March 2, 1984

No. 83-95, Patton v. Yount

Dear Lewis,

Forgive me for sending you another letter. You have enough to read without this added burden. I write because you are always willing to listen and because it seems most unfortunate to resolve this case by an equally divided Court. You qualified your vote to affirm as being "tentative" and I hope you might be persuaded to consider a reversal.

I take it from your discussion of the case that you were not persuaded to affirm on the basis of Judge Hunter's conclusion that juror bias should be implied from the pre-trial publicity. You spoke instead of Judge Garth's opinion concerning "actual bias" of Juror Hrin. I respect Judge Garth very much. He sat with me recently on the National Moot Court Finals. He is a fine judge, but I believe he is in error in this case.

The question of juror Hrin's bias was not properly raised for Judge Garth's review, I believe. The habeas petition includes only a vague reference that "two [jurors] stated they would require [respondent] to prove his innocence." App. 302a. In contrast to Judge Garth, I believe this reference was to jurors 2 and 10 (Clair Clapsaddle and Albert Undercoffer), both of whom expressed confusion concerning whether respondent had the burden of proof or not. Possibly, the reference could be to jurors 3 and 12, the two other seated jurors that respondent challenged for cause. The District Court certainly did not believe the issue of juror Hrin's "actual bias" was raised, for it assessed cause challenges to six specific jurors, and did not even mention juror Hrin. The issue of juror Hrin's "actual bias" certainly was not "set forth [as a] specific ground upon which relief [was available]." 28 U.S.C. foll. §§2254 (Rule 2(c) governing habeas petitions).

Second, I do not think Judge Garth properly applied the presumption of correctness required by the habeas statute, 28 U.S.C. §2254(d). Irvin v. Dowd characterized the issue of legally "implied" bias as a "question of mixed law and fact," and deference on that issue is therefore not required. But a question of "actual bias," based solely on the answers given at the voir dire, is a "question of historical fact" for which the presumption of correctness applies. See Smith v. Phillips, 455 U.S. 209, 216-218 (1982); Rushen v. Spain, U.S. _____, (1983). Judge Garth should have deferred to the trial judge's findings, which certainly find "fair support" in the record.
Finally, like you, I have carefully reviewed the entire colloquy between juror Hrin and respondent's trial counsel. In many ways, it was like colloquy I heard when I was a state court judge. Prospective jurors are not lawyers, and they take their temporary roles in the legal system with great seriousness and sincerity. Lawyers sometimes confuse them with hypotheticals, and they answer questions in ways that, looking at a cold record, might seem unusual. They do not watch for the legal nuances of their utterances. But all we are looking for is an open mind, and I believe juror Hrin had that. Juror Hrin openly and honestly admitted that he had read about respondent in the newspaper. He admitted that he had an opinion. But he also insisted, repeatedly, that he would not be inflexible, that he would follow the judge's instructions, and that he would hear the case with an open mind. Juror Hrin was a chemist, a man trained in and proud of scientific objectivity. He promised to judge the case on the facts presented, and that is all the Sixth Amendment requires. It is easy for us, fourteen years later, to pour over that colloquy and detect awkward statements that indicate inflexible bias. But we were not in that courtroom; we have no ability to judge his credibility and veracity. The trial judge, however, was there and could. That judge expressly denied the challenge for cause because he believe what juror Hrin said; he concluded that Hrin "could disregard [his opinion] and be guided by the law and evidence." App. 87a. Indeed, respondent's trial counsel may ultimately have concurred in that assessment, for after further questioning he accepted juror Hrin, did not renew his challenge for cause, and did not challenge juror Hrin on a peremptory basis although he had some peremptory challenges remaining.

Actual juror bias is a "question of historical fact" to which the presumption of correctness applies. Perhaps juror Hrin should have been dismissed, and perhaps venue should have been changed. But can we, fourteen years later, be so sure that respondent did not have a trial by an impartial jury when the state trial judge, the state supreme court, and the Federal habeas court all thought he had?

Thank you for taking the time to consider this. Having had to face many such questions on the bench I feel it would be very helpful if we could write an opinion in this case reversing the Court of Appeals.

Sincerely,

[Signature]

Justice Powell
March 6, 1984

RE: No. 83-95, Patton v. Yount

TO: Justice Powell

FROM: Cammie

On reexamination, I am beginning to have some doubts as to the soundness of Judge Garth's analysis. He has made the distinction between a finding of "actual bias," which concededly is a "question of historical fact" governed by §2254(d), and the legal determination whether a juror's opinion is such as to raise the presumption of partiality, which is not governed by §2254(d). The distinction applies Irvin v. Dowd correctly. When applied to an individual juror, however, it is a distinction that seems to be one that is based more on semantics than reality. In the end, Judge Garth's analysis may have the undesirable effect of making it easier for habeas courts to second guess the voir dire rulings of trial courts than would the majority's analysis.

Irvin v. Dowd sets forth an analysis that should be used only in rare cases of extreme pretrial publicity. In those cases, the question is whether the pretrial publicity is such as to create a presumption of partiality on the part of any or all the jurors. According to Irvin, that question is a legal one and is not governed by §2254(d). However, its use easily may be limited to cases of extreme pretrial publicity. See, e.g., Murphy v. Florida, 421 U.S. 794 (1975). Under Judge Garth's analysis,
the determination that one juror's voir dire testimony creates a presumption of partiality seems to be nothing more than a repudiation of the trial judge's credibility assessment. Because Judge Garth relied solely on Hrin's voir dire testimony, and not on the extensive pretrial publicity crucial to the majority's analysis, his analysis is not as easily limited to those rare cases of extreme publicity. Because Judge Hunter makes it clear that this is an unusual case in which 126 of the 163 veniremen (77%) admitted bias, the majority's opinion may be the narrower of the two. I am afraid this is something I had not thought of on first analysis.
March 8, 1984

No. 83-95  Patton v. Yount

Dear Lewis,

I am absolutely delighted to read your memo in this case. If the other votes remain as before, we should be able to decide it by a useful opinion clarifying the points made in your memo.

Sincerely,

[Signature]

Justice Powell
MEMORANDUM TO THE CONFERENCE:

In view of the evenly divided Court, this case was carried forward to be considered further at our next Conference. Although I was unpersuaded by CA3's majority opinion, I voted at Conference to affirm on the grounds announced in Judge Garth's concurring opinion. That vote was tentative, as I stated.

Judge Garth relied on language in Irvin v. Dowd to find that juror Hrin's ambiguous voir dire testimony "raise[d] the presumption of partiality." 366 U.S., at 723. Again relying on Irvin, Judge Garth characterized that determination as a question of law rather than a question of historical fact. Cert. Pet., at 52a. Bearing in mind that this case is here on federal habeas corpus, and after a further review of Irvin, Judge Garth's opinion, and other relevant cases, I now question the soundness of that characterization. Whether Hrin's voir dire testimony evidences "actual bias" is a credibility determination and seems more a question of fact than a mixed question of law and fact. See Smith v. Phillips, 455 U.S. 209, 216-218 (1982) (existence of "actual bias" on part of a juror is a question of historical fact the resolution of which is entitled on federal habeas to a presumption of correctness under §2254(d)); Rushen v. Spain, __ U.S. __ (1983) (same).

There is language in Irvin that supports Judge Garth's view that federal habeas courts may find a "presumption of partiality" as a matter of law. See 366 U.S., at 723. On further reflection, however, I am inclined to think that Judge Garth's reliance on that language is misplaced. The pertinent language in Irvin suggests that extreme pretrial publicity may create, as a matter of law, a "presumption of prejudice" with respect to the jury panel. It does not suggest, however, that in habeas corpus proceedings federal courts may rely exclusively on voir dire testimony to repudiate assessments of juror bias made by state trial courts. Thus, I believe that under §2254(d), Judge Garth
was required to presume the correctness of the state courts' assessment of Hrin's "actual bias."

Attached hereto are portions of Hrin's voir dire testimony that in my view support the conclusions reached by three of the four courts that have considered Hrin's eligibility to sit as a juror. As indicted in these pages, after defense counsel recorded his "challenge for cause," the trial court held that Hrin's ambiguous responses did not reflect a "fixed opinion." This prompted defense counsel again to ask Hrin whether he could enter the jury box with an open mind. Hrin responded:

"I think I could enter it [the "jury box"] with a very open mind. I think I could very easily. To say this is a requirement for some of the things you have to do every day." J.A. 89a.

Defense counsel asked no further questions relevant to bias. Nor did he renew his prior challenge for cause. This testimony supports the trial court's determination that Hrin was prepared to render an impartial verdict.

If we were to affirm CA3 on the reasoning of Judge Garth, we would invite federal courts on habeas to make factual judgments as to juror bias whenever a federal judge thought an error had been made. Of the many "judgment calls" that trial judges must make, not many depend as much on the judge's discretion as whether a juror is qualified to sit. Jurors vary widely in experience, education, sophistication, and -- under the pressure of examination by opposing counsel -- frequently will give ambiguous answers as to their preconceived opinions. The scope and extent of the voir dire also vary widely, and inform the judge who oversees it. A trial judge, observing the questioning and the demeanor of the prospective jurors, is in a far better position than appellate judges to determine juror fitness.

In sum, I conclude that the "presumption of prejudice" invoked in Irvin v. Dowd is not applicable to the facts of this case, and that the "actual bias" of juror Hrin is a question of historical fact to be resolved by the state court and entitled to a presumption of correctness under §2254(d) -- a presumption that Judge Garth did not engage. I therefore would reverse.

L.F.P., Jr.
A. Since there’s nothing else in my mind except what I originally read, right. The fact that there has been a new trial re-scheduled may cause some doubt as to the original facts.

Q. But it hasn’t changed your opinion?
A. Well the opinion isn’t as solid as it originally was.

Q. But it still is solid—not as solid—but solid?
A. Right.

[443] Q. Spoken like a true engineer.
A. Not an engineer—I’m a chemist.

BY MR. KING:
We would challenge for cause.

BY MR. FENNELL:
We would answer the challenge before the Court’s ruling. He has already declared he could decide the verdict solely upon the evidence and law presented and he definitely said he could.

BY MR. SABINO:
Your Honor, I think we went through this matter yesterday.

BY THE COURT:
I don’t think his answer is that he could not enter the jury box with an open mind. He said he could go in with an open mind and therefore I deny the challenge for cause. I deny the challenge for cause because he declared he could go in there with an open mind; and Commonwealth against
Q. But you would still require evidence to be presented before you could in fact change your opinion—is that what you said?

A. The fact that the trial has been reopened indicates that there may be something left unopened. I said my opinion is not as solid and possibly I could enter the box with an open mind. I think I do this every day. You try out processes that you're sure are going to work and you definitely change your mind. I don't know if that's the answer you want.

Q. Regardless whether it's the answer we want, we are just trying to get an answer too so we can judge you and decide upon you.

A. It's rather difficult to live in DuBois and get the paper and find out what the people are talking about—at least the local [445] people without having some opinion or at least reserving some opinion.

Q. That's very true. And you do have and have had an opinion?

A. I had an opinion, right.

Q. The question now is then Mr. Hrin, is whether or not you can set that opinion aside before hearing any of the facts or evidence—set it aside before you enter the jury box; not after, but before. Can you do that?

A. The opinion isn't as solid—to completely wipe—or forget what I had heard previously about the case—

Q. You still remember that?
Mr. Hrin, do you still require evidence to be 
added in fact or change your opinion?

The trial has been reopened in order to be something left unopened. I was solid and possibly I could open mind. I think I do this processes that you’re sure are definitely change your mind. I answer you want.

Q. Other it’s the answer we want, yet an answer too so we can upon you.

A. I remember reports about it or talking about it—to be honest with you I didn’t really read all the articles in the paper because I know they were possibly played up a little. I didn’t particularly like the man that wrote the article so I didn’t take too much time. Everybody is entitled to their own views on personalities, but when I started to read it, it sounded like a fiction story and I don’t care to read fiction.

Q. Mr. Hrin, I have to come back to the question that—can you put aside whatever opinion you had—solid, unsolid or however you want to describe it—can you set it aside before you go into the jury box or would you need some evidence before you could change your mind? Now think about it for a second.

A. I have to.

Q. Give me yes or no?

A. I think I could enter it with a very open mind. I think I could very easily. To say this is a requirement for some of the things you have to do every day.

Q. Then let me ask you one more question Mr. Hrin—we have asked you a number of questions and we try to find things here, but do you know of any reason that I may not have touched upon why you should not be a juror in this case?

A. Outside of the fact that you’d be locked up for three weeks which wouldn’t be a very pleasant experience.

Q. Does the thought of that effect you in such a way that you feel you could not be a juror?
MEMORANDUM TO THE CONFERENCE

Re: 83-95 - Patton v. Yount

In light of Lewis' memorandum of March 8, 1984, this case now stands reversed and is assigned to Lewis for opinion.

Regards,

[Signature]

March 12, 1984
MEMORANDUM

TO: Joe

FROM: Lewis F. Powell, Jr.

DATE: March 14, 1984

83-95 Patton v. Yount

In reading Bose Corp., 82-1246, I note that Justice Stevens speaks of the "special deference [to] be given to a trial judge's credibility determination". P. 13. In Patton, although voir dire is not precisely comparable to oral testimony, it does require a determination by the trial judge of credibility in light of the facts and circumstances. See my memorandum to the Conference resulting in our being assigned the case.

Of course, there is nothing new or special about according deference to a trial court's credibility determinations. I mention this only because it is a current statement.

L.F.P., Jr.

ss
MEMORANDUM

TO: Joe
FROM: Lewis F. Powell, Jr.

DATE: March 14, 1984

83-95 Patton v. Yount

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ss