The Burger Court Opinion Writing Database

Peters v. Kiff
407 U.S. 493 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

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You have 3 joins, I conc.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1972

No. 71-5078 -- Peters v. Kiff

Dear Thurgood:

I find I cannot join your opinion in this case and will either dissent or join a dissent..

Regards,

WEB

Mr. Justice Marshall

Copies to Conference

1 B

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JUN 8

Recirculated: _____

No. 71-5078 -- Peters v. Kiff

MR. CHIEF JUSTICE BURGER, dissenting.

There is no longer any question, of course, that persons may not be excluded from juries on account of race. Such exclusions are plainly unlawful and deserving of condemnation. That, however, is not the issue before us. The real issue is whether such illegality necessarily voids a criminal conviction absent any demonstration of prejudice or basis for presuming prejudice to the accused.

Petitioner was indicted for the offense of burglary on June 6, 1966 and thereafter convicted. The conviction was reversed on direct appeal, and the case was remanded for a new trial. Petitioner was retried on December 8, 1966, was found guilty and was sentenced to ten years imprisonment. Petitioner is not a Negro and the record in no way suggests that race was relevant in the proceedings against him. At trial petitioner made no challenge to the method of selection of the grand and petit juries, and he made no challenge to the array of the petit jury. Even in his appeal to the Court of Appeals of Georgia, petitioner made no claim addressed to the method of selection of the grand and petit juries. His conviction was affirmed.

Seven months after his trial, petitioner filed a writ of habeas corpus in the United States District Court, asserting for the first time that Negroes were systematically excluded from the grand and petit juries. If petitioner's

B

changes as indicated 1,4,5,6,7

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: _____

Recirculated: JUN 20 1972

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-5078

Dean Rene Peters, Petitioner, v. C. P. Kiff, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June —, 1972]

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

There is no longer any question, of course, that persons may not be excluded from juries on account of race. Such exclusions are plainly unlawful and deserving of condemnation. That, however, is not the issue before us. The real issue is whether such illegality necessarily voids a criminal conviction absent any demonstration of prejudice, or basis for presuming prejudice, to the accused.

Petitioner was indicted for the offense of burglary on June 6, 1966, and thereafter convicted. The conviction was reversed on direct appeal, and the case was remanded for a new trial. Petitioner was retried on December 8, 1966, was found guilty and was sentenced to 10 years' imprisonment. Petitioner is not a Negro and the record in no way suggests that race was relevant in the proceedings against him. At trial petitioner made no challenge to the method of selection of the grand and petit juries, and he made no challenge to the array of the petit jury. In his appeal to the Court of Appeals of Georgia, petitioner still made no claim addressed to the method of selection of the grand and petit juries. His conviction was affirmed.

Seven months after his trial, petitioner filed a writ of habeas corpus in the United States District Court,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 27, 1972

Dear Thurgood:

Please join me in your opinion in No. 71-5078 - Peters v. Kiff.

William O. Douglas

Mr. Justice Marshall

CC: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1972

Memorandum to:

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

I am perhaps confused about Peters v. Kiff, No. 71-5078. I assume that one of the major problems is the question of retroactivity. On the other hand, I see no reason for having the bifurcated approach as it now stands. If the hangup is on retroactivity, I am willing to conclude the opinion with the following paragraph:

> There are recognizable reasons for considering the question of retroactivity feebly raised by the petitioner in this case. Since the ruling in this case would otherwise provoke considerable litigation involving convictions of other white men who might or might not have raised the question in the trial courts we find it necessary to hold that the ruling in this case not be made retroactive. Cf. Stovall v. Denno, 388 U.S. 293, 300 (1966).

I recognize that this would be a new approach. I don't think it is unwarranted, but at any rate I would be willing to do it if we can get agreement. Needless to say, I have no pride of authorship in the language of the suggestion and welcome any changes.

T.M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 1, 1972

RE: No. 71-5078 - Peters v. Kiff

Dear Byron:

Please join me in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 15, 1972

RE: No. 71-5078 - Peters v. Kiff

Dear Thurgood:

I think your proposed paragraph is most appropriate for the purpose. I remain with Byron, however, in the view that this case can be turned on the statute without reaching the constitutional question.

Sincerely,

Bill

Mr. Justice Marshall

cc: Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 16, 1972

RE: No. 71-5078 - Peters v. Kiff

Dear Thurgood:

As promised, I've again read carefully the three opinions. I am still persuaded that reliance on § 243 is the better basis for disposition of this case. It may be I feel that way because it finds justification in some of the things I said in Katzenbach v. Morgan. And that's the way, you'll remember, I felt when we initially discussed the case at conference.

Sincerely,

Bill

Mr. Justice Marshall

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 27, 1972

No. 71-5078, Peters v. Kiff

Dear Thurgood,

I am in basic agreement with your opinion, but I am hesitant to join the last paragraph of Part III on page 11, which I think is much broader than the issue in this case requires. I would prefer to narrow that paragraph to racial exclusions. This seems to me particularly appropriate in view of the reliance in your opinion upon the federal statute that condemns only such exclusions (18 U.S.C. §243). I would suggest that the paragraph might be reformulated along the following lines:

> Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

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N

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 5, 1972

71-5078 - Peters v. Kiff

Dear Thurgood,

I am glad to join your opinion for the Court in this case, as recirculated May 4.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to the Conference

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 15, 1972

71-5078 -- Peters v. Kiff

Dear Thurgood,

The new final paragraph you suggest is entirely satisfactory to me, subject to any modifications in wording that others may suggest.

Sincerely yours,

P.S.

Mr. Justice Marshall

Copies to Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Powell

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 4-28-72

No. 71-5078

Recirculated: _____

Dean Rene Peters, Petitioner, v. C. P. Kiff, Warden. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE WHITE, concurring in the judgment.

Since March 1, 1875, the criminal laws of the United States have contained a proscription to the following effect:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; . . ."

By this unambiguous provision, now contained in 18 U. S. C. § 243, Congress put cases involving exclusions from jury service on grounds of race "in a class by themselves . . . for us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U. S. 261, 282–283 (1947).

The consequence is that where jury commissioners disqualify citizens on the grounds of race, they fail "to perform their constitutional duty . . . recognized by § 4 of the Civil Rights Act of March 1, 1875 . . . and fully established since the decision in 1881 of *Neal* v. *Delaware* . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill* v. [redacted] 316 U. S. 400, 404 (1942). Thus,

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-5078

Recirculated: 5-1-72

Dean Rene Peters, Petitioner, v. C. P. Kiff, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

Since March 1, 1875, the criminal laws of the United States have contained a proscription to the following effect:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; . . ."

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The consequence is that where jury commissioners disqualify citizens on the grounds of race, they fail "to perform their constitutional duty . . . recognized by § 4 of the Civil Rights Act of March 1, 1875 . . . and fully established since the decision in 1881 of *Neal* v. *Delaware* . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds."

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71–5078

Recirculated: 6-14-72

Dean Rene Peters, Petitioner, *v.* C. P. Kiff, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, concurring in the judgment.

Since March 1, 1875, the criminal laws of the United States have contained a proscription to the following effect:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; . . ."

By this unambiguous provision, now contained in 18 U. S. C. § 243, Congress put cases involving exclusions from jury service on grounds of race "in a class by themselves . . . for us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." *Fay* v. *New York*, 332 U. S. 261, 282–283 (1947).

The consequence is that where jury commissioners disqualify citizens on the grounds of race, they fail "to perform their constitutional duty . . . recognized by § 4 of the Civil Rights Act of March 1, 1875 . . . and fully established since the decision in 1881 of *Neal* v. *Delaware* . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds."

B M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1972

Re: No. 71-5078 - Peters v. Kiff

Dear Thurgood:

I prefer to remain with my concurring opinion. The cross section requirement with respect to petit juries rests principally, in my view, on the Sixth Amendment which since 1968 has been applicable to the States. Grand juries are not so required. Hurtado v. California, 110 U.S. 516 (1884). Hence my concurrence, which rests on congressional intention expressed in § 243.

Sincerely,

Byron

Mr. Justice Marshall

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

1st DRAFT

Circulated: APR 26 1972

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 71-5078

Dean Rene Peters, Petitioner,
v.
C. P. Kiff, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner alleges that Negroes were systematically excluded from the grand jury that indicted him and the petit jury that convicted him of burglary in the Superior Court of Muscogee County, Georgia. In consequence he contends that his conviction is invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because he is not himself a Negro, the ~~State contends that he has not suffered any unconstitu-~~ tional discrimination, and that his conviction must stand. On that ground, the Court of Appeals affirmed the denial of his petition for federal habeas corpus. 441 F. 2d 371 (CA5 1971).[1] We granted certiorari. — U. S. — (1971). We reverse.

[1] The history of this litigation is long and complicated. Petitioner was indicted on June 6, 1966. His first trial resulted in a conviction which was reversed on Fourth Amendment grounds, 114 Ga. App. 595 (196). A second trial, held on December 8, 1966, resulted in the conviction challenged here, which was affirmed, 115 Ga. App. 743 (1967). Petitioner for the first time raised the claim of discriminatory jury selection in a petition for federal habeas corpus, which was summarily denied on July 5, 1967. Brief of Appellee in Court of Appeals, at 7. The Court of Appeals affirmed on the ground that petitioner had failed to exhaust then-available

pp. 8-9, 11

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

Circulated:

Recirculated: MAY 4 1972

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-5078

Dean Rene Peters, Petitioner,
v.
C. P. Kiff, Warden.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner alleges that Negroes were systematically excluded from the grand jury that indicted him and the petit jury that convicted him of burglary in the Superior Court of Muscogee County, Georgia. In consequence he contends that his conviction is invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because he is not himself a Negro, the State contends that he has not suffered any unconstitutional discrimination, and that his conviction must stand. On that ground, the Court of Appeals affirmed the denial of his petition for federal habeas corpus. 441 F. 2d 371 (CA5 1971).[1] We granted certiorari. 404 U. S. 964 (1971). We reverse.

[1] The history of this litigation is long and complicated. Petitioner was indicted on June 6, 1966. His first trial resulted in a conviction which was reversed on Fourth Amendment grounds, 114 Ga. App. 595 (1966). A second trial, held on December 8, 1966, resulted in the conviction challenged here, which was affirmed, 115 Ga. App. 743 (1967). Petitioner for the first time raised the claim of discriminatory jury selection in a petition for federal habeas corpus, which was summarily denied on July 5, 1967. The Court of Appeals affirmed on the ground that petitioner had failed to exhaust then-available state remedies with respect to his otherwise highly col-

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Marshall, J.

Circulated: _____

Recirculated: MAY 5 1972

SUPREME COURT OF THE UNITED STATES

No. 71-5078

Dean Rene Peters, Petitioner, *v.* C. P. Kiff, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Petitioner alleges that Negroes were systematically excluded from the grand jury that indicted him and the petit jury that convicted him of burglary in the Superior Court of Muscogee County, Georgia. In consequence he contends that his conviction is invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Because he is not himself a Negro, the State contends that he has not suffered any unconstitutional discrimination, and that his conviction must stand. On that ground, the Court of Appeals affirmed the denial of his petition for federal habeas corpus. 441 F. 2d 371 (CA5 1971).[1] We granted certiorari. 404 U. S. 964 (1971). We reverse.

[1] The history of this litigation is long and complicated. Petitioner was indicted on June 6, 1966. His first trial resulted in a conviction which was reversed on Fourth Amendment grounds, 114 Ga. App. 595 (1966). A second trial, held on December 8, 1966, resulted in the conviction challenged here, which was affirmed, 115 Ga. App. 743 (1967). Petitioner for the first time raised the claim of discriminatory jury selection in a petition for federal habeas corpus, which was summarily denied on July 5, 1967. The Court of Appeals affirmed on the ground that petitioner had failed to exhaust then-available state remedies with respect to his otherwise highly col-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 15, 1972

Memorandum to:

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell

I am perhaps confused about Peters v. Kiff, No. 71-5078. I assume that one of the major problems is the question of retroactivity. On the other hand, I see no reason for having the bifocated approach as it now stands. If the hangup is on retroactivity, I am willing to conclude the opinion with the following paragraph:

> There are recognizable reasons for considering the question of retroactivity feebly raised by the petitioner in this case. Since the ruling in this case would otherwise provoke considerable litigation involving convictions of other white men who might or might not have raised the question in the trial courts we find it necessary to hold that the ruling in this case not be made retroactive. Cf. Stovall v. Denno, 388 U.S. 293, 300 (1966).

I recognize that this would be a new approach. I don't think it is unwarranted, but at any rate I would be willing to do it if we can get agreement. Needless to say, I have no pride of authorship in the language of the suggestion and welcome any changes.

T.M.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 15, 1972

Re: No. 71-5078 - Peters v. Kiff

Dear Chief:

Please join me in your dissenting opinion.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1972

Re: No. 71-5078 Peters v. Kiff

Dear Thurgood:

I was concerned about possible retroactivity of our decision in this case.

Perhaps you can allay my apprehension as to this issue. The consequences would be far reaching if the decision were given full retroactivity.

Sincerely,

Lewis

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 14, 1972

Re: No. 71-5078 Peters v. Kiff

Dear Byron:

Please join me in your opinion concurring in the judgment.

I have been concerned about the possible retroactivity of the Court's holding in this case. My understanding at the Conference was that a majority (at least tentatively) thought this would be an inappropriate case to apply retroactively. I feel this way quite strongly.

As your opinion turns only on the statute, I assume that the argument for retroactivity - when it is presented to the Court - would be less persuasive where the ground of our decision is statutory rather than constitutional. I would consider an argument for retroactivity unpersuasive in either case, but I nevertheless prefer to base our decision on the statute.

Sincerely,

Mr. Justice White

cc: The Conference

Dear Thurgood: I think you wrote a fine opinion. I have joined Byron for the reason above stated.

L. F. P., Jr.

Lewis

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1972

Re: No. 71-5078 Peters v. Kiff

Dear Thurgood:

Thank you for adding the paragraph as to retroactivity.

I have reexamined my position, and still feel more comfortable deciding this case on the statutory ground. Accordingly, I remain with Byron.

Sincerely,

L. Lewis

Mr. Justice Marshall

cc: Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1972

Re: No. 71-5078 - Peters v. Kiff

Dear Chief:

Please join me in your dissent.

Sincerely,

The Chief Justice

Copies to the Conference