

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JESSE BOND : CIVIL ACTION
 :
 v. :
 :
 JEFFREY BEARD, Commissioner, :
 Pennsylvania Department of :
 Corrections, et al. : NO. 02-08592-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

December 7, 2005

In this death penalty habeas corpus case, Petitioner seeks to introduce statistical evidence on two related issues: first, to support his claim that "as an African-American in Philadelphia charged with killing a non-black victim, he was far more likely to be sentenced to death in Philadelphia than a person convicted of killing an African American," Petition at 9, and second, that statistical evidence of strikes by John Doyle, the prosecutor in Petitioner's case, and the Philadelphia District Attorney's Office as a whole shows a pattern of striking black jurors. Some of this evidence was never litigated in the state court proceedings.

The statistical evidence that was brought to the attention of the state courts was first raised in the Pennsylvania Supreme Court on the PCRA appeal in a document entitled "Application for

Permission to File Supplemental Pleading and Motion to Remand to the Post-Conviction Court on the Basis of Newly Discovered Evidence," and in the appellate brief. The Pennsylvania Supreme Court held that: 1) the claim was not developed in the brief but improperly incorporated by reference the supplemental pleading; 2) the remand motion, as it raised a new claim, had to be filed as a second PCRA petition after the Supreme Court concluded review of the pending matter. Commonwealth v. Bond, 819 A.2d 33, 52 (Pa. 2002). There is no indication that a second PCRA petition was filed. Because the Pennsylvania Supreme Court did not preclude Petitioner from raising the claim, but required that it be done in a second petition, and because the state courts did not have an opportunity to adjudicate the claim on its merits, I will not hear evidence on it. Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005); Abu-Jamal v. Horn, 2001 Westlaw 1609690 (E.D. Pa. Dec. 18, 2001).

In any event, none of the statistical evidence can prove the ultimate issue: whether the prosecutor in Petitioner's case violated Batson. In McClesky v. Kemp, 481 U.S. 279 (1987), the Supreme Court considered evidence of a study performed by Professor Baldus (the same expert Petitioner proffers here) of death penalty cases in Georgia. The Court found the study insufficient to establish discrimination because the petitioner had to prove that the decision makers in his case acted with

discriminatory purpose, and there was no evidence specific to the petitioner's own case. Id. at 292-94. The Court held that:

Each jury is unique in its composition, and the Constitution requires that its decision rest on consideration of innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense. Thus, the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case.

Id. at 294-95 (citations and footnotes omitted). See also Miller-El v. Dretke, 125 S. Ct. 2317 (2005) (discussing the statistics of the trial venire, and noting that "more powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve"). I have all of the material necessary to evaluate Petitioner's Batson claim.

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ORDER

AND NOW, this 7th day of December 2005, IT IS ORDERED:

That Petitioner's Request to Present Statistical Evidence is
DENIED.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.