.

Anyone wishing to receive a Greater Birmingham Criminal Defense Lawyers Association Certificate, please notify a Board Member in the next few weeks. Certificates will be passed out at the Summer Social.

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THE OFFICIAL

NEWSLETTER

OF THE GREATER

BIRMINGHAM CRIMINAL

DEFENSE LAWYERS'

ASSOCIATION

GENERAL MEETING OF THE GREATER BIRMINGHAM CRIMINAL DEFENSE LAWYERS' ASSOCIATION

DATE: TUESDAY, APRIL 29, 2003

TIME: 5:30 P.M.

PLACE: REDMONT/ CROWN PLAZA

PURPOSE: ELECT NEW OFFICERS

PRESENT BOARD OFFICERS:

PRESIDENT: VIRGINIA P. MEIGS

PRESIDENT ELECT: DON COLEE

VICE-PRESIDENT: ANDREW COLEMAN

SECRETARY: MARI MORRISON

TREASURY: MARY KAY LAUMER

BOARD MEMBERS:

DEREK DRENNAN, KIT WALKER, DAVID LUKER, TOMMY SPINA, JOHN ROBBINS, RICHARD IZZI

Take office in mid Aug...

From: Bill Messick

SOUTHERN FRIED HUMOR

An Arkansas State trooper pulls over a pickup truck on I-40 and says to the driver, "Got any ID?"

The driver says, "'Bout what?"

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Two Mississippians are walking toward each other, and one is carrying a
sack. When they meet, one says, "Hey Tommy Ray, whatcha got in th' bag?"

"Jes' some chickens."

"If I guesses how many they is, kin I have one?"

"Shoot, if ya guesses right, I'll give you both of 'em!" "OK.

Ummmmm...five?"

******

An Alabamian came home and found his house on fire. He rushed next door, telephoned the fire department and shouted, "Hurry over here-muh house is on fahr!"

"OK," replied the fireman, "how do we get there?"

"Shucks, don't you fellers still have those big red trucks?"

******

Why do folks in Kentucky go to R-rated movies in groups of 18 or more?

Because they heard 17 and under aren't admitted.

******

Ida Mae passed away and Bubba called 911. The 911-operator told Bubba that she would send someone out right away.

"Where do you live?" asked the operator.

Bubba replied, "At the end of Eucalyptus Drive.

" The operator asked, "Can you spell that for me?"

After a long pause, Bubba said, "How 'bout I drag her over to Oak Street and you pick her up there?"

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Know why they raised the minimum drinking age in Tennessee to 32?

They wanted to keep alcohol out of the high schools.

******

What do they call reruns of "Hee Haw" in Mississippi?

Documentaries

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Where was the toothbrush invented?

Arkansas.

If it were invented anywhere else, it would have been called a teethbrush.

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Did you hear about the $3,000,000 Tennessee State Lottery? The winner gets $3 a year for a million years.

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A new law was recently passed in North Carolina so that when a couple gets divorced, they're still brother and sister.

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What do a divorce in Alabama, a tornado in Kansas and a hurricane in Florida have in common?

No matter what, somebody's fixin' to lose a trailer.

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How do you know when you're staying in a Kentucky hotel?

When you call the front desk and say "I've got a leak in my sink," and the
person at the front desk says, "Go ahead.

LAW DAY- MAY 1, 2003
GBCDLA PROUD SPONSOR OF LAW DAY

GBCDLA HAS DONATED $500.00 TOWARD LAW DAY. LAW DAY ORIGINATED IN 1957 WITH THE AMERICAN BAR ASSOCIATION PRESIDENT CHARLES S. RHYNE, A WASHINGTON D.C. ATTORNEY, ENVISIONING A SPECIAL DAY FOR CELEBRATING OUR LEGAL SYSTEM. IN 1958, PRESIDENT DWIGHT D. EISENHOWER ESTABLISHED LAW DAY U.S.A. TO STRENGTHEN OUR GREAT HERITAGE OF LIBERTY, JUSTICE, AND EQUALITY UNDER LAW. IN 1961, MAY 1 WAS DESIGNATED BY JOINT RESOLUTION OF CONGRESS AS THE OFFICIAL DATE FOR CELEBRATING LAW DAY. LAW DAY WAS FORMED WITH THE INTENTION OF HELPING STUDENTS UNDERSTAND HOW OUR FREEDOMS DEPEND ON OUR GREAT SYSTEM OF LAW. SEVERAL MEMBERS ARE VOLUNTEERING TO BE SPEAKERS AT LAW DAY. AMONG THE MEMBERS ARE: KEN GOMANY, DAVID LUKER, JOHN ROBBINS, KAY LAUMER, TOMMY SPINA, DON COLEE, RICHARD IZZI, VIRGINIA P. MEIGS, MIKE HANLE, KIT WALKER, DEREK DRENNAN, AND JOHN LENTINE. **THANKS FOR ALL THE HELP!!!**

ALABAMA CRIMINAL DEFENSE LAWYERS ASSOCIATION

Summer Seminar – Pensacola Beach
1 pm June 26 (Thursday) thru noon on June 28 (Saturday)(10 CLE)
General Membership and Board Meetings on Friday, June 27
Hilton Garden Inn - On the Beach
Call 1-866-916-2999 (toll-free) for hotel accommodations.
Ask for the ACDLA rate of $179-(Run of House Rate) or $199 (Gulf Front)
Hotel Room block available until May 11, 2003.

From: Bill Messick

Subject: Alabama Supreme Court Rulings

DECISIONS ANNOUNCED BY THE SUPREME COURT OF ALABAMA ON FRIDAY, MARCH 14, 2003

*Ex parte Smith,
No. 1010267 (Ala. Mar. 14, 2003)
(criminal; capital murder; death penalty; mitigation evidence; mental retardation; HOLDING: The Supreme Court held that the defendant, who had been sentenced to death, was improperly restricted in presenting mitigation evidence of the impact of his allegedly dysfunctional family on his development. The Court held that the defendant was not mentally retarded even under the broadest definition of mental retardation.)

http://www.wallacejordan.com/decisions/Opinions2003/1010267.htm

*Ex parte Hodges,
No. 1010619 (Ala. Mar. 14, 2003)
(criminal; capital murder; judicial override of jury recommendation for life sentence; evidence of mitigating circumstances; The defendant was convicted of murder made capital because it was committed during the course of a robbery in the first degree. By a vote of 8-4, the jury recommended a life sentence. The trial judge overrode the jury and sentenced the defendant to death. HOLDING: The Supreme Court held that the judicial override was not unconstitutional in this case in light of Apprendi v. New Jersey, 503 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), because the findings reflected in the jury's verdict of the aggravating circumstance of the murder during a first-degree robbery exposed the defendant to a range of punishment that included the death penalty. The Court rejected the defendant's argument that he was unfairly restricted in presenting mitigation evidence.)

http://www.wallacejordan.com/decisions/Opinions2003/1010619.htm

Ex parte Barnett,
No. 1012094 (Ala. Mar. 14, 2003)
(criminal; Timothy Barnett was convicted of capital murder and was sentenced to life imprisonment without the possibility of parole. Barnett filed a petition for a writ of mandamus in the Court of Criminal Appeals, alleging that the trial judge had "abused his discretion by failing to rule on [his] Rule 32 petition." On July 15, 2002, the respondent trial judge answered, stating: "The records of the Circuit Court of Autauga County have been diligently searched and the Rule 32 Petition that Mr. Barnett alleges to have filed on April 30, 2001, does not exist." The Court of Criminal Appeals dismissed Barnett's petition. Barnett filed a petition for writ of mandamus with the Supreme Court of Alabama. Barnett did not include a copy of the alleged petition with his petition for writ of mandamus. Barnett asked the Court to order the trial judge to allow him to file his Rule 32 petition nunc pro tunc as though it was filed on April 30, 2001. HOLDING: The Supreme Court denied the petition for writ of mandamus. The Court noted that Barnett offered no evidence indicating that he has refiled, or has even attempted to refile, the Rule 32 petition with the circuit court, and therefore, the Court cannot grant Barnett's requested relief -- at this time -- because there is no pending Rule 32 petition for the Court to direct the circuit court to treat as having been filed on Apnl 30, 2001.)

http://www.wallacejordan.com/decisions/Opinions2003/1012094r.htm

From: Bill Messick [mailto:messick9@bellsouth.net]
Subject: Re: BAD SEARCH WARRANT

Ex parte Parker, No. 1010487 (Ala. - Jan. 17, 2003) Charlie Mae Parker pleaded guilty to unlawful possession of marijuana in the first degree. Before pleading guilty, Parker preserved her right to appeal the denial of her motion to suppress marijuana seized at her residence pursuant to a search warrant. The ground of her motion to suppress was that the search warrant was based on a deficient affidavit. On May 10, 1999, Investigator Van Jackson of the Lee County Sheriff's Department obtained a warrant to search Parker's and Hutchinson's residence. This search warrant was not executed. On May 18, 1999, Investigator Jackson obtained a second warrant to search this residence. To obtain this second search warrant, Investigator Jackson submitted his affidavit stating: "Within the past 72 hours, undercover Officer Jimmy Martin purchased approximately $100.00 in crack cocaine from Tabitha Hutchinson at her residence. ... Undercover Officer Martin has purchased crack cocaine from several different subjects and Hutchinson while at/or near this residence. Officer Martin was able to purchase crack cocaine approximately seven different times from Hutchinson and/or someone near her residence." At the suppression hearing, Investigator Jackson admitted that the last controlled buy made by police at Parker's residence was on May 7, 1999 and was not "within the past 72 hours" of his application for the May 18, 1999 search warrant. He said that the "within the past 72 hours" language was an "administrative error." **HOLDING**: The Supreme Court reversed the conviction. The Court held that the falsehood in the affidavit precipitated the issuance of a warrant not supported by probable cause to believe that cocaine was still located in the house on May 18, when the second affidavit was sworn and presented and the second search warrant was issued. The Court further noted that the affidavit does not establish a pattern of cocaine sales from the house occupied by Hutchinson and Parker that would support the conclusion that the cocaine that was there on May 7, 1999, was still there on May 18, 1999, when Investigator Jackson applied for the second search warrant and submitted the second affidavit. The Court noted that Investigator Jackson's affidavit testimony that Officer Martin had purchased crack from "Hutchinson while at/or near this residence" is not evidence that Officer Martin had purchased crack at this residence. Likewise, the Court noted that Jackson's statement that Officer Martin purchased "crack cocaine approximately seven different times from Hutchinson and/or someone near her residence" is not evidence that he purchased crack from Hutchinson at all. The Court also held that statements of unattributed hearsay in the affidavit did not contribute to a showing of probable cause.)

Click here for the full text of the decision:

http://www.wallacejordan.com/decisions/Opinions2003/1010487.htm

US SUPREME COURT DECISION:

MILLER-EL V. COCKRELL (01-7662)

Web-accessible at:

http://supct.law.cornell.edu/supct/html/01-7662.ZS.html

Argued October 16, 2002 -- Decided **February 25, 2003** Opinion author: Kennedy

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When Dallas County prosecutors used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury at petitioner's capital murder trial, he moved to strike the jury on the ground that the exclusions violated equal protection. Petitioner presented extensive evidence supporting his motion at a pretrial hearing, but the trial judge denied relief, finding no evidence indicating a systematic exclusion of blacks, as was required by the then-controlling precedent, **Swain v. Alabama**, 380 U.S. 202. Subsequently, the jury found petitioner guilty, and he was sentenced to death. While his appeal was pending, this Court established, in **Batson v. Kentucky**, 476 U.S. 79, a three-part process for evaluating equal protection claims such as petitioner's. Upon remand from the Texas Court of Criminal Appeals for new findings in light of Batson, the original trial court held a hearing at which it admitted all the Swain hearing evidence and took further evidence, but concluded that petitioner failed to satisfy step one of Batson because the evidence did not even raise an inference of racial motivation in the State's use of peremptory challenges. The court also determined that the State would have prevailed on steps two and three because the prosecutors had proffered credible, race-neutral explanations for the African-Americans excluded--i.e., their reluctance to assess, or reservations concerning, imposition of the death penalty--such that petitioner could not prove purposeful discrimination. After petitioner's direct appeal and state habeas petitions were denied, he filed a federal habeas petition under 28 U.S.C. sect. 2254 raising a Batson claim and other issues. The Federal District Court denied relief in deference to the state courts' acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, and subsequently denied petitioner's sect. 2253 application for a certificate of appealability (COA). The Fifth Circuit noted that a COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right," sect. 2253(c)(2); reasoned that a petitioner must make such a "substantial showing" under the standard set forth in **Slack v. McDaniel**, 529 U.S. 473; declared that sect. 2254(d)(2) required it to presume state-court findings correct unless it determined that the findings would result in a decision which was unreasonable in light of clear and convincing evidence; and applied this framework to deny petitioner a COA.

Petitioner's extensive evidence concerning the jury selection procedures falls into two broad categories. First, he presented, at the pretrial Swain hearing, testimony and other evidence relating to a pattern and practice of race discrimination in the voir dire by the Dallas County District Attorney's Office, including a 1976 policy by that office to exclude minorities from jury service that was available at least to one of petitioner's prosecutors. Second, two years later, petitioner presented, to the same state trial court, evidence that directly related to the prosecutors' conduct in his case, including a comparative analysis of the venire members demonstrating that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians; evidence that, during voir dire, the prosecution questioned venire members in a racially disparate fashion as to their death penalty views, their willingness to serve on a capital case, and their willingness to impose the minimum sentence for murder, and that responses disclosing reluctance or hesitation to impose capital punishment or a minimum sentence were cited as a justification for striking potential jurors; and the prosecution's use of a Texas criminal procedure practice known as "jury shuffling" to assure that white venire members were selected in preference to African-Americans.

HELD: The Fifth Circuit should have issued a COA to review the District Court's denial of habeas relief to petitioner. Pp. 11-24.

(a) Before a prisoner seeking postconviction relief under sect. 2254 may appeal a district court's denial or dismissal of the petition, he must first seek and obtain a COA from a circuit justice or judge, sect. 2253. This is a jurisdictional prerequisite. A COA will issue only if sect. 2253's requirements have been satisfied. When a habeas applicant seeks a COA, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims. E.g., **Slack**, 529 U.S., at 481. This inquiry does not require full consideration of the factual or legal bases supporting the claims. Consistent with this Court's precedent and the statutory text, the prisoner need only demonstrate "a substantial showing of the denial of a constitutional right." sect. 2253(c)(2). He satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his case or that the issues presented were adequate to deserve encouragement to proceed further. E.g., id., at 484. He need not convince a judge, or, for that matter, three judges, that he will prevail, but must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong, ibid. Pp. 11-13.

(b) Since petitioner's claim rests on a Batson violation, resolution of his COA application requires a preliminary, though not definitive, consideration of the three-step Batson framework. The State now concedes that petitioner satisfied step one, and petitioner acknowledges that the State proceeded through step two by proffering facially race-neutral explanations for these strikes. The critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. E.g., **Purkett v. Elem**, 514 U.S. 765, 768 (per curiam). The issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy. A plurality of this Court has concluded in the direct review context that a state court's finding of the absence of discriminatory intent is "a pure issue of fact" that is accorded significant deference and will not be overturned unless clearly erroneous. **Hernandez v. New York**, 500 U.S. 352, 364-365. Where 28 U.S. C. sect. 2254 applies, the Court's habeas jurisprudence embodies this deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, sect. 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, sect. 2254(d)(2). Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. In the context of the threshold examination in this Batson claim, it can suffice to support the issuance of a COA to adduce evidence demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based. Cf. **Reeves v. Sanderson Plumbing Products, Inc**., 530 U.S. 133. Pp. 13-16.

(c) On review of the record at this stage, this Court concludes that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. The Fifth Circuit evaluated petitioner's COA application in the same way. In ruling that

petitioner's claim lacked sufficient merit to justify appellate proceedings, that court recited the requirements for granting a writ under sect. 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence. This was too demanding a standard because it incorrectly merged the clear and convincing evidence standard of sect. 2254(e)(1), which pertains only to state-court determinations of factual issues, rather than decisions, and the unreasonableness requirement of sect. 2254(d)(2), which relates to the state-court decision and applies to the granting of habeas relief. More fundamentally, the court was incorrect in not inquiring whether a "substantial showing of the denial of a constitutional right" had been proved, as sect. 2253(c)(2) requires.

the jurors' own family history of criminality--pertained just as well to some white jurors who were not challenged and who did serve on the jury; by the evidence of the State's use of racially disparate questioning; and by the state courts' failure to consider the evidence as to the prosecution's use of the jury shuffle and the historical evidence of racial discrimination by the Dallas County District Attorney's Office. Pp. 16-24.

261 F.3d 445, reversed and remanded.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, O'Connor, Scalia, Souter, Ginsburg, and Breyer, JJ., joined. Scalia, J., filed a concurring opinion. Thomas, J., filed a dissenting opinion.

The question is the debatability of the underlying constitutional claim, not the resolution of that debate. In this case, debate as to whether the prosecution acted with a race-based reason when striking prospective jurors was raised by the statistical evidence demonstrating that 91% of the eligible African-Americans were excluded from petitioner's venire; by the fact that the state trial court had no occasion to judge the credibility of the prosecutors' contemporaneous race-neutral justifications at the time of the pretrial hearing because the Court's equal protection jurisprudence then, dictated by **Swain**, did not require it; by the fact that three of the State's proffered race-neutral rationales for striking African Americans--ambivalence about the death penalty, hesitancy to vote to execute defendants capable of being rehabilitated, and