In the

Supreme Court of the United States

DEAN RENE PETERS,

Petitioner,

vs. No. 71-5078

C. P. RIFF, Warden,

Respondent.

Washington, D. C.
February 22, 1972

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C. P. KIFF, WARDEN,

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Tuesday, February 22, 1972.

The above-entitled matter came on for argument at 11:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDWARD T. M. GARLAND, ESQ., Garland & Garland, 229 Candler Building, Atlanta, Georgia 30303; for the Petitioner.

MRS. DOROTHY T. BEASLEY, Assistant Attorney General of Georgia, 132 State Judicial Building, 40 Capitol Square, S. W., Atlanta, Georgia 30334; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-5078, Peters against Kiff.

Mr. Garland, you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWARD T. M. GARLAND, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GARLAND: Mr. Chief Justice, and may it please the Court:

The case before you comes on a simple record, in that it comes simply predicated upon the filing of a federal habeas corpus petition. There was no hearing. And then it was dismissed by the court. An appeal was taken to the Fifth Circuit, stating denial of equal protection of the law and due process of law, as it related to the claims in the petition.

Those same claims were in the petition for habeas corpus, and they related to the systematic exclusion of blacks from the grand jury and the petit jury, all of which were taken from the same list, the grand jurors and the petit jurors.

That claim was urged in the Circuit Court, and was urged both on the basis of equal protection and due process in violation of the Fourteenth Amendment.

It is from the denial in the Fifth Circuit Court --

Q Did you present both grounds to the Court of Appeals?

MR. GARLAND: Yes, sir.

Q I see they're both in your petition for habeas corpus.

MR. GARLAND: Yes, sir.

Q And you presented both arguments to the Court of Appeals?

MR. GARLAND: Both equal protection and due process of law.

Q And they responded to just one?

MR. GARLAND: No, sir, they did not. They stated that it was both. The language said: Petitioner claims a violation of equal protection and due process. That was the language of the --

Q Of the opinion?

MR. GARLAND: -- of the court's decision, and then it went on to discuss the question of waiver, and then finally said that there was no denial of equal protection; but it was acknowledged that we had raised both issues, in the preparatory paragraphs, the first paragraphs of the opinion.

Q This is the most recent opinion of the Court of Appeals?

MR. GARLAND: Yes, Your Honor.

Q Is that the opinion at page 20 of the record, Mr. Garland?

Q Well, whether they dealt with it or not, expressly, you presented it to them?

MR. GARLAND: Yes, we did. And I believe it is in the opinion, Your Honor.

Q Well, it either is or it isn't, but --

MR. GARLAND: Yes, sir.

Q -- you did present the issue --

MR. GARLAND: Yes, we did.

Q -- on both equal protection and due process?

MR. GARLAND: It was in the brief that accompanied the petition in the District Court as well as the briefs in the Circuit Court, and by act of counsel, obviously, we didn't state it adequately in our question in the petition for certiorari, we feel that both concepts are before the Court since it was a matter of the law, and that it was --

Q Well, your first question in your petition was simply to just say, to stand there.

MR. GARLAND: That's right.

Q I assume that what you're saying is that you argued standing from two vantage points?

MR. GARLAND: That is correct, Your Honor, and we feel that it is before this Court for consideration, based on the record in the case.

As to the question that we did not mention the petit jury in --

Q What would this -- tell me more precisely what your due process ground is. Is it historic fairness, or is it

the Sixth Amendment, as incorporated in the Fourteenth?

MR. GARLAND: It's not -- I wouldn't say it is exactly historical background of it. It is the Sixth Amendment as incorporated by the Fourteenth, the concept of Duncan; but it is also that that is a fundamental concept in the administration of justice in this country.

And that basically the due process therefore requires it.

Q You're saying the concept of a jury necessarily includes a cross-section, is that what you're arguing?

MR. GARLAND: Yes, sir. So we feel that based upon the present determination of what a jury is and what it amounts to under the law in the United States and in Georgia, that it necessarily comprises the concept of the representative basis, the democratic concept of the jury.

Q Well, tell me how a white man is denied equal protection of the law by the exclusion of Negroes.

MR. GARLAND: Well, he is denied equal protection, to the extent that there are different juries that would judge him, or that his case is affected by; to that extent now, exactly what the perimeters of that are, it's hard to say.

Q All right, then.

MR. GARLAND: And it may be that there is --

Q Well, I know, but that doesn't distinguish him from anybody else.

MR. GARLAND: Well, it may give him a different quality of justice.

Q Are you saying that a Negro would have the right to have Negroes included on the juzy and be closer to a fair cross-section than a white man on trial?

MR. GARLAND: Yes, this is --

Q Is that your argument?

MR. GARLAND: Yes. And the effect of that, of course, is that a black could very well, under the same indictment that a white -- returned by the same grand jury, might well file his attack upon the composition of the grand jury, and if it were overruled he'd have a chance to get an acquittal, but if he didn't he could appeal on that basis, assuming the trial court erred. Whereas the white man could not do that.

Now, somehow that presents an unequal system.

Q Well, I suppose -- it sounds like you're arguing, at least partly, that every one's entitled to a jury with a fair cross-section in it, and --

MR. GARLAND: That is --

Q -- and if you deny it to anybody, you're being discriminated against?

MR. GARLAND: That is the essence of the argument, and to a great extent the extent of the argument. It --

Q What is the spread between Presbyterians, Baptists

Methodists, Lutherans, and other religious groups on these juries?

MR. GARLAND: I am uninformed upon any statistics in our State, but I --

Q Wouldn't that --

MR. GARLAND: -- based on experience and outside the record, I would say that we have a representative cross-section of the various religious groups on our juries.

Q Well, if you didn't, would you be making the same claim? Suppose Methodists or Baptists turned out to be disproportionately represented, would you say that was a denial of this perfectly balanced jury?

MR. GARLAND: I would say in theory, yes. For the purposes of this case, the Court would not have to go that far. And of course you would first have to reach the question of whether they were an identifiable class and whether or not that left -- I don't think you can go into the question of the extent of a particular prejudice. I would say yes, that if there was an identifiable segment of the community, and those were excluded, that the concept of the -- that the fundamental concept of a jury would require that.

It should be able to do that.

Q In Georgia, do they record on the jury wheels or rolls the religious affiliation of persons who might be called?

MR. GARLAND: No, they do not. Now, they do send --

they have -- no, you cannot get that information in the Clerk's office. It's not available to counsel.

Now, perhaps at the time of the compilation of the voter registration list, from which our juries are now selected, there could be some information on it; but I'm not familiar with it, Your Honor.

Q Mr. Garland, does the Georgia Constitution require jury trial in criminal cases?

MR. GARLAND: It provides for jury trial in criminal cases, Your Honor, and of course the defendant may waive it, in all criminal cases, both misdemeanor and felony.

In considering this issue, of course I think the Court recognizes that the black man,acknowledged that he can complain, and the State seems to rely on some concept of prejudice as needing to be shown.

It is the position of the petitioner that in fact there is prejudice to the petitioner, and that that prejudice comes from the essence of the requirement of the jury, what the jury means. I think this Court has talked about the value of the cross-section in Duncan vs. Louisiana, and has talked about it in Williams vs. Florida. And I think there the fact that there must be between the government and the defendant the voice of the people has been recognized.

I submit to you that one of the considerations should be that it is the voice of all of the people.

Now, how there is prejudice is a more speculative matter. It's speculative in that you have to analyze what a jury trial in fact amounts to and how the minds of respective jurors work. But I would suggest to the Court that in fact there is prejudice when the broad base of the jury is destroyed in this respect. The jury stands as the barrier against the various vices that can occur in a jury trial.

Now, those may be improper acts or conduct by a prosecutor, hopefully not, but improper acts or biased acts by a judge, or improper acts by a juror, particular juror, such as someone attempting to influence the jury.

In addition to those factors that the jury stands as a buffer between, there is the question of the nature of the crime and how that particular crime affects a particular jury, or the standing of the defendant, his particular status in reference to the community that is about to try him, or the status of the victim, or the status of the witnesses.

The concept, I submit to you, that the defendant in fact is prejudiced is that as to those possible violations and those possible acts that depart from what we say is the right to a fair jury, that the broader the base the more likelihood there is that there will not be the influence of any of those things to such an extent as to deny the fairness of trial. So I think the very concept of what the provision for trial by jury means is that we try to strive toward the system that

will get us the fairest possible result.

So we say that --

Q The fairest possible result or the fairest possible jury?

MR. GARLAND: Well, I would say fairest jury. And the result being that if you have a fair jury, that is the result you seek, that that is the closest you can come to justice. Now, we're not talking about from the standpoint of what one side or the other wants in a jury, Your Honor, but it's as to those things, the broad base amounts to insurance in reference to the ability of the jury to withstand any number of unfair prejudices.

So it's to that very basis that I submit to you that the concept that seems to have been the basis for the opinion below that there was no prejudice to this man is in -- or to a white person complaining of exclusion of blacks -- is in error, that there in fact is a prejudice.

And of course, in speaking of the language that has been used by the courts, there is a narrowing of attitudes, some of the distinct flavor of the jury is lost, and you can also consider, of course, that the whole is different from the parts.

Q Mr. Garland, how broad does the jury have to be?

MR. GARLAND: Well, as broad as the fabric of the society from which it is selected, Your Honor, and hopefully

that would include all of the eligible citizenry.

Q Well, how do you get that?

MR. GARLAND: Hopefully, we can get that by the Court sustaining our position here.

Q Well, how can you get a real cross-section of the jury when the prosecution is busily engaged in not getting a fair jury but a pro-prosecution jury, and the defense counsel is not interested in getting a fair jury but getting a pro-defendant jury; how do you get that big cross-section?

MR. GARLAND: Well, if you have -- we select our juries by the process of rejection. And if the prosecution, in rejecting those that he doesn't feel will go his way, and the defense is objecting to the ones that look most prosecution --

Q Well, I mean, how many different areas, different types, different groups, do you need in the big jury box, the wheel?

MR. GARLAND: Well, I couldn't name a number, of course, but I think we need all of the identifiable groups in the community that exist, and who are -- who meet the other qualifications, and that those qualifications are --

Q Well, what do you need other than all of the racial groups?

MR. GARLAND: Well, the economic groups, any -- the religious groups, if they fall into --

Q Well, you didn't object to that, did you?

The only thing you object to is the racial thing.

MR. GARLAND: That's the only thing I'm objecting to here. In theory, I would object further, yes, sir.

Q Yes, but your basis for that is that you have this broad base you need. And you only complain because no Negro was considered.

MR. GARLAND: That was the only one we knew in advance that in fact we could prove without difficulty, because the jury list had been selected in the same method that had been declared to be invalid previously. And we saw -- we have never had a chance to present proof in this case in the record, it's twice been filed and there's never been any evidentiary hearing. So there's no sense, from our standpoint, no sense carrying a greater burden under the allegations than we needed. It was rather clear that there was a disparity. The previous jury list selected by the same process was 14 percent black, 86 percent white, and the percentages were substantially different.

Q Well, your position is, you're not arguing so much about who should be in there, but you want to be sure nobody is kept out; is that your position?

MR. GARLAND: That is correct, Your Honor. And I submit this --

Q That no discernible group is kept out; that's your position?

MR. GARLAND: That is correct.

And I submit that the practical effects of the trial of ordinary criminal cases, if analyzed, and if there were statistics, would illustrate the variety of circumstances where it would be logical for counsel on one side or the other to see the implication of a white man being damaged by the actions of blacks in rather clear terms, rather than the terms that I have expressed here, as it relates to the fundamental protections.

But it's common that a white defendant may rely upon black witnesses, or it's common that he may have close identification, by many means, with a black; but that should not be the standing. If it is, we get into an interminable question of when does prejudice exist? Where do you find this prejudice? And how do you determine it?

And that will open up a scope for litigation that's unending.

Q Now, Mr. Garland, --

MR. GARLAND: Yes, Your Honor.

Q -- it's of course well settled, as I am sure you will concede, that there's nothing in the Constitution that requires, even in a case where a Negro defendant is on trial in the State court, there's nothing in the Constitution that requires that either the grand or the petit jury have on it any Negro. That's correct, isn't it?

MR. GARLAND: Yes, Your Honor.

Q The only constitutional requirement is that there be a non-discriminatory system of jury selection. You agree with that, don't you?

MR. GARLAND: And that it be a representative cross-section.

Q The system. Not that any particular jury be --

MR. GARLAND: Right.

Q -- representative cross-section?

MR. GARLAND: The system that that jury be drawn in the representative cross-section.

Q That the system be one designed to get a representative cross-section.

MR. GARLAND: Yes.

Q You agree with that?

MR. GARLAND: Yes.

Q And that it's been explicitly held that there's no requirement even, as I say, in the case of a Negro defendant that there be any Negroes at all on his jury. You would agree with that, wouldn't you?

MR. GARLAND: Yes, I would.

Q And yet a defendant has been allowed to attack a system, even in the light of those holdings. And wouldn't it then be possible to argue your case in quite a different way from the way you've argued it to date, and that is along these lines, that this is one of the very few cases, perhaps, one of

the very few situations where this Court, going way back to Strauder v. West Virginia, back in 1879, and those early cases under the Fourteenth Amendment, this is one of the few cases where a court has allowed somebody who cannot actually show prejudice in his case to represent the rights of other people, i.e., Negroes in the community, to serve on a jury. And that right was established way back in the 19th Century and was reaffirmed as recently as a year or two ago in the Carter case in this Court, and the companion case, in which we allowed Negroes themselves to sue to serve on a jury.

Not that your client was denied equal protection, not that your client was denied due process, but you're representing, your client is representing the rights of Negroes in the community for an opportunity for citizen service on grand and petit juries.

Wouldn't it be possible to argue your case along those lines?

MR. GARLAND: It certainly would be possible for this Court to take that position and to add that to the argument which we make. And that -- and as that was pointed out by the amicus in this case.

I think this Court can decide the decision in our favor without having to do that and declare that. I think the Court should declare that.

Q Well, the point is the Court could, if there is

any merit in that position -- if there is merit in that position, could decide the case in your favor without any finding of prejudice to your client whatsoever.

MR. GARLAND: It certainly could, Your Honor. And I think the Court should do it on both bases, on the basis pointed out by the amicus is certainly a good one to do it on. However, I think the Court can also say that it would stand either way: that we find in fact when you deny the cross-section, there is a prejudice; however, you don't have to find the prejudice, because he has the right to enforce a fair system.

Q You didn't bring this action as a class action, however, did you?

MR. GARLAND: No, I did not. One individual client.

I think that -- I wish to mention the case of Faye vs. New York is not against the petition of the position that we assert here. In that case there was a failure of proof on the allegations that were made by the petitioner; that case also was decided before Duncan vs. Louisiana, and perhaps the Court would have viewed the problem a little differently at that stage, and the Court in Faye did not reach the issue of the requirement of identity in that case.

So we submit that Faye is not against us, and of course would call the Court's attention to the logic and language of Justice Murphy in his dissent in that case.

Q Mr. Garland, you argue in your brief and mentioned at the outset of your argument here that retroactivity is an important point in this case. I wish you would state for my benefit to what extent your case depends on retroactivity.

MR. GARLAND: I don't believe my case depends, the petitioner's claim depends on retroactive application. I do think, though, that retroactive application is very much needed in reference to a matter of this nature to avoid the type of process that this particular petitioner has gone through in the courts, raising the issue, going up, coming back, going back in.

Q If this is not a class action, and if your own client's rights do not depend on retroactivity, why do you press it?

MR. GARLAND: So that we can have a simple decision that's workable in our State courts. So we won't go through the process of men waiting in jail while we go to our State courts to determine the question of retroactivity and then go into Federal court to again wait to find out what happens. I think that it will do, it will relieve some of the burden on the Federal system if there is aclear pronunciation and it's dealt with, and I would see nothing to prohibit this Court from dealing with that issue.

Q It means every man in this county is released, every white man?

MR. GARLAND: Well, as a practical effect, most of those people -- this is outside the record, because I don't have the statistics. But since the jury was allegedly corrected in 1967, in March of that year, most of those people that would be affected by this would have already been released from the present system --

Q But those that were still there would be released? That's what you want?

MR. GARLAND: Yes. That is correct.

Q Well, what about the Negroes?

MR. GARLAND: They would be released also.

Q How could they in this case?

MR. GARLAND: If they haven't asserted their rights, they would be released. They should have asserted their rights, or someone should have asserted them for them.

Q Well, Whitus wasn't made retroactive, was it?

MR. GARLAND: I think the effect of it is --

Q Was it?

MR. GARLAND: -- in Georgia.

Q Was it made retroactive?

MR. GARLAND: It's been applied retroactively in Georgia. And I don't know the answer to the question. But it has been applied retroactively.

I ask the Court to consider, in reference to this, the possibility that could occur if there are juries in the

State of Georgia and other States that are invalidly composed, and I would suggest to the Court that this type discrimination does still in fact exist, and does occur.

I wish to give illustration outside the record. Shortly before coming here, three weeks ago, in a town some 60 miles south of Atlanta, the Superior Court judge declared invalid the jury list upon an application by a black in a rape case.

In response to that, the three white jury commissioners resigned in protest. Now, that issue had not been raised, had not been pursued in that court until 1972.

What the reason for that is is that in your rural areas where, if there is this type discrimination that carries over into the system, the lawyers generally are few, are engaged in a more local practice. They fight the evidentiary questions in the court. But it's not as likely that the constitutional concepts are litigated or are fought and it's brought out.

So the fact that there will be a beneficial effect to this type decision is illustrated by the fact that these prejudices can in fact occur and continue even though the system that was used in this particular case has been rejected.

MR. CHIEF JUSTICE BURGER: All right, Mr. Garland.

Mrs. Beasley.

ORAL ARGUMENT OF MRS. DOROTHY T. BEASLEY,

ON BEHALF OF THE RESPONDENT

MRS. BEASLEY: Mr. Chief Justice, and may it please the Court:

Peters is in the extraordinary position of asking that his conviction and his sentence be set aside, and his indictment voided, because he was favored by the jury selection system. And he does so as an afterthought, after his second trial and appeal to Georgia appellate courts.

He didn't raise the complaint at all in the State courts.

What happened actually is that the history of this whole case is a piggyback affair, if I may use that colloquialism.

He wants to avoid his burglary conviction, which was had in 1966, by claiming the rights of Negroes, without alleging any harm to him. As I said, he never complained of the jury composition in the State courts.

Q Are you urging this as a deliberate bypass, or what?

MRS. BEASLEY: No, I'm not, because we did not take a cross-appeal from the decision of the Fifth Circuit that he did not have to exhaust --

Q Are you suggesting that Faye v. Noia wouldn't permit raising it on habeas corpus?

MRS. BEASLEY: No, not at all; although one of the positions that we took in the District Court, and that we thought should have been sustained, was sustained in the District Court, and that the Supreme -- that the Fifth Circuit ruled on the merits of the claim, was that he should have exhausted his State remedies.

Q Are you urging that there hasn't been exhaustion, contrary to the decision of the Fifth Circuit?

MRS. BEASLEY: Yes, we certainly are. But since we did not take a cross-appeal I regard that more or less as a peripheral matter.

Q Well, why aren't you entitled to sustain the judgment below on any ground that you want to, even if it was rejected?

MRS. BEASLEY: We think that there is a more fundamental question here, and of course we were brought to this Court as the respondent, on a grant of petition for certiorari.

Q So, are you urging us to hold that he didn't exhaust State remedies or not?

MRS. BEASLEY: No, sir; I don't think that's necessary, Mr. Justice White, because I think there's a much more fundamental issue here, which the Court can rule on and which was ruled on at the District Court level, and by the Fifth Circuit; and that is that there is no claim stated by the petitioner upon which relief can be granted, because he

doesn't claim a Federal constitutional right which was violated. He's claiming somebody else's right.

Q So you accept the Court of Appeals decision that there was exhaustion?

MRS. BEASLEY: For the purpose of this appeal, that's correct. Although the reasons that they said the exhaustion was not necessary we believe were wrong, because we don't think that --

Q Well, doesn't there have to --

MRS. BEASLEY: -- it is foreclosed by the State court's opinion in this.

Q Doesn't there have to be compliance with a habeas corpus statute, though?

MRS. BEASLEY: Indeed there should be.

Q Well, was there or wasn't there?

MRS. BEASLEY: But we don't think that there was.

Q Well, then, are you urging that point here to sustain the judgment below or not?

MRS. BEASLEY: No, sir; only in answer to your question. We don't --

Q Well, there still must be compliance with the statute.

MRS. BEASLEY: That's correct. But I think the answer that was given in going to the merits itself is what this Court can rule on, so that the matter does not need to come up again.

Q Well, but if that was -- whether the parties raised it or not, I suppose we could notice a plain error.

MRS. BEASLEY: Yes, indeed, you could.

Q You don't mean to say you're abandoning the possible support of the judgment below by reason of --

MRS. BEASLEY: Oh, not at all, because I think the very basic, the fact that they moved on to the question, and so did the District Court; the District Court held, in answer to our motion to dismiss, which was on three bases, the second one being that he had not exhausted, and the third one being beyond that that he had no cause of action. The District Court held in conformity with the position taken by the respondent that he did not exhaust his State remedies, but even if he had, there is no cause of action; taking the view that even if he had got to the State courts, the result would have been the same, because he alleged no violation of a Federal constitutional right.

So it foreclosed the necessity of going back and forth to reach the same result, when it could be reached right in the District Court without a hearing.

Q And the second -- the Court of Appeals rejected the second ground for dismissal?

MRS. BEASLEY: That's correct.

Q And said there had been exhaustion --

MRS. BEASLEY: Yes.

Q -- and compliance with the statute.

MRS. BEASLEY: Yes, Mr. Justice --

Q It said they wouldn't require him to do a useless act.

MRS. BEASLEY: That's correct. Right.

And --

Q You're saying that's wrong?

MRS. BEASLEY: We're saying that's wrong because of the reasons given, that he was foreclosed from raising the issue in the Georgia courts, and that is incorrect, as a matter of fact. But that's neither here nor there when you get down to the cause of action.

And, as a matter of fact, that very fact that he relied so heavily on the exhaustion as giving him -- and that's what the standing issue came in, as a matter of fact; he said he had standing because he had -- didn't have to exhaust, he had a justification for non-exhaustion, so he had standing to come into court. And that's how that issue got in, although, of course, we never challenged the standing to raise the question.

What we're saying is that there is no constitutional right in the first place, not that you're not the proper party to raise it.

But I think the fact the exhaustion question is important, because it illustrates that he did not pursue the

due process claim in the courts below, and this is in answer to a question that Mr. Justice White asked appellant's counsel, and I think it's very important to recognize that, because this whole thing arose as an equal protection claim. The petitioner, in his petition, in the court below -- in the District Court, talked in terms of systematic exclusion and Fourteenth Amendment and equal protection, and just briefly mentioned the words "due process". And we don't think that that raises the due process argument.

And he says: I don't have to go to the Georgia Supreme Court because they've already ruled that I can't raise the systematic exclusion issue. And systematic exclusion has always been regarded as an equal protection concept. This Court said so in Whitus, and in the cases preceding it. It's in terms of an equal protection concept that we look at the systematic exclusion allegation.

And by him now coming, at this point, and saying: Well, now I want to pursue this idea of due process, which I just mention the two words, in the court below and in the District Court; I don't think he has raised that properly. Because he didn't argue it in the court below, and that's exactly what he used as the basis for not going through the Georgia State courts.

So it indicates to me that he didn't intend to raise the due process argument, because he there states he has a

new right which has never been recognized before, which is a right to a representative cross-section of the community, period.

He eliminates the part that makes it a due -- makes it an equal protection claim, which is a right to a representative cross-section of the community from which members of his race were not excluded. And that's the concept that -- that's the context in which that phrase has been used in all of the cases that I have been able to find since Strauder.

And, as a matter of fact, I think that the context is relevant in the Smith case in 1900 -- or rather 1940.

Q Mrs. Beasley, what do you say to the point that he is entitled to a jury from which no discernible group is systematically excluded?

MRS. BEASLEY: But he doesn't tie that in at all --

Q Do you think he is entitled to that?

MRS. BEASLEY: If it affects the fairness of his trial, yes.

Q Well, you don't think as a general principle that he has the right to a jury from which no discernible group is systematically excluded?

MRS. BEASLEY: As an abstract principle, I think that's correct. But I think for him to assert that and say that his trial should be avoided --

Q Well, would it be all right if it excluded all

wage-earners?

MRS. BEASLEY: It may very well be so, if it didn't affect his case.

Q That would be all right?

MRS. BEASLEY: It wouldn't be under the statutory scheme, nor would it be correct as a --

Q I'm talking about the Constitution --

MRS. BEASLEY: -- system.

Q I'm talking about the constitutional scheme.

MRS. BEASLEY: Mr. Justice Marshall, it would not be correct in terms of the constitutional requirements.

Q I should think not.

MRS. BEASLEY: But it wouldn't affect him.

Q He'd have no standing if all wage-earners were excluded systematically. If he were the president of a bank, he would -- or even the owner of the bank, and without a wage, just a capitalist, he would have no standing. That's your point, isn't it?

MRS. BEASLEY: Yes, sir. Yes, Mr. Justice Stewart, it would be.

Q Even though it would be abstractly unconstitutional, --

MRS. BEASLEY: Which gets to the, I think, to the point that --

Q -- to systematically exclude all white persons.

MRS. BEASLEY: -- that you were making in your questioning of the appellant's counsel -- petitioner's counsel; that he couldn't be representing the interests of anybody else in the posture of this case, because this is a habeas corpus case in which he's saying "my conviction and my indictment are bad, and I'm looking for relief to myself, because I didn't have an impartial jury."

And he specifically said here that that's what he's relying on is his Sixth Amendment right brought into the due process clause.

Q This really is a standing case, isn't it; that's what it comes down to? Isn't that right?

MRS. BEASLEY: No, I don't think so. I think it's much more fundamental than that.

Q Why?

MRS. BEASLEY: If it were a standing case, then I think we might be in position to say that the right belongs to somebody but he's not the right person to come forward and --

Q But the right does belong to somebody, doesn't it? Isn't that what --

MRS. BEASLEY: The right which he is talking about here, which is the right not to have Negroes excluded from --

Q That's right, and that belongs to somebody, and that's what the Carter case and the Turner case, of two terms ago, --

MRS. BEASLEY: Right.

Q -- absolutely establishes; isn't that correct?

MRS. BEASLEY: Yes, sir. Yes, Mr. Justice Stewart, it belongs to those who would be deprived of a right thereby, or who would be discriminated against thereby.

Q The right to serve on juries.

MRS. BEASLEY: That's correct.

Q Right?

MRS. BEASLEY: That's Turner.

Q So then --

Q And that's also Carter?

MRS. BEASLEY: That's also Carter.

Q So then if two people, a black man and a -- a Negro and a white man were both charged with robbery, of the same robbery, and they are tried by the same jury, the Negro has got a good point but the white man hasn't?

Q Right.

MRS. BEASLEY: That's right, because he presumes --

Q Why? Why?

MRS. BEASLEY: We have presumed that there is prejudice against the black man if members of his race are excluded from the jury selection system, and that he is thereby discriminated against --

Q Is that, therefore, a bad jury?

MRS. BEASLEY: As to him? It is.

Q No. Is that, therefore, --

MRS. BEASLEY: It is not a void jury.

Q Well, but he's the only one who can raise the point?

MRS. BEASLEY: But he's the only one that can raise the point. Because the constitutional claim --

Q Unfortunately, I'm sure you can't cite me such a case.

MRS. BEASLEY: No, sir.

Q Well, Mrs. Beasley, let's assume that the defendant here was a Negro, and he raised only the due process claim. He says: I'm not claiming a denial of equal protection at all; I'm claiming a strictly Sixth Amendment due process, namely, I'm entitled to be tried by a jury representative of the community.

He says: I don't want any decision about equal protection, I think that -- I just don't believe in that equal protection rationale.

And I take it, a while ago, you said that you didn't disagree with that fundamental constitutional argument about a jury.

MRS. BEASLEY: I don't. The Sixth --

Q All right, would you sustain his claim there on strictly due process Sixth Amendment grounds?

MRS. BEASLEY: I think I would, because it gets so

close, and I think this Court has said so in at least one or two cases that equal protection melds with due process --

Q Well, we just forget -- we just forget equal protection for a moment.

MRS. BEASLEY: All right.

Q And he argues straight Fourteenth Amendment due process, and incorporation of the Sixth Amendment as binding on the States, and he says the concept of a jury requires no substantial group in the community be systematically excluded, or I do not have the kind of a jury I'm entitled to.

MRS.BEASLEY: I think that he would indeed be sustained, for this reason: If he is claiming due process has been denied to him means he has suffered some harm, he has not had a fair trial; is the concept. And he --

Q Well, he says that: I can't really say, I can't show any specific prejudice in my case, but I am entitled to a -- to be tried by a jury that is fairly representative of the conscience of the community. And he cites Witherspoon and a few other cases, and Ballard, and you would sustain that claim on strictly due process grounds, wholly aside from equal protection?

MRS. BEASLEY: If what he was saying was that he was denied a fair trial, that he was denied an impartial jury, --

Q Well, he says --

MRS. BEASLEY: -- because Negroes were systematically

excluded, people of his own race were systematically excluded, then, yes, you would have to sustain it because he did not have an impartial jury. We are --

Q So you're saying --

MRS. BEASLEY: -- we presume the prejudice in those cases.

Q All right. You're saying that the cross-section requirement for a jury must be tied to the possibility of partiality or prejudice?

MRS. BEASLEY: Yes. Either it has to be something that we had presumed, which we have done, and I don't want to belabor the point presumed, but we presumed in the case of exclusion of race.

Q I thought that that went out of the case in our decision in Faye vs. New York. There's no showing of prejudice, actual prejudice there. This was a case of the blue-ribbon jury, you remember?

MRS. BEASLEY: Yes, sir. Yes, Mr. Justice Douglas.

Q Our Court decided it 5 to 4; I dissented, but the Court decided 5 to 4 that that was a properly selected jury. And the argument against it was not that this man was damaged, but that you take a group of the upper class and put them on the juries to deal with property offenses, you're apt to get a more prejudiced jury against the defendants.

MRS. BEASLEY: But there again you're talking about

harm, and you're talking about prejudice which this man here doesn't claim. As a matter of fact, what you've got --

Q We don't know. We don't know. I mean if, once we -- maybe some whites would like to have blacks, or maybe they'd be more sympathetic in the light of the nature of the charge made against him. We don't know. This is highly speculative.

MRS. BEASLEY: Oh, yes, indeed. But -- and if he claims some affinity or some identity with those who were excluded, or for some reason thinks that the exclusion of those are going to affect his case, then he would be in a position to claim it.

But to just take the concept out of the air and say that --

Q It's taken out of the Constitution, it's the definition of a jury trial; what is a jury trial. This was the issue that we faced, I think, in Faye v. New York. And we unfortunately adopted your point of view, I think.

MRS. BEASLEY: Well, I would ask that that position, of course, be maintained again in this case. And the Court there -- I think you mentioned, Mr. Justice Douglas, Ballard; and of course those cases are not -- are inopposite, because those are on the basis of the supervisory powers of the court, and the court doesn't look into whether there's prejudice or not, because Congress has laid down the policy. And I think

that's one of the points that was made in Faye, that where you're talking about a constitutional right, that's a distinction as to when you're claiming a statutory violation.

Because if it's a statutory violation, there's no question as to whether it does harm or not; that's already been decided. Whereas if you're talking about a lack of due process or equal protection, then you must show some harm.

And I think one of the best analogies that I came across was the decision in Witherspoon, and particularly since it was followed by the Bumper case the same day.

There was also a procedure which it was found -- criminal part of the criminal proceedings which was found to be in violation of the Constitution. And that was the questioning that was used in death-penalty cases, or at least capital felony case where the death penalty was a possibility. And it was found without question that it made the jury prone towards giving the death penalty; but the Court didn't go so far as to say: therefore we are going to eliminate his whole conviction; because there was no connection between the questioning which had to do with the sentence and the conviction. The concept of guilt or innocence.

So, since he couldn't show any harm flowing to him, even though this was an unconstitutional questioning system that was being used, since it didn't affect him, we're not going to overturn his conviction.

And that happened specifically in the Bumper case, where, although the questions were used, he had gotten life imprisonment, so it didn't matter to him; it didn't affect him, those improper, unconstitutional, lack of due process kind of questions. Because it didn't affect him, since he wasn't --

Q I suppose that follows logically if you decide that the jury can mean anything that a local prosecutor and a local court decides it should mean.

MRS. BEASLEY: Not at all, I think he certainly is entitled to a fair trial.

Q Well, then it comes down to prejudice in a particular case. But I thought we had a definition in the constitutional term: what does a jury trial mean?

Just like speech, what is press? Does it include obscenity? What is a criminal prosecution in the Sixth Amendment; does it include derangement?

I mean things of that kind, --

MRS. BEASLEY: Yes, I think that's --

Q -- where you don't have a showing of prejudice in a particular case, but merely the scope of the design of the Constitution.

MRS. BEASLEY: But what he's claiming here, and it was indicated not only in the briefs below but also in oral argument, he's claiming that he was denied due process because of his Sixth Amendment right. The Sixth Amendment right talks

about an impartial jury, and he doesn't say he had an impartial jury.

Moreover, if you follow the theory that there's presumed prejudice if Negroes are excluded, the prejudice going against a Negro, then there must be, on the converse, favor towards the white man if Negroes are excluded.

So here he is in a position saying: I was denied due process but I really wasn't denied an impartial jury, I was given a favored jury in my circumstances.

He doesn't show anything that would affect the impartiality of his own jury. And again the question I would like to point out that was raised in the petition for certiorari dealt only with the grand jury; whereas, the brief expanded it to include the petit jury; and I thought that the grant of the petition limited it to the grand jury, which would --

Q Would that make any difference?

MRS. BEASLEY: I think it would, because a grand jury may not have even been aware of discolor, whereas a trial jury might.

So, [illegible] the nature of what a grand jury's duties are, really had nothing to do with the nature and duties of a trial jury when all they do is prefer the charge.

And in this particular case, and perhaps in this case, he never claimed --

Q Well, on that basis, then, all the court's older

cases that are dealing with just the grand jury are wrong.

MRS. BEASLEY: No, I think not, because, again, we say that in order to reach or to have an impartial jury is to have a fair jury system selection. You must not exclude Negroes in order so that Negroes themselves will not be discriminated against.

But I think he has gone too far in saying that we will presume a prejudice here. He hasn't suggested what it would arise from, and I would suggest that there is no harm in this case.

Q Well, do you -- have you -- you probably have read Strauder v. West Virginia very recently, haven't you?

MRS. BEASLEY: Yes.

Q Justice Strong's opinion. Wouldn't you agree that at least the first few pages of the opinion of Justice Strong in that case emphasize -- this was a removal case, as we both agree -- emphasize the right of Negro citizens to serve on juries, not the right of Strauder to be tried by a representative jury. And that opinion implies, doesn't it, that Strauder is in a position to assert the right of Negro citizens to serve on juries, a right that was denied them by the law of West Virginia.

MRS. BEASLEY: But that's not the right that's being asserted here. The right that's being asserted here is his own personal right, Peters' own personal right as it affected

him. He's saying that he was denied due process, not people out in the community who weren't represented on the jury. So I don't think that it's particularly --

Q Well, I thought he said that a trial by this jury violated due process of law and equal protection of the law. A trial of anybody by this jury, white, or black, or any other color, because this jury was created by a system that, as a system, denied Negroes their rights to serve on juries. And those rights are, perhaps for the first time were articulated in the Strauder case, and most recently they were in the Carter case and its companion cases, isn't that right?

MRS. BEASLEY: Well, that may very well be, in the sense that the system should be changed. As a matter of fact, it was, right after the Whitus decision came down in 1967. And now the statute does -- the Georgia statute does call for a representative cross-section.

Q Yes, but we're talking about this person's standing.

MRS. BEASLEY: And I think he has none.

Q Doesn't Strauder indicate that he does?

MRS. BEASLEY: I think not. He doesn't claim it here, in the first place, and I don't think --

Q He claims a denial of equal protection and of due process.

MRS. BEASLEY: In his trial.

Q In the trial of him.

MRS. BEASLEY: Not in all the trials in the county.

Q Well, he's only interested in his trial, of course, and --

MRS. BEASLEY: But the question is, and I think the Court's decisions with respect to jury discrimination show this, not in Georgia's discrimination but other due process types of things, that it's harm to him, which --

Q Well, don't the Court's decisions --

MRS. BEASLEY: -- was a personal right, before --

Q Don't the Court's decisions which explicitly hold that nobody has a right to have people of his own race on his trial jury, don't those cases imply that what the person is complaining of is the right of citizens to serve on a jury?

MRS. BEASLEY: Which is somebody else's right.

Q Under a general system.

MRS. BEASLEY: And he has no standing.

Q I mean if -- and I think you will agree -- our cases have consistently held that no Negro person has any right to have any Negroes on his jury that tries him, or the grand jury that indicts him. That's correct, isn't it?

MRS. BEASLEY: Yes, indeed.

Q Well now, doesn't it follow from that that he must be asserting some other right if he is allowed to attack

a system as unfair, even though he's not allowed to attack a particular jury that's unfair.

Then, mustn't it follow that he's allowed to attack the system, i.e., the system that prevents citizens from serving on the jury?

MRS. BEASLEY: Yes, indeed, he's attacking the system, and that's what he would have to do if he had raised it properly at the time and introduced as evidence to show that there was systematic exclusion, perhaps; but he doesn't have a claim here. Because he doesn't tie himself into a denial of any right that he has.

The cross-section concept has always been in terms of equal protection cases and used in that term where somebody has been excluded, and the person who has been tried is a member of that excluded group; and so it's the harm flowing to him.

Q That wasn't true in Carter, or in Turner.

MRS. BEASLEY: But those were the people who were excluded from serving on the juries.

Q Right.

Q Isn't it in the nature of the due process argument that it's process, system, procedure, which is being attacked?

MRS. BEASLEY: Yes, indeed, but I don't think -- and again I'll give you another analogy -- that merely showing that there has been something wrong with the system can be sufficient

to overturn the conviction of the person who says he has been denied due process. He has been denied due process. The clause says that he has been deprived -- whether he has been deprived of his liberty without due process of law, not somebody else.

Now, the second analogy I would like to present, other than the Witherspoon case, would be the very recent cases following U. S. vs. Jackson, and I point particularly to Brady, where, although the statute was declared to be unconstitutional in Jackson, in Brady the Court said it didn't matter in his case even though the death penalty and jury tie-in under the kidnapping statute in Jackson was used and was involved in Brady's case, still it didn't affect his plea. And therefore, we're not going to overturn his plea. Because it didn't -- the use of the statute in that case didn't harm him.

And I think that we have exactly the same situation here.

I think it's also important that you recognize that in the cases that are cited by the appellant, which have talked about an absolute right to a cross-section community, period, and not talking about exclusion of members of your own race, is that the rationale in those cases doesn't answer the question, why should you have this cross-section of community, period.

And I think that's where they fall short. If we talked about whether this should be a cross-section, the idea is to make sure that we have an impartial jury, and that was have a fair criminal proceeding.

Now, if we do have a fair criminal proceeding with respect to Peters, then, again, there is no denial of due process. And it seems to me, in reading the cross-section cases, that that really is a measuring device and not a substantive right, because we say he has a right to a cross-section of the community, not to a proportional representation or not to trial by members solely of his race.

MR. CHIEF JUSTICE BURGER: We'll resume right there after lunch.

MRS. BEASLEY: Thank you.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mrs. Beasley, you have about four minutes -- no, you have one minute left.

MRS. BEASLEY: Thank you, Mr. Chief Justice.

I wanted to address the question in the discussion that was had with Mr. Justice Stewart, with regard to the Strauder case.

I think there is a vast distinction here, because this arises under the Federal Habeas Corpus Act, and under the theory of Federal habeas corpus or habeas corpus generally, a person would be challening his own conviction and saying that he was denied his own constitutional rights by virtue of something that happened at his trial or afterwards; whereas Strauder, of course, being the removal statute case, involves something else entirely in its context.

Moreover, Strauder, too, was Negro, in that case, and the opinion does talk to a great extent about prejudice, that evolved to him; which we don't have in this case at all.

He is not -- Peters is not a person aggrieved by what he claims is not proper in that sense.

Q Unless you take the position suggested by my brother Douglas that the very constitutional definition of a jury is a jury selected under a system which does not discriminate, and that every man, every criminal defendant has a due

process right to be tried by a jury selected under such a non-discriminatory system.

MRS. BEASLEY: Yes. It would be then an abstract principle, which has not been held, but the application of constitutional rights in other contexts, I think. And I think in answer to that I would quote from the Faye case, which Mr. Justice Douglas mentioned, in 1947: "Defendants have shown no intentional and purposeful exclusion of any class, and they have shown none as prejudicial to them. They have had a fair trial, and no reason exists why they should escape its results. To reverse the judgment, free from intrinsic infirmity, and perhaps to put in question other judgments based on verdicts that resulted in the same method of selecting the jury reminds too much of burning the barn in order to roast the pig."

And I think we have that same situation here.

As in Faye, so in Peters: the challenge to the judgment under the due process clause must stand or fall on the showing that these defendants have had a trial so unfair as to amount to a taking of their liberty without due process of law.

And I think on this record we find that it doesn't raise anything more than that he is a white person, he doesn't raise any infinity or identification with those who are not a member of the class; doesn't allege that he's a member of the class, or was harmed; and therefire I think that this judgment

should not be overturned.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Beasley.

Mr. Garland, you have about four minutes left.

REBUTTAL ARGUMENT OF EDWARD T. M. GARLAND, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GARLAND: I wish to urge that this Court take the position and declare one of the fundamental concepts of a trial by jury is the right of all citizens to a representative cross-section.

We take issue with the statement that this jury from which blacks were excluded favored the petitioner; that is, to assume that it had a bias of some sort in assuming, you can say it was a white bias. We say all the juries should be absent white bias or other types of bias. And that that is the fundamental issue here.

In commenting upon what has been the status of the law, I wish to quote, in conclusion, from Justice Wisdom in Labat v. Bennett, where he quoted from Shakespeare's Measure for Measure, and that is: "That the law hath not been dead, but it has been asleep."

We ask you to wake it up as it relates to the right to a representative process.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Garland.

Thank you, Mrs. Beasley.

The case is submitted.

[Whereupon, at 1:03 o'clock, p.m., the case was submitted.]

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