The Burger Court Opinion Writing Database

Test v. United States

420 U.S. 27 (1975)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1975

Re: 73-5993 - Test v. U. S.

Dear Lewis:

Please join me in your circulation of January 7.

Regards,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

154-5

January 25, 1975

Dear Lewis:

Please join me in your Per Curiam in 73-5993, Test v. United States.

William O. Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 7, 1975

RE: No. 73-5993 Test v. United States

Dear Lewis:

I agree with the Per Curiam you have prepared in the above.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 7, 1975

Re: No. 73-5993, Test v. United States

Dear Lewis,

I agree with the per curiam you have circulated in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 8, 1975

Re: No. 73-5993 - Test v. United States

Dear Lewis:

Please join me in your suggested per curiam in this case.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 7, 1975

Re: No. 73-5993 -- John E. Test v. United States

Dear Lewis:

I agree with your Per Curiam.

Sincerely,

T. M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 7, 1975

Dear Lewis:

Re: No. 73-5993 - Test v. United States

Please join me in your proposed per curiam.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-5993

John E. Test, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[January —, 1975]

PER CURIAM.

Petitioner was convicted under 21 U. S. C. § 841 (a)(1) for distribution of a hallucinogenic drug commonly known as LSD. Prior to trial he filed a motion to dismiss his indictment claiming that the master lists[1] from which his grand jury had been, and petit jury would be, selected systematically excluded disproportionate numbers of people with Spanish surnames, students and blacks. These exclusions, petitioner alleged, violated both his Sixth Amendment right to an impartial jury and the provisions of the Jury Selection and Service Act of 1968, 28 U. S. C. § 1861 *et seq.* Attached to this motion was an affidavit by petitioner's counsel stating facts that had been disclosed by testimony at a jury challenge in another case, and which petitioner claimed supported his challenge. Also accompanying the motion was another motion requesting permission to inspect and copy the jury lists "pertaining to the grand and petit juries in the instant indictment." Petitioner asserted that inspection was necessary for discovering evidence to buttress his claims.

The District Court rejected the jury challenge and denied the motion to inspect the lists. Petitioner

[1] These lists were based on Colorado voter-registration records.

February 11, 1975

Cases held for No. 73-5993 Test v. United States

MEMORANDUM TO THE CONFERENCE:

The following cases were held for No. 73-5993, Test v. United States:

No. 73-6826 Jenkins v. United States
No. 73-6903 Wilcox v. United States
No. 73-6639 Hall v. United States

Petitioners were co-defendants in a trial for a bank robbery. Each presents the same issue relating to the racial composition of the venire from which the jury was selected. The contention, elaborated in full in Hall, No. 73-6639, and adopted by petitioners in Jenkins, No. 73-6823, and Wilcox, No. 73-6903, relates to the proper method of analysis for determining whether a "substantial disparity" exists in the racial composition of the jury pool. Petitioners Jenkins and Wilcox additionally raise individual contentions.

The jury composition question is not affected by our decision in Test that under the provisions of the Jury Selection Act, 28 U.S.C. § 1867(f), any litigant has an unqualified right to inspect the jury list. In my view, neither the common question relating to the Jury Selection Act nor the individual points raised by petitioners Jenkins and Wilcox present certworthy issues. I will vote to deny in all three cases.

Issue Under the Jury Selection Act:

Petitioners claim that the courts below adopted an erroneous method of analysis in determining whether a

"substantial disparity" existed between the percentage of Negroes in the adult population and the percentage of Negroes available for jury selection. It was argued that this disparity was sufficient to require supplementation of the jury pool by names chosen from other sources.

In New Haven, Connecticut, where this case arose, the Selection Plan relies solely on the list of registered voters. There is no allegation of present or past discrimination in voter registration. Petitioners' statistics reveal that the percentage of Negroes in the adult population is 5.45%. Evidence derived from questionnaires sent out by petitioners, however, indicates that the percentage of Negroes in the jury pool from 1969 to 1973 was approximately 3.3%. Petitioners claim that this disparity requires supplementation of the jury pool with names selected from other sources.

At issue in these cases is the method of assessing the substantiality of the disparity of the racial composition of the jury pool. Petitioners claim that the relevant statistic is obtained by comparing the percentage of Negroes in the adult population of the community with the percentage of Negroes in the jury pool. That comparison produces here a disparity of 2.15%. This, in turn, represents a ratio of 5 to 3, or an underrepresentation of some 40%. The Court of Appeals for the Second Circuit (Friendly, Mansfield and Zampano [district judge]) rejected this contention and ruled that the relevant test of disparity is obtained by calculating the actual impact of the challenged practice. In this case, the court noted that the disparity had produced an under-representation of only one Negro in a jury venire of 50 to 60 persons. It determined that this was not substantial within the meaning of the Act, citing legislative history indicating that Congress contemplated that "minor deviations from a fully accurate cross section" were to be tolerated.

This impresses me as an interesting argument, and one that we probably will have to confront at some point.

There is no conflict in the circuits, and the result reached in this case seems to be acceptable. I therefore will vote to deny the writs of certiorari on this issue and will wait to see whether a conflict develops.

Individual Contentions:

No. 73-6826, Jenkins v. United States. Petitioner Jenkins also asserts two individual points, He claims first that the District Court erred in admitting a witness' in-court identification. In support, he raises a number of factors that he claims made the identification too unreliable to be admitted. From his petition, however, it appearst that these factors would have surfaced at trial and would have been considered by the jury in reaching its verdict. Jenkins further claims, relying on Chambers v. Mississippi, 401 U.S. 284 (1973), that the court erred in excluding certain hearsay testimony indicating that one witness previously had identified another individual to be the person who played the role in the robbery that the witness attributed to petitioner at trial. The Court of Appeals considered this point troublesome, but noted substantial confusion surrounding the statement in question and determined that this was not a proper occasion for further liberalization of the hearsay rules. The court finally observed that petitioner had made no showing of substantial prejudice from the exclusion of the statement.

These claims are fact-specific, which I think were properly decided. In my view, they do not present cert-worthy issues. rs

No. 73-6903, Wilcox v. United States. Wilcox's separate assertions of error present Fourth Amendment questions arising from the examination of his personal effects prior to and after his arrest. Petitioner was stopped in New Jersey for questioning about the cardboard license tag displayed on his motorcycle. In response to questioning, petitioner produced a license and a bill of sale with different names. The trooper thereupon searched the saddlebags, discovered a pistol, and placed petitioner under arrest. Petitioner was incarcerated and his personal belongings inventoried. Eight days after the arrest an FBI agent examined a number of five-dollar bills in petitioner's wallet and determined by their serial numbers that they were part of the "bait money" stolen from a Connecticut bank.

Petitioner objects both to the search of the motor-cycle saddlebag and to the station-house inspection of the

contents of his wallet. He contends that the pistol should have been suppressed as the fruit of an unlawful arrest, and that the station-house examination of his wallet violated the Fourth Amendment. The Court of Appeals found there was probable cause to arrest petitioner on suspicion of having stolen the motorcycle, and also that there was justification for a search of the saddlebag which was within reaching distance. Chimel v. California, 395 U.S. 752 (1969). The Court of Appeals considered it unimportant that the normal sequence of events was reversed and that the officer examined the bag before arresting petitioner. The court also held that the subsequent examination of the wallet falls within the rationale of United States v. Edwards, 415 U.S. 800 (1974). I do not consider either of these points to be certworthy.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 7, 1975

Re: No. 73-5993 - Test v. United States

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference