Supreme Court of the United States

OCTOBER TERM-1970

In the Matter of:

JAMES EDMUND GROPPI

Appellant

vs.

STATE OF WISCONSIN

Appellee

Docket No. 26

Place Washington, D.C.

Date December 7, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM -- 1970

JAMES EDMUND GROPPI

Appellant

vs.

STATE OF WISCONSIN

Appellee

No. 26

Washington, D.C.

Monday, December 7, 1970

The above-entitled matter came on for argument at 1:25 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLAIM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

MRS. ELIZABETH DUBOIS, ESQ.
On Behalf of James Edmund Groppi

MR. SVERRE O. TINGLE
On Behalf of the State of Wisconsin

****

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear argument next in No. 26, Groppi against Wisconsin. Mrs. DuBois, you may proceed whenever you're ready.

ARGUMENT OF MRS. ELIZABETH B. DUBOIS, ESQ.

ON BEHALF OF APPELLANT

MRS. DUBOIS: Mr. Chief Justice and may it please the Court. This case is here on appeal from the Supreme Court of Wisconsin. It involves the criminal conviction of Father James E. Groppi for resisting arrest during the civil rights demonstration which took place in August of 1967.

At issue is the constitutionality of the Wisconsin statute which prohibited the change in venue in Father Groppis' case because he was charged with a misdemeanor rather than a felony.

The facts of the case, briefly stated, are as follows: Father Groppi, a Roman Catholic priest, advisor to the NAACP youth council has been an active civil rights leader for a number of years in Milwaukee. He was arrested on August 31, 1967. He was charged with resisting arrest, a misdemeanor punishable under Wisconsin law by a maximum of one year and a $500 fine.

He was convicted after a jury trial, on February 9, 1968. The testimony at trial is laid our in some detail in our brief, is significant in two respects. First it is clear that the activities from which his criminal charge arose are considered crimes of major porportions by the People of Milwaukee, what-

ever the technical classification of the crime in which he was charged.

Thus the defendants' arrest ocurred in the course of a civil rights march, protesting a proclamation issued by the mayor of Milwaukee banning all marches and demonstrations from 4:00 p.m. to 9:00 a.m. for a thirty day period.

That proclamation had itself been issued in response to a series of civil rights demonstrations, marches, and activities participated in by Father Groppi and the youth council. The testimony is also significant in that the States and the Defenses' versions of the facts essential to his guilt or immocence on the resisting arrest charge were in basic conflict. The States' witnesses tesrified that while Father Groppi was being carried in a limp position to the police wagon, he kicked the policeman who was carrying him by the left leg, meanwhile shouting a profanity. Defense witmesses testified that that same officer had gouged Father Groppis' leg and that it was in response to that that Father Groppi demanded his name and badge number. The Defense denied that there had been any kicking and any profanity.

The defendant moved prior to trial for a change in venue on the grounds that massive and prejudicial news coverage that he had recieved as a civil rights leader and in connection with this case in Milwaukee County had created community prejudice preventing an impartial jury trial in that county. He asked for

an opportunity to proove the nature and extent of that news coverage and its effect on the community and on the liklihood of an impartial trial in that county.

This motion was denied without an evidentury hearing on the sole ground that the Wisconsin statute at issue prohibited a change of venue in misdemeanor cases. The defendant charged the validity and constitutionality of--

Q. At this point did the statute in so many terms prohibit the change in venue in misdemeanor cases?

A. Today, Your Honor, or at the time of---

Q. Then. At that time.

A. At that time the statute as interpreted by the trial court in its terms probibited. The trial court interpreted it very specifically to prohibit change of venue. It was on that ground that it denied the motion. The Supreme Court of Wisconsin, in its opinion, again interprets that statute to absolutely probibit change in venue in a misdemeanor case.

Q. The statute certainly does not mention misdemeanors, does it?

A. It does not mention it. It says only that in a felony case a change in venue may be allowed, but the Wisconsin Supreme Court opinion specifically says both that the motion was denied on the ground that the statute provided for change in venue only in felony matters, that's 208 of the record, and then the Supreme Court itself said the applicable statute specifies

that a change in venue based on community prejudice shall only be permitted in felony cases.

Q. Is there a constitutional right to a change in venue in any kind of a case? Fully apart from the statute?

A. Your Honor, it's our contention that---

Q. On sufficient showing of community prejudice.

A. On a sufficient showing of community prejudice, a change of venue may be constitutionally required and that this statute is subject to due process challenge. Because it absolutely prohibits change of venue without even according a right to hearing in which one can show the kind of community prejudice that would justify a change of venue.

Q. You can sense I'm struggling with the question of why the Wisconsin Court interpreted its statute in the way it did when it didn't refer, make any mention to misdemeanor cases whatsoever.

A. Maybe it's because the statute, the language of the statute seems to assume that no change of venue exists except for the statute and that its because of the statute that a change of venue is allowed in a felony case. And Wisconsin itself recognized a federal due process right to change of venue, only after the statute had been enacted.

Q. Is it possible, Mrs. DuBois, that you might have a situation where the original jurisdiction having a special misdemeanor court concievable there might be no other place where

they had a comparable court. What would that do to your argument? What would that do with respect to this problem?

A. You mean that in a particular county, for example, in Wisconsin there might be a special misdemeanor court that other counties---

Q. There might be no other misdemeanor court anywhere else in the state, in some states.

A. It seems to me, Your Honor, that if there was a showing in such a case that commumity prejudice was such that it was impossible to try that misdemeanor in that county that the state would simply have to provide some means of trying him in another county. The fact that a specific misdemeanor court did not exist it seems to me would not be a barr to that. Certainly another court would be able to try the case. Or the state court would simply have the burden of providing some means of trying it somewhere else. If it was going to try the case at all.

Q. While I have you interrupted, what impact, if any, is there from the fact that the Wisconsin legislature has now extended the change of venue provisions to cover misdemeanor cases, as I understand it?

A. Your Honor, I don't think there's any impact at all in this case, because the Wisconsin statute that changed the law which we refer to in the reply brief, page 2, footnote 1 specifically makes that change in the law prospective only. The section we quote there applies to the entire newly revised

criminal procedure code, and it says that the code shall govern procesutions commenced on or after July 1, 1970. It says the prosecutions commenced prior to July 1, 1970, shall be governed by the law existing prior thereto. This prosecution was commenced prior to that date, the trial itself was in 1968.

Q. Mrs. DuBois does the record show, I wish to be sure as to this, whether there was any offer of proof as to community prejudice?

A. Yes, Your HOnor. On the original motion for a change of venue, which appears in the appendix at pages 23-25, the defendant offered, he asked the Court to take judicial notice of the massive news coverage of this defendant and of this particular case. And in addition he proffered proof as to the nature and extent of the coverage and as to the effect on the community. The motion was denied out of hearing. The specific grounds the judge agve were not that inadequate evidence had been produced but that the Wisconsin statute prohibited a change of venue.

Q. Does the fact that the jury was expeditiously selected weigh against that any suggestion of community prejudice?

A. Well, I don't believe that it does because our contention that change of venue may in some cases depending on the circumstances be constitutionally required because voir dire and continuance and other available meghods would simply

not be adequate to protect the defendants right to an impartial jury trial. Therefore, the fact that in the particular case voir dire may have been expeditiously dispatched doesn't affect the constitutional claim. The premptory challenges were all exercised in this case and ther's simply no way of telling what else went on at the voir dire.

Q. Do you know whether under Wisconsin procedure counsel has the right to question prospective jurors?

A. Well, Counsel has the right to question prospective jurors. The state makes the argument that the defendant had an opportunity to show community prejudice in this case, either on voir dire or on a motion for a continuance, or on a motion for a new trial, and its the failure to do this that deprives him of -- . Our answer to that is that his claim is that the circumstances are such that only a change of venue can protect his right to an impartial trial.

There is no reason that he should be required topursue remedies which he considers inadequate in order to get a record of community prejudice. And we contend this is so particularly because pursuit of those remedies might involve waiver of vital constitutional rights and might be fruitless in particular, both with continuance and with voir dire.

Continuance under Wisconsin law, had the defendant moved for a continuance, he would have waived his right to a speedy trial. Secondly the kind of proof he might have been able to

get in on a motion for a continuance would have meant that he would indeed have been able to get a fair trial in Wisconsin, eventually, and it's that very thing that he's claiming he could not get.

As far as voir dire is concerned, he is allowed under Wisconsin law to ask questions of particular jurors, presumably it is with respect to whether or not they have heard particular information or seen things. But he would not be allowed to bring in outside witnesses to show that the community as a whole is exposed to prejudice, which is the kind of evidence that this Court found in Rideau was relevant. In Rideau this Court found that it was not the exposure of the three jurors that was shown on voir dire that was relevant, they found it was the exposure of the community as a whole. In voir dire there would be no way, in Wisconsin or in any jurisdiction that I know of, that the defendant could show that kind of exposure of the community as a whole.

He would be limited to showing simply the exposure of particular jurors.

Q Mrs. DuBois, what do you say about the States' point that there was no prima facie shown in the motion, there was just general conslusions?

A. Well, the defendant is faced with a statute which prohibited, as Wisconsin courts had interpreted it, prohibited a change of venue. He did make conclusory allegations---

Q. Is there any rule of Court or law in Wisconsin that says you can't file exhibits to a motion?

A. No, Your Honor, he could have, and he did in fact file an affadavit which is in the record, and he did also ask the Court to take judidial notice of the news coverage which many Courts have in this kind of case, considered news coverage of the being attached, but the most important thing---

Q. Could you have put into the record what he wanted the Court to take judicial notice, namely the clippings that he said were so inflammatory?

A. Well, Your Honor, two answers. He could have put some of the clippings into the record, but he was denied any opportunity to bring in witnesses, which is another important way of showing community prejudice. He was denied any opportunity.

Q. But was he denied the opportunity to put in a thousand affadavits or fourty five hundred clippings, was he?

A. No, he wasn't Your Honor, but that may be an inadequate way of showing community prejudice.

Q. Well, I mean, doesn't the Court have some control over the fact that he wants prima facie shown?

A. I agree. If either the trial court or the Supreme Court of Wisconsin had ruled that his failure to get community prejudice into the record had anything to do with his failure to produce proof on the change of venue motion, but neither

of them went on those grounds.

The only contention--- The trial judge on that motion---

Q. Do you say that we are prohibited from affirming on that ground?

A. I would say, not for that reason, Your Honor, but I would say that where he proffered proof---

Q. Where is this proffer of pooof?

(No response)

Q. Page 24a?

(No response)

Q. All I saw was a general statement which asked the Court if they ever read the newspapers.

(No response)

Q. There was an affadavit. Page 24a of the record.

A. It's on page 23a of the record. The defendant requests that this Court take official notice of the massive news coverage by all news media in this community, of the activities of this defendant. Such activities as have been related to him, or the alternative that the defendant be permitted to offer proof of the nature and extent thereof, its effect upon this community and the right of the defendant to an impartial jury trial.

Q. Which newspaper article are you asking thatCourt to take judicial notice of?

A. Your Honor, there are masses of newspapers.

Q. Well which one?

A. None of them were attached, that is true. THe Court--

Q. You mean you want the Court to go back and research through the newspapers and find the clippings?

A. Your Honor, we're not---

Q. Wouldn't you agree that it would have been much simpler to have presented what you wanted the Court to take judicial notice of?

A. Your Honor, the defendant was faced with the statute probiting change of venue. He came in and proffered proof and akked theCourt to take judicial notice. He also attached a note by Father Groppi.

If the Court did not go on the ground that these things were inadequate. If the Court had said at that point that these things were inad quate, the defendant could have produced more proof. What theCourt ruled was that the defendant had no right whatsoever to produce any proof and it did not even rule that that proof was inadequate.

Q. So you want to send the case back so that that evidence can be put in?

A. No. Your Honor at this point the only appropriate remedy would be to reverse the conviction, because at this point to put in proof that's three years old as to the kind of community prejudice that existed in---

Q. You just want us to release it?

A. I want the Court to---

Q. You don't want a remand, you want just an out and out reversal.

A. A reversal so that the defendant could have a new trial at which he could have an opportunity to show the kind of community prejudice which would justify a change of venue if indeed under circumstances---

Q. Well, that's what I thought you were saying. You didn't want a complete reversal, and turn him loose, did you?

(No response)

Q. I understood you to say that it wasn't clear in this case that a change of venue in a misdemeanor case in this state was completely unpermissable. That it was only in this case and that the decision of the trial court and then the subsequent affirmance in the State Supreme Court that it became clear. That the rather ambiguous language of the state statute meant in only felony cases could you get a change of venue and that they were absolutely forbidden in misdemeanor cases.

A. It has never been held by the Supreme Court of Wisconsin, but I believe that it was commonly understood, by Counsel in Wisconsin, that this was not allowed, that changes of vemue were not allowed in misdemeanor cases, and this is that the language of the statute is that ambiguaus because it presumes that no change of venue is allowed. It permits change of venue in a felony case---

Q. Well, maybe by implication, I suppose, but I thought you'd agreed earlier with Justice Blackmun when he said the statutory language wasn't all that clear, and now in your responses to Mr. Justice Marshall you say that the reason that a better factual case wasn't put in for a change of venue was that Counsel for the defendant knew he had a hopeless case anyway because clearly there couldn't be a change of venue. It seemed to be a little inconsistent. I wondered what you---

A. I think that the statute and that the practice in Wisconsin was fairly clear. That no change of venue would be allowed in this case, and I think he produced adequate proof, in any event an adequate proffer of proof so that the judge should either have said this is not enough evidence or allowed him to have an evidentury heareng.

Q. Well if, going back to a point raised before, if there was that much community prejudice wouldn't it normally be a matter that Counsel would explore very extensively in examining the jurors? To be sure that he had eliminated such of those persons that had been tainted by that excessive coverage that you claim?

A. There is no way of telling exactly what kind examination that was made in this case but under Wisconsin law, as under the law in most jurisdictions, the juror who has been exposed to prejudicial news coverage may stay on the jury so long as he can tell the judge that he has not formed an irrevoc-

able opinion that the defendant is guilty.

Q. Did you make a motion for a new trial, Counselor?

A. Your Honor, yes, after the motion for a change of venue there was a motion before trial to dismiss challenging this statute. There was also a motion for a new trial afterwards challenging the statute and in both cases the---

Q. But did you ask, in your motion for a new trial, to submit any evidence with respect to community prejudice?

A. At that stage there was no evidence submitted, but again, our argument is that the reasons that it's unnecessary to submit evidence, or that it's unfair to require the defendant to get new evidence in at that stage is because it would be fruitless.

In the first place---

Q. The Court, I take it, the Wisconsin Court said that they certainly weren't holding that you didn't have a right to a fair trial.

A. They say that Your Honor---

Q. And that on a motion for a new trial that if there had been evidence of strong community prejudice you could have condluded---

A. They say that, but this is the firs t case in which they've indicated in any way that the way to get change of venue on community prejudice into the case is on a motion for a new trial and there are several cases indicating that the standard

for reversal on an unfair trial theory is entirely different from the standard on a vhange of venue.

In the case of State vs. Nutley, which we cite in our brief, the Wisconsin State Supreme Court case, they desc=ibed the two different standards very specifically. They describe there that the standard on a change of venue motion is whether there is community prejudice which might color the perceptions of the jurors. They describe the standard on the reversal for an unfair trial as whether the publicity was such that tht jurors could not help but predetermine the guilt of the defendant.

Q What do you think the condtititional standard is?

A I certainly don't think it's the second, and I don't think this Court has made it quite clear in these cases that it would not be a standard that the jurors clearly couldn't help but predetermine the guilt of the defendant.

The other problem with introducing this evidence on a motion for a new trial and the other reason that it would be fruitless is that there's no indication that a change of venue would be possible in Wisconsin even if such a motion were won.

Q Suppose the trial judge, at the conclusion of the trial, after he had seen the whole panorama, decided that this cluld have been a miscarriage of justice because of community feeling permeating the jury. He might then, on some broad ground, independent of the statute, decide to grant a new trial

Isn't that so?

A. He might decide to grant a new trial, but a new trial in the same community. I think that given this Wisconsin statute denying change of venue, that there would be no possibility of their granting a change of venue and its our obvious contention in this case --- I mean, it's Groppis contention in this case that a simple -- I mean, granted a new trial under thise circumatances would really be the same as granting a continuance. That's his contention. That that would be an inadequate remedy. Because, under the circumstances in this particular case because of his continued civil rights activity, because the prejudice really resulted from his notoriety as a person, not from the facts of the particular crime.

There's no reason to believe that the prejudice would disappear. In any event, our only real contention is that he was entitled at least to a hearing to show that a continuance would not have been an adequate remedy.

I'd just like to point out that the two cases which have really dealt with a statute like Wisconsins both held that on a record where the defendant had no opportunity to get community prejudice in the change of venue motion hearing, the cact that there was no community prejudice in the record is irrelevant.

I'd like to just briefly discuss the argument. Our basic argument is the statute is in violation of the defendants

rights, both under the due process and under the equal protection clauses of the Constitution.

We start with the fundamental proposition that a criminal defendant in our system has a right to have his innocence or guilt determined on the evidence by an impartial trier of fact. Whether the case is a felony or a misdemeanor, a petty or a serious offense. Since Wisconsin law provided that the trier of facts in all criminal cases be a jury, it's our contention that the defendant had a Federal due process right to all proceedures essential to insure that that jury was impartial.

The Court below and the State contend that change of venue is only one of several methods of insuring impartiality. Bur it's our contention that the other methods available to him deal with pretrial publicity have inherent limitations and that therefore change in venue may under some circumstances be constitutionally necessary.

Continuance, as I said, nay be inneffective, publicity may revive and because it conflicts with the defendants right to a jury trial.

Voir dire may also be ineffective for reasons I've already described. And also for reasons that this Court in Rideau recognized. In Rideau this Court based its finding that due precess required a change of venue. In that case all the exposure of the community to prejudicial publicity. It specifiaally refused to base its finding on a particularized examination of the

transcript of the voir dire procedings.

If change of venue is required, depending on the circumstances, by due process, then we contend that it cannot be limited to felony cases. But that there is no rationale for this distinction because as this case indicates, community prejudice may arise from the personality, the notoriety of the individual, rather than the particular crime, and also from the substance of the activities, not just from the technical charge.

Q Supposing you prevail. You think that Father Groppi could get a fair trial now?

A. I would think that there's no way of knowing, Your Honor. I think that the only---

Q But you'd have the new statute in play, wouldn't you? I suppose the new statute would give the judge a---

A. Your Honor, I think that if we prevail, I think that the solution would be a reversal of the conviction, and a new trial at which he would have an opporcunity to show that he has a right to change of venue.

We don't claim that he has an absolute right to change of venue. We don't claim that in this case. We don't know. We claim he has a right to a hearing in which he can introduce evidence to show that, that under the new statuteof course he would have that right in any event. Also under this Courts reversal.

Q If the Court limited you to affadavits and exhibits

would you say that's a denial of due process?

A. I'm sorry Your Honor I missed---

Q. If the Court said that the only way you can show prejudice is by affadavits and exhibits, would you say that's a denial of due process?

A. I would say that, Your Honor, I -- answer that as an absolute rule. I can see that there might be circumstances in which it was necessary to bring in people from the community to actually testify. Also it's been recognized that one of the best ways of showing community prejudice is not the traditional ways that have been used in the past, but is by some kind of opinion poll, something that---

Q. Waht more you want then, than you have in this case?

A. You mean what more opportunity than there was in this case?

Q. Yes.

A. Your Honor, I think that---

Q. Your only complaint is that the judge would not let you put on evidence. That's your only---

A. No. It's not just that. It's that the judge would not deal with the merits of the situation. The judge did not rule that he would refuse to take judicial notice of the massive news coverage. He did not rule that that---

Q. That I agree on, for the sake of my question. But you made no effort to. He couldn't have restricted you from

filing exhibits. He couldn't have restricted you and prohibited you from filing affadavits. And we would have had something to go on. But here, all we have is the affadavit of the defendant that on the advice of his lawyer he didn't think he could get a fair trial. That's all we have. Is that right?

A. The affadavit of the defendant is also news coverage which is not in the record but which was before the judge and which was objected to---

Q. Well, I don't read the Milwamkee newspapers.

A. Your Honor, this Court has held in other cases, I believe, well, in a case like Colon vs. Alabama that where the Court refused to consider the issue or hold a hearing, that that in itself is a denial of due process. And what we're asking is a refusal not just to hold a hearing but to consider the issue on the merits, that is a denial of due process.

That, for instance in the stated ex rel. Rico vs Biggs case which declared unconstitutional a statute like this, there is absolutely nothing in the record. All that happened was exacty what happened in this case, where the defendant came in and asked for a change of venue, the Court said that it wasn't allowed for, and it was ruled that he at least had a chance to at least be heard on the merits. It wasn't just that he denied him a hearing, he refused to decide him on the merits, that this coverage which he knew of which was inadequate or that the coverage should hav e been brought in.

I would like to reserve whatever time I have.

Q. Very well, Mrs. Dubois. Mr. Tinglum?

ARGUMENT OF MR. SVERRE O. TINGLUM, ESQ.

ON BEHALF OF APPELLEE

A. MR. TINGLUM: Mr. Chief Justice, and if the Court please.

I would like first of all just to mention briefly what is a difference of opinion about the statement of facts. The respondent did not take issue in the brief with the statement of facts presented in the appellants brief. The misunderstanding arises in this fashion. That the statement of facts in the appellants brief contains considerable detail of what happened at the trial, what the testimony of this witness was and what the testimony of that witness was. And our disagreement arises in that the defendant takes a position that such facts do not have any relevance whatsoever with respect to the issue which the appellant seeks to raise and seeks to have decided by this Court.

The ground rules of this Court, as I understand them, and as expressed by this Court in Meany vs. Hollohan and other cases is that an appellant who seeks reversal of his conviction on the grounds that he has been denied a constitutional right must show that he and not some hypothetical member of the class has been denied. Now

Now the constitutional right that the appellant seeks to

have vindicated here, is the Sixth Amendment right to trial by an impartial jury. That is, a jury that is not affected by community prejudice to the point where it cannot judge the issues of fact impartially in the case. The constitutional right soughtto be vindicated is not change of venue, but the right to an impartial jury.

Now the appellant says that under certain circumstances, and this expression, or something similar to it, is found four different places in the briefs filed by the appellant, the Court is told that under certain circumstances a change of venue may be constitutionally necessary even in a misdemeanor case to protect the defendants right to a fair trial by an impartial jury.

And the reason, we contend, that the appellant repeatedly says, under some circumstances, this may be constitutionally necessary is because the appellant recognized thet this Court has not been given a factual record, a factual setting, in which the constitutional issue can be decided.

The question that the appellant seeks to raise is certainly an interesting one, it's a tantalizing one, there's not much law previous authority on the subject. There will apparently be less in the future because of the trend among the states to grant changes of venue in all criminal cases and nottto limit the right to change of venue to felonies or capital crimes or make such other distinctions.

It's the respondents position that the Court is being asked to give an advisory opinion, and this Court has repeatedly said in the past that it does not sit to give advisory opinions.

Now the Wisconsin Supreme Court, in this case, decided, made the decision on the constitutional issue raised and argued by the parties in that Court. And it's the respondents position here that the Wisconsin Supreme Court should not have done so. Because it did not have a factual record that would raise the constitutional issue.

No one, to my knowledge raised to the Wisconsin Supreme Court the question of the standing to challenge the constitutionality of that statute. The Court, there, had to , when you look at the record, deal in abatractions, and this Court has said, in the pase, specifically refering to United Publuc Workers vs. Mitchell, as one case, where this Court has said it will not deal in abstractions, but it must be presented with concrete, legal issues in factual settings before it will undertake to decide the constitutionality of a statute.

Q I had understood the appellants theory to be that since the trial court denied the motion for a change of venue, not on the ground that there was no sufficient showing of community prejudice, but rather on the ground that no matter how much community prejudice you may show I cannot and will

not listen to any evidence along those lines because the statute of this state absolutely forbids me to grant a change of venue so any hearing on community prejudice would be a waste of time for both of us. Therefore, we must assume in this case that what this case amounts to is a denial of a hearing on community prejudice and we may perhaps assume that there could have and would have been an extraordinary showing of it, right alont the lines of Rideau against Louisiana, but that the District Court said even assuming that kind of a case, I can't hear it and won't hear it because I can't grant a change of venue, anyway.

It makes it a little bit like that Chicago censorship case where there was no evidence, either, really, of what the movie was, but assuming the very most offensive imaginable kind of a movie, the question was, was there any power to have a prior restraint of the showing?

(No response)

Q. That is the position that Juwcice Hefferna took in the dissent, wasn't it?

A. Yes, it is. As a matter of fact, the only Justice of the Wisconsin Supreme Court that addressed himself, that seemed to address himself to the appellants standing to raise the issue of constitutionality was Mr. Chief Justice Hallows, who wrote a concurring opinion in which he expressed an opinion on the constitutional question, but said that this record

showed no prejudice and therefore he would vote to affirm the conviction below.

Q. Page 20a and 21a, what is that document? It appeass not to---

A. 20a and 21a as I understand it, Mr. Justice Marshall, is a document that was submitted to the trial court at the time the trial court denied the motion to change the venue.

The defendant, as I understand it, presented this document at 20 and 21, to the trial court and asked the court to sign this document in which the court would find facts that were more or less in accordance with the affadavits submitted by the defendant and its also my understanding---

Q. But I don't even know what it was attached to, do I?

A. By the--

Q. Was it a separate document, or---

A. I understand it was a separate document.

Q. Well, how did it get in the record?

A. It, I don't know---

Q. You don't know---

A. A fugitive document---

Q. I can't balme you for it.

A. I don't know.

Q. -- It said in the record that the label--- facts --- and conclusions of law, no other explanation. Do you know

A. I don't know.

Q. Did you challenge the inclusion decided in the appendix?

A. I did not. I---

Q. At best, it should have been labeled "proposed", or something of that kind, should it not?

A. It perhaps should have, but I assumed that this was a document that the defendant asked the trial judge to sign and he said No, I'm not going to sign it. You can file it if you want, but I'm not going to sign it. I assume that's how it found its way into the record but I don't know.

Q. Do you know whether it is or it is not in the original record, in the trial court and in the record before the Supreme Court of Wisconsin?

A. No, I do not. Again, I assume---

Q. I'm not suggesting you have a responsibility for this. You did not bring the case here, of course.

A. I don't know.

Q. What position did the prosecution take below on this question of publicity and burden of proof and the like?

A. The prosecution at the trial court level took the position that it would, that a change of venue, that the whole question of a change of venue would be a problematic matter for legislative regulation and that the Wisconsin legislature had only acted to grant a right to change venue in felony cases.

The prosecution at the trial court level took the position that inasmuch as the legislature had not granted, extended the right to change of venue in misdemeanor cases, that it would resist, and it did resist, or oppose the motion for a change of venue.

Now, regardless of, I feel somewhat at a disadvantage, because here's the Wisconsin Supreme Court that has decided the very issue that I claim would not be proper for this Court to decide. Here again, this Court has said in the past, in the Tileson case, in Prant vs. Board of Public Instruction that this Court will exercise its independent judgement on the question of standing and will not simply follow the lead of a state Supreme Court.

The Court has stated the question of standing as being one of whether the defendant has sustained an injury by the statte that is attacked, by enforcement of the statute that has been attacked. The record in this case, when you compare it with the record in Rideau, Irvin, Irvin vs. Dowd, Estes vs. Texas, Sheppard vs. Maxwell, the record here doesn't even give this Court an opportunity to say, well, it was even probable, or it was even likely that this defendant had to go before a jury from a community that was even probably prejudiced.

The facts simply aren't in the record.

Q. Well, is it possible to say that the prosecution prevented the presentation of such facts?

A. No sir. I do not believe so. The Wisconsin Supreme

Court in its opinion said that there was no bar to the presentation of facts at trial court level. And the only thing we find is this affadavit that has been discussed here earlier on pages 24 and 25 which is in very general conclusory terms.

Now---

Q Well, then perhaps I misunderstood your last question. I thought the state had taken a very positive position as to the availability of a change of venue in a misdemeanor case on grounds of community prejudice. And, if this is so, is the state in a position to complain of the deficiency of the record?

A. I believe so and I think I misunderstood your earlier question, and that is why I perhaps should have phrased the answer differently.

The state could not have, that is the prosecution could not have prevented, under any circumstances could not have prevented the defendant from making a record of facts about community prejudice. The opportunity was there for the defendant in the first place, to file, as Mr. Justice Marshall has mentioned, to file affadavits, to file exhibits, newspaper clippings, being denied that opportunity, after the first denial of the motion, the defendant had many othtr opportunitits to introduce the same evidence. A renewed motion for a change of venue, with exhibits, with affadavits. The defendant had an opportunity to file the same evidence with a motion for

continuance. It would have been relevant there. The defendant had an opportunity to file the same type of evidence which would have been relevant on a post trial or post verdict motion for a new trial on the ground of community prejudice.

Furthermore, the defendant didn't avail himself of the opportunity to make a record that courts have traditionally considered of utmost importance, in community prejudice cases. And that is a record on the voir dire examinatinn. There certainly, we know that there's no request in the record anywhere that the voir dire examination be reported. We have to assume that there was a careful examination of jurors by defense counsel at the trial, but we don't know. And the blame for this can be laid at the door of defense, because it's the defendss responsibility to make a record if it's goint to stand of a constitutional issue, and hopes to show some reviewing court that the defendant was denied a relevant constutitional right.

Q. What was the name of that -- film case, in Chicago?

A. I'm not---

Q. That's quite a different area of the law, but I think in this respect there is an analogy, having to do with the right of censors. A movie, any movie, and the plaintiffs in that case deliberately kept out of the record the nature of the movie. And therefore asked the court to assume that it was the worst possible kind of movie and said even on that

assumption our claim is there can be no censorship -- . There was absolutely no evidence whatever of the nature of the movies And the case was decided, the constitutional question was decided as I remember by the Three Judge District Court and I know by this Court that kind of a record, i.e. no record at all.

A. I would say that I would think that that would be just the reverse of our situation. That we have, in this case. Because in that sort of a case, you can safely assume for constitutional purposes that the film was the worst possible kind of garbage. But in this type of case you cannot assume that Milwaukee was aflame with prejudice and that there were lynch mobs roving the streets and crowds inside and outside the courthouse yelling for the defendants blood.

You don't have any of the facts that were presented in the records in the Rideau case, where there had been a televised confession, you don't have any of the facts that were presented to this Court in Irvin vs. Dowd, or in Sheppard vs. Maxwell.

It seems to be, to me, exactly the reverse. Of that situation.

Q. The Court has held that there at least can be situations where in order to comply with the requirements of due process of law, there must be a change of venue. You agree with that?

A. Yes, I do.

Q. The Rideau case is ont that comes to mind.

A. Yes.

Q. In this case, as I understand it, the state of Wisconsin has said even in a Rideau case there cannot be a change of venue if its a misdemeanor.

A. That's correct. That's what the Wisconsin Supreme Court said.

Q. Right

And it's my, the respondents position here---

Q. That it didn't deed to decide that.

A. That it didn't need to decide that and shouldn't have. Because it didn't have.

Now, if---

Q. But you're really not defending the basic decision of the State Supreme Court, are you?

A. No.

Q. That's the only issue here, though, isn't it?

A. I don't believe it is, because this Court said that it will exercise its independent judgement on the matter of standing. And that, so that that is a new issue, and we don't have to go to the Wisconsin Supreme Court to look at the basis for their decision, because they didn't decide that issue.

Looking at the record, all we know about this case was

that there was an arrest, at the end of August, 1967, there were six postponements along the way that cannot be laid at the door of either the defense or the prosecution, one of them was caused by a mistrial. But there were a number of postponements. There was an affadavit of prejudice filed against a judge and it was honored.

There were no exhibits filed. There was no renewal of the motion for a change of venue. There was no request of the Court that the voir dire examination be reported. The voir dire was conducted and finished in one half a day, the jury was selected. The state put in its case all in the course of one afternoon. The defense put in its case the following morning.

Q Was thereeever a motion made for a continuance based on prejudice?

A. No sir.

Q Did Counsel say that such a motion would have had unfortunate consequences to the defense in the sense of a speedy trial?

A. Yes. The---

Q If you make a motion like that, for a continuance, you waive your right to a speedy trial? Is that what you said?

A. That's correct. And they may have a very valid reason for wanting a speedy trial and not wanting a continuance and it was the defendants right to insist on observance of that

constitutional right to a speedy trial, therefore the defendant should not be compelled to make that motion in order to make a record of community prejudice. That is the defense position.

Q. Although a change of venue would involve some delay.

A. A change of venue would involve some delay. It ordinarily does.

Q. Was there any request in the moving papers as to where the appropriate venue might be?

A. It was in general language, to some county, as I recall, where an impartial trial may be had.

Q. But none was suggested specifically?

A. No county was suggested specifically, and the motion is on page 23. The motion is for a change of venue to a community where prejudice against this defendant does not exist but there's no specific county mentioned or requested by the defendant.

The record, then, we've examined what's in the record. But that leaves unanswered the basic question. Was there prejudice in Milwaukee? Was there? Were there lynch mobs? Was there tremendous intensity of feeling in Milwaukee either bearing on this incident or on other incidents in the defendants history?

Were there crowds? Was there a carnival atmosphere? All the facts that were presented to this Court in these other

cases that are relied upon by the defendant, were in the record. But they're not here.

We don't know whether the editorials mentioned in this affadavit, the editorials are described as being sometimes critical or frequently critical, of the defendant. This is'nt saying that an editorial has condemned this man or has prejudged him on the issue of his guilt or innocence in this particular case.

Q. I don't recall that the motion identified the source of those editorials as the Milwaukee Journal or the Sentinel, or any other papers.

A. No, sir, it did not.

Q. I don't understand your argument beaause even if they had been in en masse, in great detail, they would not be admissable. By your own interpretaiton of the statute. They're irrelevant.

A. Obviously, unless the trial judge had been so tremendously impressed by this evidence that he would have taken a more careful look at the statute and decided to construe it differently. But, you're correct, Mr. Justice Douglas. But. The filings of the affadavits and of the reams of newspaper clippings, if there were such, with the, as an exhibit to be attached to this motion, with these matters of record in this case and would have given the reviewing court an opportunity to look to see whether there was a liklihood that an impartial

jury could not be impanneled to hear this case.

Q. Well, why should a reviewing court act like a trial court? And look in the first instance at evidence which the trial court has said I won't look at at all, and the trial court does it because of an error of law? Wouldn't an appellate court just reverse and remand and have a trial judge take the evidence in the first place?

A. If the issue weren't a Sixth Amendment question of whether or not this defendant had a fair trial and a fair tribunal by an impartial jury. The issue raised, and the only basis on which a reversal could be predicated is that the defendant did not have a trial by an impartial jury and so this Court has required in the past even in the Rideau case, and in Sheppard, and in Irvin vs. Dowd, has required that h there be something in the record so that this Court could say this situation was so bad in that community that it's likely, we don't ask that---

Q. Let's say that this had been a felony case. and the Petitioner wanted a change of venue on the grounds of prejudice and the trial court said awfully sorry, but we don't listen to evidence like that in this court. We just don't listen to it. And he says, well, my confession was on television. Sorry, we just don't listen to that, in our court, and he was convicted. And, I suppose you would make the argument, it seems to me like you would that unless there's some evidence in the record

no appellate court could reverse a refusal to accept evidence.

A. Yes, sir, I have to make that argument, and I think that's what this Court would have said in the Rideau case, for example where there was a televised confession. If the record brought to this Court in the Rideau case had had nothing in it concerning---

Q. So you've got---

A. a televised confession, I don't think this Court would have decided the Rideau case the way it did. If the Court hadn't known about a televised confession, the Court couldn't have acted the way it did.

Q. So there's got to be some offer of proof with some specifics.

A. Yes, sir.

Q. May I ask you what you understand to be meant by the paragraph on page 214a of the opinion? If the defendant in the present case, this is the Supreme Courts opinion, feels that he is denied a fair and impartial trial, no such claim has been made in this Court, that the issue can be raised and evidence can be presented in the motion for a new trial based on a denial of a fair and impartial trial. What do you understand that meant?

A. I understand that paragraph to mean, Mr. Justice Black, that the court was saying if Counsel was convinced that there was serious community prejudice, serious enough to warrant

a change of venue, Counsel could have made---

Q. But it doesn't say "could have". So you can't.

A. That's -- yes -- I'm sorry. I misunderstood your question. Yes. The court was saying---

Q. Despite---

A. Yes---

Q. Despite the affirmance he could raise a question in the lower court now as to whether he ahs been denied a fair---

A. Within that one year period.

Q. What was that?

A. Within the one year period following the conviction, yes, sir.

Q. That time has now elapsed?

A. That time has now elapsed.

Q. But would it elapse if it were still pending in the court?

A. Presumably the opportunity to file that motion in the trial court was still there at the time that the Wisconsin Stpreme Court decision was rendered.

Q. You say presumably. Doesn't this record show whether the year had elapsed? Or of it had, as Justice Black suggested, perhaps the pendancy of the appeal would have suspended that. Would -- the -- of that statute. Do you happen to know whether the opinion of the Supreme Court of Wisconsin came down within a year after the conviction, or not?

A. I believe it did, I don't have the date.

Q. The main interest I have in it is, is the affirmance o of the Supreme Court to be read as meaning that even now he can make a motion for a new trial on the grounds that he was denied a fair and impartial trial? It sounds to me like it reads that way, but---

A. I believe that that is the proper interpretation to put on that paragraph.

Q. Well, would it be a final judgement here?

A. Pardon,---

Q. Would it be a final judgement until that issue had been determined?

A. It would be in Wisconsin---

Q. I mean here. For us. He still has a chance to challenge is the main point they're raising. Would it be final here so that we should dispose of it?

A. I don't believe the appeal to this Court would toll, would extend that one year period within which a motion can be made to vacate a judgement in Wisconsin. I don't -- that's my offhand opinion. I don't believe it would, sir.

Q. It would occur to me that theSupreme Court in Wisconsin in writing that opinion would not have said what it said if this were an academic exercise. If the year had already expired.

A. It occurs to meetoo, but I just dont have the dates.

It seems rather odd to do so.

Q. Now the footnote at that very place says that the trial ended on February 9, 1968. And I think the opinion came down during the August term of 1968. Doesn't that supply your dates?

A. Yes, the trial did end---

Q. ---Page 205a of the record indicates that the opinion of the Supreme Court of Wisconsin was the Fourth Day of February Anno Domini 1969. That's within a year, so as of the time of the opinion, one year had not elapsed.

A. No, it was five days short a year.

Q. And now it has, long since.

A. Yes.

Q. In other words---

A. While this remedy was being pursued by the defendant, while this constitutional issue was being pursued on appeal---

Q. Yes.

A. With respect to the constitutional question, the due process question, I believe that in order to, as I have said before, in order to even reach the question, you have to begin assuming a parade of horrible facts about Milwaukee in February of 1968 which is the respondents position that thisCourt should not and has in the past refused to do. There are two cases other than this current case in the Wisconsin Supreme Court that have discussed this question and they're both against

our position, with respect to the balance of the argument I rely on in my brief. Thank you.

Q Mrs. Dubois, your time has expired, but we'll extend that a little so you can offer a rebuttal.

A All right, I just have a few points to make---

Q We'll allow you four minutes. Mr. Wilkins---

A Thank you, Your Honor.

First, with respect to new trial. I just want to make absolutely clear that under the two cases that we have found dealing with the standards for reversal on the grounds that the trial was unfair, on a motion after verdict. The standard is entirely different from the constitutionally required standard for a change of venue.

One case, the State vs. Nutley, says that reversal for an unfair trial can be granted only where the publicity was such that the jurors could not help but predetermine the issue.

The other case, in Zilmer vs. State, which is not cited in our brief, its at 159 Northwest Second, 669, its a 1968 Wisconsin Supreme Court case. It says that you can reverse only if the court is convinced that the defendant should not have been found guilty.

I think the constitutional standard that this Court has defined in cases like Rideau, Irvin, Sheppard, and a number of others is a standard of potential for prejudice, not an extreme liklihood that the defendant would be found guilty.

Secondly, on the continuance remedy, I think it's clear that in a case like this, continuance would be inadequate unless somebody like Father Groppi is simply to stop the kind of civil rights activity in which he was engaged and continues to be engaged.

Thirdly, in considering the adequacy of the record of community prejudice made in this case, I think it's important to recognize that this is not an entirely new issue that the Court is being asked to decide. That in Rideau this Court made it very clear that change of venue was a constitutionally required method of guaranteeing jury impartiality in certain circumstances.

All we asked for below, and all we're asking for now is a change to proove those circumstances.

Finally, just a few points with respect to the record of community prejudice in this court. I think that it's important to recognize that when the defendants counsel went before the judge in this case, and asked him to take judicial notice of adverse news coverage, it was before that court at that time which had been living for months, indeed, years with publicity abour Father Groppi, not before this Court.

Secondly, we believe it's fairly common for courts to take judicial notice of, or to be asked to take judicial notice of adverse news coverage, and that if they consider that inadequate, and want to see it, or want some kind of

showing that they can ask for a hearing.

Thirdly, on the---

Q. On that point, isn't it the conventional way, if you're asking the Court to take judicial notice of a whole category, at least to suggest by way of proffer some specific instances?

A. Your Honor, I think---

Q. So as to alert the Court to the area.

A. Yes. I think, Your Honor, in this case the defendant did suggest, both in his affadavit, in the motion and also in those proposed findings of fact, which you asked about, the kind of television and newspaper coverage and to answer finally and specifically that question about the proposed finding of fact that appear, I think it's record 23, they were rejected in the record at page 9, as the hearing on the motion for a change of venue, and the court rejucted those findings of fact on the same grounds that it rejedctd the proffer of proof, saying, page 9, that change of venue was asked for in the motion, and will be denied, it not being provided for in the Wisconsin Statutes. Also filed with the court is the findings of facts and conclusion of law. I'll leave that unsigned.

Q. Let me clear up one thing. In the last page of your appendix is a Notice of Appeal that this court filed in the Supreme Court of Wisconsin. Now, that has a bearing on the

footnote in, as to the possibility of a new trial. When that Notice of Appeal was filed, I would surmise what is on the reverse side the certification, the third of April, 1969. Is that correct? That's 233a and 234a.Is that the faith, then on which you perfected an appeal to this Court?

A. I believe so, Your Honor. I'm not sure, I only know that the opinion of the Supreme Court came down shortly before the expiration of the year.

Q. What is the time of appeal on --- What was your deadline here? Do you know?

A. Notice of Appeal to this Court was filed in the Supreme Court of Wisconsin on May 6, 1969.

Q. Well, the time, the one year had expired by that time, had it not?

A. Yes, Your Honor, because February 9, 1968 was when he was tried, so it had expired at that time.

Q. That motion could have been made after the judgement, there was still time to do tt.

A. I think there was something like a few days, 3 or 4 days.

Q. Yes, but she'd made the motion for the hearing, anyway.

A. There had been---

Q. I notice at page 232a--

A. Yes, there was a motion for rehearing in the Wiscon-

sin Supreme Court.

Q. Well, it wasn't until after the year had expired, in any event, that the proceedings in the Supreme Court were concluded.

(No response)

Q. Well, is the statute of limitations designed, in your judgenent to run from the date the judgement is final or from the date of the trial? Here, of course, judgement is not final until we dispose of the case.

A. No, Your Honor, I think that there's no. My understanding of Wisconsin law there'd be no question that it ran from the date that it was final before. That it wouldn't run from this Courts decision. There would not be any move, now, for a new trial. If I understand Your Honors question, I think it's clear that the defendant would not now be able to move for a new trial under Wisconsin law. That his year has run.

Q. My question is, if there is a statute of limitations from the date of final judgement of one year, why is this question not still open in the Court of Wisconsin to make a motion for a new trial? On the grounds of an unfair trial.

(No response)

Q. I think perhaps that the best answer to that is that it doesn't say one year after final judgement.

A. No---

Q. It says one year after trial.

A. Yes.

Q. Well, suppose she had taken a hearing after an appeal, and yet (inaudible). Do you think that you would have been barred?

A. Well, I think that the whole remedy of the motion for a new trial is something that under Wisconsin law you make after the trial, you try to correct certain errors, or ask the court to rule again on certain errors. I think that it is not designed to provide the kind of remedy for change of venue---

Q. Well, it might be, but the Supreme Court of Wisconsin seemed to think it had the right at that time. I don't see how it could be anything except for the finality of the judgement.

A. Well, I think that the---

Q. Which is final after appeal.

A. Well, I think that it's perhaps that it was an after-thought of the Supreme Court of Wisconsin. The Supreme Court of Wisconsin had never before that opinion suggested that a motion for a new trial is the proper way to bring in community prejudice just to find a change of venue. They've never before suggested anything---

Q. Never before been suggested, but it seems to have been suggested, here. In this case, in this opinion of the

Supreme Court.

A Your Honor, to justify the constitutionality of the statute. Thank You.

Q Thank you, your case is submitted.