April 3, 1986

No. 84-1479

Henderson v. Wilson

Dear Lewis,

I shall, of course, as soon as I get around to it, circulate a dissent in the above.

Sincerely,

Justice Powell

Copies to the Conference
April 3, 1986

Re: No. 84-1479-Kuhlmann v. Wilson

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Justice Powell

cc: The Conference
April 3, 1986

No. 84-1479  Kuhlmann v. Wilson

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

P.S.  This excellent opinion takes a significant step in the right direction in controlling successive petitions for habeas relief. I am delighted to join it.
April 3, 1986

Re: 84-1479 - Kuhlmann v. Wilson

Dear Lewis:

I await the dissent.

Respectfully,

Justice Powell

Copies to the Conference
April 4, 1986

Re: 84-1479 – Kuhlmann v. Wilson

Dear Lewis:

Please join me.

Sincerely,

Justice Powell

cc: The Conference
Dear Lewis,

I agree with Parts I, IV and V but reserve judgment on the rest.

Sincerely yours,

Justice Powell

Copies to the Conference
Supreme Court of the United States
Memorandum

5/25 86

Byron,

Here is a copy of
my draft opinion
in the case. In your
April 4 note you
joined Parts I, IV & V,
and reserved judg.
on II & III.

Subject to an 'ende
of justice exception, I
would bar 'successiv
habeas petition' on the
same issue. L. F. O.
Dear Lewis,

I'll call for you today.

Dissent.

Byron

[RE 5/25/82]
May 29, 1986

84-1479 Kuhlmann v. Wilson

Dear Byron:

I can, of course, understand your waiting to see the dissent before deciding whether to join Parts II and III of my opinion in this case. If you will forgive me for bothering you further at this time, I write this note.

It occurred to me after our brief and accidental talk on Saturday that it was your opinion in Barefoot, 463 U.S., at 895, that first brought to my attention the importance of the difference between "successive petitions" and "abuse of the writ" in habeas cases. See n. 6, p. 7, in my draft opinion in this case. Although the difference was identified clearly in Sanders v. U.S., 373 U.S., at 15-17, and we have relied on abuse of the writ several times in capital cases, I do not recall our having relied on the "successive petition" prong of Sanders, now incorporated in Rule 9(b) of the rules governing 2254 cases.

This case gives us an opportunity to do what you, Bill Rehnquist and I - in particular - have sought to do, namely, establish that a successive habeas petition will be rejected unless the defendant carries his burden of coming forward with a colorable showing of innocence.

Sincerely,

Justice White

1fp/ss
Dear Lewis,

I continue to agree with Parts I, IV and V of your circulating draft. Parts II and III are difficult for me in light of Sanders and the history of the 1966 amendments. They are also unnecessary to the judgment, and I do not join them.

Sincerely yours,

Justice Powell
Re: No. 84-1479, Kuhlmann v. Wilson

Dear Lewis:

I am where Byron is. I join parts I, IV and V of your opinion. You will recall that I was in dissent in Henry.

Sincerely,

Justice Powell

cc: The Conference
June 25, 1986

To: Mr. Justice Powell

From: Anne

Re: No. 84-1479, Kuhlmann v. Wilson

The following is a draft hand-down speech for this case:

We granted certiorari to review the decision of the Court of Appeals for the Second Circuit granting relief to respondent on his successive petition for habeas corpus.

Prior to his trial for murder in New York court, respondent moved to suppress statements he made to a jailhouse informant on the ground that they were obtained in violation of his right to counsel. After a hearing, the trial court found that the informant asked respondent no questions and merely listened to his spontaneous remarks. The court denied the suppression motion.

Following direct appeal, respondent unsuccessfully sought habeas corpus relief, in both federal and state court, arguing that his statements to the informant were obtained in violation of his right to counsel. Later, he filed a second petition for federal habeas corpus review, alleging that United States v. Henry, 447 U.S. 264 (1980), supported his Sixth Amendment claim. The District Court denied relief because the state court's findings showed that the informant made no effort of any kind to
elicit information from respondent. The Court of Appeals reversed, reasoning that the facts of this case were indistinguishable from the facts of Henry.

We now reverse. As the District Court properly concluded, a criminal defendant does not establish a Sixth Amendment violation merely by showing that an informant reported his statements to the police. Our cases establish that, once a defendant's right to counsel has attached, he is denied that right when police "deliberately elicit" incriminating statements from him in the absence of counsel. That standard is designed to protect defendants from surreptitious interrogation or investigative techniques that are the equivalent of interrogation. Therefore, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks.

The Court of Appeals in this case failed to accord to the state court's findings of fact the presumption of correctness required by 28 U.S.C. §2254(d). Giving those findings the weight to which they are entitled, it is apparent that respondent has not established a violation of his Sixth Amendment rights.

The Chief Justice, and Justices White, Blackmun, Rehnquist, and O'Connor join Parts I, IV, and V of my opinion. The Chief Justice, and Justices Rehnquist and O'Connor also join Parts II and III. The Chief Justice has filed a concurring opinion. Justice Brennan, joined by Justice Marshall, has filed a dissenting opinion. Justice Stevens also has filed a dissenting opinion.
This case is here on cert to the Court of Appeals from the Second Circuit.

Prior to his trial for murder in a New York Court, respondent moved to suppress statements he had made to a jailhouse informant - claiming a violation of his right to counsel. After a hearing, the trial court found that the informant had asked no questions, and had merely listened to respondent's incriminating statements. Accordingly, the court denied the suppression motion.

Following direct appeal, respondent sought habeas corpus relief in both federal and state courts. Relief was denied by each of these courts.

After our decision in United States v. Henry (1980), respondent filed a second federal habeas petition, arguing that in light of Henry, his statement should have been suppressed. Again, the federal District Court denied relief, but a different panel of the Court of Appeals reversed. It reasoned that the facts of this case were indistinguishable from those in Henry.

We think the CA erred.
We think the Court of Appeals erred. It failed to accord to the state courts findings of fact the presumption of correctness required by §2254(d) of the federal habeas statute. The facts in this case were quite different from those in Henry, *here* the informant merely reported statements voluntarily made by respondent. Every court that considered this case, *state and federal, has accepted the basic findings of fact that the Court of Appeals simply rejected.

Therefore, *and for reasons more fully stated in our opinion today, we reverse the decision of the Court of Appeals.*

The Chief Justice, and Justices White, Blackmun, Rehnquist, and O'Connor join Parts I, IV, and V of my opinion. The Chief Justice, and Justices Rehnquist and O'Connor also join Parts II and III. The Chief Justice has filed a concurring opinion. Justice Brennan, joined by Justice Marshall, has filed a dissenting opinion. Justice Stevens also has filed a dissenting opinion.
LFP for the Court
  1st draft 4/2/86
  2nd draft 6/16/86
  Joined by SOC 4/3/86
  WHR 4/4/86
  CJ 4/28/86
BRW agrees with Parts I, IV and V 4/4/86
BRW continues to agree with I, IV and V, but cannot join II and III - 6/9/86.
HAB agrees with BRW 6/12/86
CJ concurring
  1st draft 5/28/86
JPS dissenting
  1st draft 6/9/86
  2nd draft 6/13/86
WJB dissenting
  1st draft 6/11/86
  3rd draft 6/17/86
  4th draft 6/23/86
  Joined by TM 6/11/86
WJB will dissent 4/3/86
TM awaiting dissent 4/3/86
JPS awaiting dissent 4/3/86
June 29, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Allen v. Hardy, No. 85-6593
No. 85-6748, Williams v. Illinois

Petra, who is black, pleaded guilty to murder, and a jury sentenced him to death. Ill. Sup. Ct. affirmed, People v. Williams, 97 Ill.2d 252 (1983), and we denied certiorari, 466 U.S. 981 (1984). Petra then filed this petition for post-conviction relief in Ill. Cir. Ct. That court dismissed the petition, and Ill. Sup. Ct. affirmed.

Ill. Sup. Ct. considered Petra's contention that his constitutional rights were violated by the State's exercise of peremptory challenges to exclude blacks from the jury that sentenced him to death. The court noted that it had rejected this contention on direct appeal and that its decision there ordinarily would be res judicata. The court went on, however, to consider a study and an article offered by Petra, holding that this evidence did not satisfy the standard of Swain v. Alabama, 380 U.S. 202 (1965).

Seeking cert., Petra summarizes the evidence in his case, which consists both of proof concerning the State's peremptory challenges at his trial and of data concerning the racial composition of juries seated in capital cases in Cook County, Ill. He claims that this evidence raised a prima facie case of purposeful, systematic exclusion. The State responds by arguing that, even if Batson v. Kentucky applies retroactively, Petra's allegations are irrelevant because they focus on the standard of Swain.

I will vote to deny this petition. Although the facts concerning the State's use of peremptory challenges at Petra's trial may well raise a prima facie case under Batson, Allen v. Hardy, No. 85-6593, holds that Batson does not apply on collateral review of a conviction that became final before our decision was announced. Petra's claim under Swain is not certworthy.

My vote is to deny.

L.F.P., Jr.
July 1, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Kuhlmann v. Wilson, 85-1479

No. 85-567, Wainwright v. Songer


Resp then unsuccessfully sought state habeas corpus relief by filing a Rule 3.850 motion. After a hearing, the trial court denied relief and the Florida Supreme Court affirmed. Songer v. State, 419 So.2d 1044 (Fla. 1982). Resp also was unsuccessful in his subsequent attempt to obtain federal habeas corpus relief. The federal DC considered resp's claim under Lockett as part of an ineffective assistance argument, concluding that counsel's failure to put on nonstatutory mitigating evidence was a reasonable mistake. The DC denied relief, CAAll affirmed without discussing the Lockett issue, 733 F.2d 788, and we denied cert., No. 84-5690 (1985).

Resp again sought post-conviction relief in state court. In this proceeding, the original TJ stated that at the time of resp's trial, he had interpreted the Fla. statute as requiring him to consider only those categories of mitigating evidence listed in the statute. The judge also suggested that he had not considered any nonstatutory mitigating evidence. But the TJ denied relief, and Fla. Sup. Ct. affirmed, 463 So.2d 229 (1985).

Resp then filed his second petition for federal habeas corpus relief. The DC dismissed the application on the grounds that the ends of justice would not be served by reconsideration of the issues presented. Sitting en banc, CAAll reversed and remanded, with instructions to the DC to
order the State to hold a new sentencing hearing. The court reasoned that the TJ's statements demonstrated new and different grounds for relief that resp could not have raised on his first federal habeas petition. The court concluded that the TJ's failure to consider any nonstatutory mitigating evidence constituted a clear violation of Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982).

We held this petition for Kuhlmann v. Wilson, No. 84-1479, because the cert. petition filed by the Fla. prison warden argues that CALL erred in concluding that the "ends of justice" would be served by reconsideration of the merits of this successive petition. A GVR in light of Wilson would not be appropriate since our judgment there did not rest on the standard that should govern successive review. Moreover, the standard adopted by the plurality in Wilson pertains to successive review of a conviction, while this case involves review of a death sentence.

I recommend that we hold this petition for Hitchcock v. Wainwright, No. 85-6756 (cert. granted June 9, 1986). In Hitchcock, we will consider Florida's pre-Lockett rule, which may have had the effect of limiting introduction of mitigating evidence to certain categories provided in the statute. CALL's decision here rested on its conclusion that such rule violated our holdings in Lockett and Eddings, and our disposition in Hitchcock will shed light on the question whether CALL's decision was correct.

My vote is to hold for Hitchcock v. Wainwright, No. 85-6756.

L.F.P., Jr.
July 1, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Kuhlmann v. Wilson, 85-1479

No. 85-276, Lockhart v. Walker

Resp was convicted for a murder that occurred in 1963, and sentenced to death. Ark. Sup. Ct. remanded for a new trial. Prior to retrial, resp unsuccessfully moved to recuse the TJ on the ground that the TJ was biased against him. Resp again was convicted and was sentenced to life imprisonment. The conviction was affirmed on direct appeal, Walker v. State, 241 Ark. 300 (1966), cert. denied, 386 U.S. 682 (1967).

Resp filed his first petition for federal habeas relief, alleging that the TJ was biased and that the prosecutor suppressed exculpatory evidence. The DC denied the writ, and CA8 affirmed. Walker v. Bishop, 408 F.2d 1378 (CA8 1969). In 1981, resp filed a second federal habeas petition. Applying the guidelines set out in Sanders v. United States, 373 U.S. 1 (1963), the DC refused to permit resp to relitigate his claims concerning the TJ's bias and the State's suppression of evidence. Sitting en banc, CA8 affirmed, over the dissent of four judges, on the ground that resp failed to establish that the "ends of justice" would be served by successive review. Walker v. Lockhart, 726 F.2d 1238 (CA8 1984).

Resp moved for recall of CA8's mandate on the basis of "newly discovered evidence." CA8 ordered the DC to hold a hearing to consider the new evidence. After the hearing, the DC again decided that the ends of justice did not require reconsideration of resp's claims. Among the items of evidence allegedly suppressed by the State was a transcript of a conversation that took place in 1963 between resp's confederate and the confederate's sister, in which the confederate made statements suggesting that it was he, and not resp, who had committed the murder. The en banc CA8 reversed, again over the dissent of four judges.

CA8's rested its decision on two separate grounds. First, the court considered "whether the new evidence sufficiently tips the balance of the ends of justice standard to permit us to reconsider" resp's claims. The appropriate standard for making this determination was "not whether the
district court or this court would find the new evidence credible, but whether the evidence possesses sufficient credibility that it should be heard by the real factfinder: the jury." CA8 assessed the new evidence under that standard and decided that the evidence created "sufficient additional doubt" about resp's guilt so that the ends of justice required successive review. The court held that resp was entitled to relief on the ground that the TJ's bias denied him a fair trial.

Second, the court determined that the suppressed transcript, which is described above, constituted a "separate and independent ground" for granting habeas relief. The court noted that "where the defendant has made general requests for all exculpatory material, the conviction will be set aside only if 'the omitted evidence creates a reasonable doubt that did not otherwise exist.'" Quoting United States v. Agurs, 427 U.S. 97, 108 (1976). CA8 determined that the transcript was authentic, that it would be admissible in evidence at trial, that it had been suppressed by the State, and that it was both favorable to resp and material on the question of his guilt. With respect to the issue of materiality, CA8 concluded that the transcript itself was "sufficient to create a reasonable doubt" about resp's guilt. Therefore, suppression of the transcript violated resp's right to due process and constituted an independent ground for federal habeas relief.

The Arkansas prison warden has filed a cert. petition, challenging CA8's conclusion respecting the TJ's bias, its standard for deciding when new evidence justifies successive review, and its determination that the transcript was authentic. We held the petition for Kuhlmann v. Wilson, No. 84-1479. A GVR in light of Wilson would not be appropriate, since our judgment did not rest on the standard governing successive review.

Although CA8's "ends of justice" analysis was dubious, my vote is to deny this petition. The alternative ground for CA8's decision, i.e., its holding on the Brady violation, appears to be consistent with our cases. This case was decided prior to our decision in United States v. Bagley, 105 S.Ct. 3375 (1985), which sets out the standard of materiality to be applied in evaluating a Brady violation. But CA8's conclusion on this issue is not inconsistent with Bagley. Since CA8's judgment rests on this independent ground, and its conclusion on that ground appears correct, further review is not warranted.
My vote is to deny.

L.F.P., Jr.
July 1, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for Kuhlmann v. Wilson, 85-1479

No. 85-567, Wainwright v. Songer


Resp then unsuccessfully sought state habeas corpus relief by filing a Rule 3.850 motion. After a hearing, the trial court denied relief and the Florida Supreme Court affirmed. Songer v. State, 419 So.2d 1044 (Fla. 1982). Resp also was unsuccessful in his subsequent attempt to obtain federal habeas corpus relief. The federal DC considered resp's claim under Lockett as part of an ineffective assistance argument, concluding that counsel's failure to put on nonstatutory mitigating evidence was a reasonable mistake. The DC denied relief, CALL affirmed without discussing the Lockett issue, 733 F.2d 788, and we denied cert., No. 84-5690 (1985).

Resp again sought post-conviction relief in state court. In this proceeding, the original TJ stated that at the time of resp's trial, he had interpreted the Fla. statute as requiring him to consider only those categories of mitigating evidence listed in the statute. The judge also suggested that he had not considered any nonstatutory mitigating evidence. But the TJ denied relief, and Fla. Sup. Ct. affirmed, 463 So.2d 229 (1985).

Resp then filed his second petition for federal habeas corpus relief. The DC dismissed the application on the grounds that the ends of justice would not be served by reconsideration of the issues presented. Sitting en banc, CALL reversed. The court reasoned that the TJ's statements
demonstrated new and different grounds for relief that resp could not have raised on his first federal habeas petition. The court concluded that the TJ's failure to consider any nonstatutory mitigating evidence constituted a clear violation of Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982).

We held this petition for Kuhlmann v. Wilson, No. 84-1479, because the cert. petition filed by the Fla. prison warden argues that CALI1 erred in concluding that the "ends of justice" would be served by reconsideration of the merits of this successive petition. A GVR in light of Wilson would not be appropriate since our judgment there did not rest on a decision respecting the standard federal courts should apply when confronted with a successive petition for habeas corpus relief.

I recommend that we hold this petition for Hitchcock v. Wainwright, No. 85-6756, in which we will consider Florida's pre-Lockett rule, which may have had the effect of limiting introduction of mitigating evidence to certain categories provided in the statute.

L.F.P., Jr.