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GENE HAM,)
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Petitoner,)
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vs.) No. 71-5139
)
SOUTH CAROLINA)

Washington, D. C.
November 6, 1972

Pages 1 thru 42

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IN THE SUPREME COURT OF THE UNITED STATES

GENE HAM,

Petitioner

v. : No. 71-5139

SOUTH CAROLINA

Washington, D. C.,

Monday, November 6, 1972

The above-entitled matter came on for argument at 1:11 o'clock p.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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JONATHAN SHAPIRO, ESQ., 10 Columbus Circle, New York, New York 10019 for the Petitioner

TIMOTHY H. QUINN, ESQ., Assistant Attorney General, P.O. Box 11549, Columbia, South Carolina 29211 for the Respondent

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-5139, Ham against South Carolina.

Mr. Shapiro, you may proceed whenever you are ready.

ORAL ARGUMENT OF JONATHAN SHAPIRO, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on certiorari to a decision of the South Carolina Supreme Court affiming the Petitioner's conviction and sentence to one and a half years at hard labor for the possession of marijuana.

The certiorari grant was limited to the issue of whether a black criminal defendant is constitutionally entitled to an opportunity to examine prospective jurors on voir dire with respect to whether they are prejudiced against him because of his race or because of certain pre-trial publicity in the case. Thus this case raises for the first time in this court the question of the right of a criminal defendant to examine and to challenge for cause juries who are called to decide his case.

We think that that right is a part of the constitutional right to a jury trial and that in this case it was violated.

The petitioner is a black civil rights worker

who has been active in the county of Florence, South Carolina as a representative of SCLC as well as at the time a member of the Biracial Commission of the City of Florence.

He was indicted on June 1st, 1970 for the crime of possession of marijuana. His defense in the case at the trial of the case at which he testified was that the charge against him was the result of complicity by the local police authorities to frame him because of his civil rights activities.

Over his objections the trial was commenced on the day after indictment, that is, on June the 2nd. Although Petitioner's counsel sought to make motions for a change of venue and for a continuance on the basis of pretrial publicity and possible prejudice on the part of the prospective jurors, he was unable to do so in sworn affidavits as required under South Carolina law and rather was forced to make the request orally to the court which overruled both motions summarily.

He made, similarly, an oral motion to quash the trial venire on the grounds that blacks had been systematically excluded and after a hearing on June the 2nd the court denied that motion.

The next day, prior to the selection of the jury, the Petitioner requested the trial judge to voire dire the prospective jurors with respect to several matters relating to

whether they were prejudiced against him because he was black and because of certain pretrial publicity and extra-judicial statements in the case. Specifically, he requested that each prospective juror be asked whether he or she was prejudiced against negroes, whether the fact that the defendant was black would affect his or her ability to render an impartial judgment and verdict in the case, whether the fact that the petitioner was bearded would make any difference in the way they decided the case.

In addition, he specifically requested that the trial judge ask the jurors about certain publicity which he claimed had poisoned the minds of -- or possibly poisoned the minds of persons in that county with respect to persons charged with the crime which Petitioner was charged with and also with respect to whether any of them had heard a television program several days before the trial at which the state's chief prosecution witness had appeared and had talked extensively in connection with drug crimes.

The trial judge refused to ask any of the proposed questions on the grounds that they were irrelevant. Instead, he posed three questions to the prospective jurors. He asked them whether any of them had formed or expressed an opinion as to the guilt or innocence of the petitioner, whether any of them was sensible of any bias or predjudice for or against him and whether each of them could give the

state and the defendant a fair trial.

The entire examination of the prospective jurors in this case took a total of 12 pages of the record. It was hurried, formalistic and routine. Each juror as he was called and sworn was put the exact same question by the trial judge. Each juror with two exceptions answered the questions, the first two questions, "no," and the third question, "yes." No further examination was gone into in any case. The only two exceptions was one juror who answered the first two questions "no," but in response to the third question said that she would rather not serve.

One juror said that she had formed or expressed an opinion as to guilt or innocence, but beyond that, no juror said anything more than "no, no, yes" to the entire voire dire proceedings.

Q Mr. Shapiro, the brief under your hand, there, on page four, the -- right after the quote at the bottom of the page where it says, "The jurors were excused," that should be two jurors were excused --

MR. SHAPIRO: That is correct.

Q -- shouldn't it? Two?

MR. SHAPIRO: Yes. It is two jurors. That is a typographical error.

Q Mr. Shapiro, under South Carolina practice after the judge has put the questions that he wants to put

on voir dire, is counsel permitted to conduct any voir dire of their own?

MR. SHAPIRO: The South Carolina practice would permit counsel to question the juror at the judge's discretion. That is, it is permissable for the judge to allow counsel, although the usual practice is for the judge to conduct the entire voir dire examination and the more usual practice is for the judge to ask questions proposed by counsel as was done in this case.

Q Did counsel for Petitioner here seek to interrogate the jury on his own after the judge declined to put the questions himself?

MR. SHAPIRO: No, the counsel submitted written proposed voir dire questions to the judge prior to the selection of the jurors and when they were refused he sought no further attempt to question the jurors.

Q Can we construe that record as meaning that a request on the part of the counsel would have been fruitless? Is that correct?

MR. SHAPIRO: I think that is a necessary conclusion since the preferred practice in South Carolina is for the judge to put all questions to the jury and when counsel did request that he do so and that request was denied, I think that it is certainly reasonable to infer that any further request would have been fruitless.

Q Well, isn't that settled on page 35? The court said this is all irrelevant and I am not going to do it.

MR. SHAPIRO: I think that that certainly indicates the way --

Q It's on page 35.

MR. SHAPIRO: -- the judge would have ruled with respect to that.

Q That is the way he did rule.

MR. SHAPIRO: Exactly.

Q Well, isn't that what he says on page 35 of the record?

MR. SHAPIRO: Yes, it does. He ruled that the questions were relevant and would not put --

Q Mr. Shapiro, the three questions to which Mr. Justice Stewart referred you at page four of your brief, do I understand that those three questions are required by South Carolina statute?

MR. SHAPIRO: The South Carolina statute which is set out in footnote three on page five of the brief states that the court shall on the motion of either party in this suit examine on oath any person who was called to know whether he was related to either party, has any interest in the cause, has expressed or formed any opinion or is sensible of any bias or prejudice therein. And the South Carolina Supreme Court had interpreted that statute to be satisfied

when questions -- general questions -- of the nature put to the jurors by the trial judge are asked.

Q So these three questions were asked by the trial judge in obedience to that statute, is that it?

MR. SHAPIRO: That is correct. That is correct. Although it should be noted that the judge did not even fully comply with the -- all of the requirements of that statute but the three questions the South Carolina Supreme Court held on appeal constituted sufficient compliance under South Carolina law.

The refusal of the trial judge to voire dire the jurors with respect to the issues posed was raised on appeal in the South Carolina Supreme Court which affirmed the conviction holding that it was within the discretion of the trial judge to refuse the questions and that there was no abuse of that discretion showing this case. Two judges of the South Carolina Supreme Court dissented on the ground that this court's decision in Aldridge versus the United States was binding on the South Carolina court and that the questions with respect to racial prejudice, as this court held in Aldridge, should have been asked.

Q How many are there?

MR. SHAPIRO: There are five judges.

We don't understand the state in this case to question the general proposition that a criminal defendant

has a constitutional right to challenge for cause jurors who are prejudiced against him because of race or because of pretrial publicity. The right of challenge is a right which we think is a necessary component of two independent constitutional rights, the right to a jury trial and the right to a trial before an impartial tribunal.

The right to a jury trial has included the right to challenge as long as there have been jury trials. It is a right which developed at the time of the right to a jury trial developed in the first instance and has never been deviated from, either before or after the adoption of the United States' Constitution.

What Mr. Justice Powell said with respect to the unanimity requirement in the Appidacca case, we think is equally if not more true about the right of challenge and that is that although the history of the sixth amendment is ambiguous in the sense that we don't have the record of the framers, the history of the right of challege at common law has been unambiguous and we think it has been related to the right to jury trial for time immemorial.

We think also that right of challenge is essential to the very function which the jury is intended to serve and that is to provide an impartial barrier between the state and the defendant. If there is any one element of the right to jury trial which is essential, we think it is the

impartiality of that body and we think that the right of challenge is the only means of successfully guaranteeing that impartiality.

We think also that the right of challenge is implicit in the right to jury trial in this court's decision in Appidacca wherethe rationale for eliminating the unanimity requirement is premised on the defendant's ability to secure an impartial, responsible panel of jurors who will decide his case.

Q How would you prepare the specific questions? For example, if the request had been made, do you have any prejudice against people who wear pink shirts, and the defendant was wearing a pink shirt or counsel was wearing a pink shirt, do you think that inquiry must be made?

MR. SHAPIRO: I would think certainly not. I think that most of the questions and the extent of a voire dire examination must necessarily rest in the discretion of the trial judge for the most part. Here, however, we are confronted with the question of whether any examination at all with respect to an issue which was crucial not only to this particular case but crucial to any case where there is a black criminal defendant on trial before an overwhelmingly white jury and where there has been a certain amount of pretrial publicity and extrajudicial statements connected with the case.

Q What was the final composition of the trial period?

MR. SHAPIRO: The jury was ten white and two black as finally impaneled.

Q And does the state require a unanimous verdict in a criminal case there?

MR. SHAPIRO: It does. In South Carolina it does require a unanimous verdict.

Q But either one, any one juror could have prevented a verdict?

MR. SHAPIRO: Yes, that is correct.

Q Well, then, I take it the answer -- your response to that other question, Mr. Shapiro, that you are really concentrating on -- really concerned about the questions on racial prejudice, essentially, aren't you, not wearing apparel and --

MR. SHAPIRO: Well, I think that this case involved two areas in which this court on numerous occasions has recognized are perhaps the most fundamental areas in dealing with impartiality on juries and that is racial prejudice and pretrial publicity. We think these areas certainly are areas which are essential, that the trial judge examines jurors with respect to. There may be other questions which in other cases are essential to selecting the impartial jury. In the case of Morford versus the United States, this

court held that a trial judge was required to examine prospective jurors with respect to whether a loyalty order would affect their ability as government employees to give the defendant -- who in that case was a communist who had refused to testify before the unAmerican Activities Committee so that that inquiry, in the circumstances of that case, was crucial.

Q Is that a constitutional holding?

MR. SHAPIRO: We think that it was. The court -- it is a brief per curiam order but in that decision the court did cite and refer to Dennis versus United States where the court held that preservation of the opportunity to prove actual bias is essential to the selection of an impartial jury and we think that implicit in that and reliance of the Morford court on that is that it was, at least with respect to that federal case, part of the right to an impartial jury under the sixth amendment.

Q Are you saying, in effect, Mr. Shapiro, that the statutory questions that are required there might be entirely satisfactory for an ordinary routine case but that when special factors emerge the Constitution requires that the judge exercise discretion to cover a broader range of inquiry of the jury?

MR. SHAPIRO: I think that is a fair statement of our position which is that in any -- in a given case, the

relevance of the area of inquiry, proposed questions to the issues and the circumstances of the case are what must be considered and that when dealing with something as fundamental as the issues in this case, racial prejudice and pretrial publicity, that the judge cannot refuse to inquire into these areas.

Q Well, now, in the Aldridge case back 40-odd years ago, had the trial judge there asked any questions at all or had he just refused to make any inquiry?

MR. SHAPIRO: There was a voire dire examination in the Aldridge case which is set out at 283 U.S. 309 and that examination did relate to the facts in that particular case, the bias or prejudice of the juries with respect to certain kinds of evidence and, certainly, even that examination was a lot more extensive than the examination in this case. The judge in that case did refuse a specific question with regard to racial prejudice and this court held that that refusal violated the essential demands of families under the circumstances of the case.

In addition to the right of challenge resting on the sixth amendment right to a jury trial as applied to the states, we think it also is directly related to the right to a trial before an impartial body. We think that the right of challenge is crucial to selecting jurors who will not be influenced by passion or prejudice or extrajudicial

matters. We think it is more essential even than the right which this court recognized in Groppi versus Wisconsin to obtain a change of venue in certain cases and, indeed, it is more basic, too, than the right to a cross-section of the community because this right is one which can only be satisfied, the right to an impartial jury. One can only determine the partiality of jurors by questionning them specifically and exercising the right of challenge.

The only position the state takes, basically, in this case is that the general questions that the judge did put to the jury satisfied whatever constitutional requirements there are. However, to conclude that, we think would make the constitutional requirements hollow indeed because the questions which were asked did not relate in any way and did not direct the jury's attention in any way to the crucial questions which counsel sought to put to the jury.

There was no question at all which could even be construed as asking the jurors whether they had heard or had been prejudiced by any of the extrajudicial statements or the pretrial publicity which had related to the case. The only question which comes near that is the question as to whether they had formed or expressed any opinion with respect to the case but it must be recognized that at that time, when that question was asked, the jurors knew nothing

whatsoever about the case. All they knew was that the defendant's name was Gene Ham. They didn't know what the nature of the case was. They didn't know what the crime he was charged with was and they had no idea of who was going to testify in the case and as I pointed out before, the chief prosecution witness was the person who had appeared on local television several days before, discussing drug crimes.

In that sense, the case was very close to Turner versus Louisiana where this court held that contact between jurors and prosecution witnesses, even without a showing of actual bias or prejudice was enough to deny the defendant a right to an impartial jury.

The other questions with respect to general bias or prejudice for or against, we don't think can satisfy the requirements of probing racial prejudice. We think that this court's decision in Aldridge, in Dennis, in Morford, indicates that specific inquiries are indeed essential to securing an impartial jury.

We think it is clear that when jurors are put formal, hurried questions in open court where an immediate response is expected, they won't volunteer things such as whether or not they are prejudiced because of race.

Q Was this the kind of proceeding where each venireman was asked the three questions?

MR. SHAPIRO: That is correct. Each juror was called to the -- they were all in the box. The judge went from one to the other asking --

Q And repeated the questions.

MR. SHAPIRO: That is correct.

So that we think that general questions as put would reduce the right of challenge and the right of examination to a hollow guarantee.

This court has recognized that the jury is fundamental to the American scheme of justice but the jury will only be able to serve its high function if the procedures are designed to insure impartiality to the greatest extent possible.

Because Petitioner was deprived of the opportunity to secure the impartiality in this case, we think his right to an impartial jury was denied and that his conviction should be reversed.

MR. CHIEF JUSTIVE BURGER: Thank you, Mr. Shapiro.

Mr. Quinn.

ORAL ARGUMENT OF TIMOTHY G. QUINN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The facts of this case having been presented in the Appendix, I will not reiterate them with the permission

of the court. There basically appear to be two issues involved. Firstly, the trial judge's refusal, and prejudicial pretrial publicity, questioning as to prejudicial pretrial publicity on the examination of the jurors through the voire dire violate their ability to render a fair verdict.

There is no question that a pretrial publicity is the proper subject for questioning on voire dire, if there is a showing that pretrial publicity did exist, that the pretrial publicity did refer to the Petitioner, that the pretrial publicity was prejudicial.

In this case, there was no such showing. There was no pretrial publicity which referred directly to the Petitioner. There was no pretrial publicity which was prejudicial nor was there any pretrial publicity other than general publicity regarding the drug problem in the State of South Carolina, County of Florence which we contend is no different from any newspaper in the state today that you cannot pick up without finding some allegation as to drug use or drug abuse.

The facts in this case reveal that the pretrial publicity alleged to be prejudicial consisted of three articles in the same newspaper, published on the same date, none of which referred to the Petitioner and all dealing only generally with the drug problem.

Q Where do we find that in the record?

MR. QUINN: Page 12.

Q Thank you.

MR. QUINN: At the top of the page there it states the "clippings appearing in the Florence Morning News."

Under these circumstances we contend that there was no abuse of discretion on the part of the trial judge in refusing to ask these specific questionings sought.

And as for some basis for even conjecture that specific prejudicial items might have reached the venire, we contend that it was wiser for the trial judge to praise the voire dire examination in the general terms that he did.

With no showing of pretrial publicity that was prejudicial the chief question of this appeal becomes whether the refusal of the trial judge to ask the specific questions sought on voire dire pertaining to the defendant's race and the fact that he wears a beard, the trial judge ruled that these proffered questions were irrelevant and he asked general questions instead and the general questions being, "Have you formed or expressed any opinions as to the guilt or innocence of the defendant, Gene Ham? Are you conscious of any bias or prejudices for or against him? Can you give the state and the defendant a fair and impartial trial?"

The petitioner was present in the courtroom. He was within view of the jury. It was obvious that he was a negro, that he was black and that he wore a beard.

Is it necessary that the trial judge ask, "Are you aware of any bias or prejudice for or against this defendant who is a negro, black, and wears a beard?" when these facts are so obvious. The state contends not. Did not the general questioning presented encompass the specific inquiries sought by the petitioner? We think that it did and we think the effectiveness of this general questioning was proved by the facts when two jurors stated in response to the general questions that they could not fairly serve and they were excused by the trial court.

Q Which two?

MR. QUINN: (No response.)

Q Which two?

MR. QUINN: I am not aware of -- you mean which?

Q Which two of the wwtnesses? One you mentioned on 47 I don't agree with you that was the reason he was excused.

MR. QUINN: I don't understand your question, your Honor.

Q You say there were two witnesses that were excused?

MR. QUINN: Yes.

Q Hmn?

MR. QUINN: Yes, sir.

Q Two jurors?

MR. QUINN: Yes, sir.

Q For what reason?

MR. QUINN: When they stated they could not give the state or the defendant a fair and impartial trial.

Q The state or the defendant?

MR. QUINN: Or that they had rather not serve.

Q Yes. It was state or the defendant?

MR. QUINN: Yes, sir.

Q It wasn't the defendant. I thought you said defendant.

MR. QUINN: I apologize I made that error.

The two jurors were excused in response to the general questioning of voire dire and they were excused by the court. Would this not more effectively than any line of questioning cause the remaining veniremen to be on notice that they could not serve with an impartial attitude and would not this cause the remaining veniremen to fairly search their souls for any prejudice or any partiality which would prevent their rendering a fair and impartial trial and a fair and impartial verdict based upon the facts and evidence presented?

Q In South Carolina, do you do the same to persons on a capital offense?

MR. QUINN: Yes, your Honor.

Q The same questions?

MR. QUINN: Yes, your Honor.

Q Have you ever read Witherspoon against Illinois?

MR. QUINN: I beg your pardon?

Q Have you ever read Witherspoon against Illinois?

MR. QUINN: Yes, I have, your Honor.

Q Okay.

MR. QUINN: The sixth amendment of the United States' Constitution guarantees the right to trial by an impartial jury. It has been held that this includes the right to challenge for cause. However, I am not aware of any holding that it says the right to preemptory challenge is included therein. The right to challenge for cause must be accompanied by some showing of bias or prejudice which would affect the jurors' ability to render a fair and impartial trial.

Clearly, there was no such showing in the instant case.

Was the petitioner denied the opportunity to make such a showing? Did he have any grounds to suspect bias or prejudice? Did he present any grounds to the trial judge justifying his suspicion? None of these things were done.

Q Mr. Quinn, what would have been lost, however, had the court asked the requested questions?

MR. QUINN: In this particular instance I don't think anything would be lost, your Honor. I think that the

trial judge was concerned with future cases coming before him. These were a short number of questions and he did rule that they were irrelevant. I think that was within his discretion to do so. However, I personally do not think anything has been lost.

Q Well, I suppose his irrelevancy conclusion must have been based in the thought that the statutorily-prescribed questions covered the ground.

MR. QUINN: I would assume so, your Honor.

Q Because otherwise they certainly were relevant, weren't they?

MR. QUINN: Yes, Your Honor.

Q The attorney printed those references at page 12 to the newpaper clippings. Were those newspaper clippings put in evidence or are they in the record of the case? They are not in this appendix, as far as I can find.

MR. QUINN: They were in the records of the -- in the case that was appealed to the State Supreme Court. They are not in the appendix, that is correct, your Honor.

Q Well, are they up here, do you know?

MR. QUINN: I do not think so.

The law, as the petitioner apparently contends, would be that the sixth amendment to the United States' Constitution guarantees the right to conduct fishing expeditions and this, we contend, cannot be so. If this

were the law, then the law would reduce the function of the trial judge and the questioning of voire dire of jurors to that of a parrot taught to repeat each question submitted to him, for it is submitted that there is no question, no matter how innocuous, that might lead to some bias or prejudice. For example, I expect that a christian might have somewhat biased attitude toward an atheist. I expect that a pacifist might be somewhat biased toward a member of the military establishment and, as your Chief Justice stated, I expect that someone who has an aversion to pink shirts might have a somewhat biased attitude to someone who wore one.

But I do not think, I do not contend, that this existing bias or prejudice would prevent this juror from rendering a fair and impartial trial upon giving his oath or affirmation to do so.

I submit that the sixth amendment of the United States' Constitution does not guarantee the right to a trial by jury from a jury free of all biases, all prejudices and all partiality.

Q Of course, Mr. Quinn, even if, at the conclusion of the answering of these questions by the jurors, the trial judge were to say, " I don't find the juror to be disqualified," it might be that the petitioner's counsel would have obtained some information that would have helped him exercise his preemptory challenges.

MR. QUINN: Your Honor, I think this is a crucial issue of the case is whether the sixth amendment of the United States Constitution guarantees the right to probe into the prospective jurors as to whether -- as to the propriety of exercising of preemptory challenge and I think this is what I am referring to as a "fishing expedition," which I don't think comes within the confines of the sixth amendment.

Q You say, then, that no form of voire dire is incorporated into the notion of a jury trial as the sixth amendment?

MR. QUINN: No, your Honor, I am stating that, absent some showing, some basis for supporting the question on voire dire, then the unsupported questions can be properly excluded.

Q Is this issue raised in the constitutional right of the Supreme Court of your state? I notice on the opinion of the court, at least in the form it appears on page 102 there is just a brief paragraph discussing this and it is all in the terms of alleged error at a matter of state law, nothing about the United States' Constitution, nothing about either the sixth or the fourteenth amendments in your Supreme Court's opinion discussing it and while the dissent talks about a Supreme Court case which it says, "In which decision is binding upon this court,"I think that you would

agree that is probably an erroneous statement because the Algren case was not a constitutional case. It just was a matter of error, was a matter of administration of federal criminal law. Was this issue ever raised, this constitutional issue, or not? Certainly, it doesn't seem to have been decided as such by your Supreme Court.

MR. QUINN: I think the issue was brought to the attention of the Supreme Court in the arguments of the defendant at the Supreme Court level. I do -- in the sense that they alleged and alluded to the fact that he was denied a fair trial. I don't think there was any specific constitutional issue involved, particularly brought before the court, rather.

Q Well, do you place any reliance on that?

MR. QUINN: I think I do not, your Honor.

Q Generally speaking, we do not consider questions here that haven't been raised in a timely way up through the trial and appeal of a case in the state courts and if there is no federal question properly raised in this court we have no jurisdiction of this case.

MR. QUINN: Your Honor, in our brief on certiorari we did raise this issue and supported it in our brief on certiorari -- in our brief in opposition to certiorari, rather, and we were of the contention at that time that no federal question was presented to the State Supreme Court and

we would adhere to this decision or our opinion today.

Q Well, at least your dissenter to the Supreme Court referred to Aldridge.

MR. QUINN: Yes, your Honor.

Q Which is not a constitutional decision.

MR. QUINN: That is correct, your Honor.

Q Well, of course, if you turn to page 101 of the record at the very bottom, there, in the majority opinion by Judge Littlejohn -- no, I guess that was the continuance. I withdraw the question. That was the continuance, yes.

MR. QUINN: The state submits that the sixth amendment requires not that the jurors be free of all partiality but that such partiality does not interfere with their duty to render a fair and impartial trial.

Q What is your definition of the word "impartial?"

MR. QUINN: A situation in which such partiality that does exist does not interfere with their rendering of a trial based upon facts and evidences as presented with no outside influencing factors, your Honor.

Q But you could have a bias?

MR. QUINN: I think everyone possesses some bias of some type, no matter how slight or how --

Q And you think a juror that has a bias against a particular group of people could give an impartial trial?

MR. QUINN: I think that would be an undue assumption, your Honor.

Q But you can't ask it, can you?

MR. QUINN: I can't state what bias exists in anyone. I don't think that anyone can. I don't think that --

Q You don't think anybody is entitled to try to find out?

MR. QUINN: I think that they are entitled to find out, your Honor. I think they --

Q Well, how could you find out with that question?

MR. QUINN: There is no way you could find out with that question.

Q Thank you.

MR. QUINN: However, I do feel that there must be some groundwork laid for the -- prior to the submitting of the questions to the jurors.

Q I take it your position is that the questions that were asked in this case were sufficient to crush out any prejudice? You pointed out that several jurors did respond that they could not be fair. They were then excused.

MR. QUINN: That is correct, your Honor. I think that the general questions asked did encompass the specific questions sought, absent some showing that the specific questions might elicit some bias or prejudice and the

suspicion that some bias or prejudice exists must have some grounds for that.

I submit that the sixth amendment requires not that the jurors be free of all partiality for such a perfect jury does not exist. A voire dire examination designed to uncover all existing bias or prejudice or partiality could lead to the circumstances recognized by one of our State Supreme Court and I state in their opinion -- and I quote, "The records of the cases appealed to this court in which rulings made while impaneling the jury have been involved indicate that there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examination of jurors apparently with no definite purpose or object in view but with the hope of eliciting something indicating the advisability of rendering a preemptory challenge and that the supposed privilege of doing so has been greatly abused."

This opinion was rendered in 1912 and I think this is even more appropriate today. The congested court docket, the congested system of judicial administration leads one to the conclusion that an unlimited voire dire examination cannot coexist with efficient administration of justice. There must be some compromise. We contend that this compromise is the laying of the groundwork for the admission of

the particular questions sought. Absent this groundwork, we think there is no basis for these questions.

We contend that there was no abuse of discretion in the instant case, particularly when the judges -- trial judge's voire dire examination encompassed the specific inquiry sought and was effective to produce a jury which could render a fair and impartial trial, their verdict being based upon the facts and the evidence.

Further, we state that it is more effective if the general question is proved to supply this necessary jury. For these reasons, we respectfully submit, in conclusion, that the decision of the South Carolina State Supreme Court be affirmed.

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

Mr. Shapiro, you have got a few minutes left.

REBUTTAL ARGUMENT OF JONATHAN SHAPIRO, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SHAPIRO: I would like to first address myself to the point raised by Mr. Justice Stewart with respect to whether the issue was properly presented below. In the briefs in the South Carolina Supreme Court, the petitioner made the following statements: "The question is a constitutional one of due process of law for whether a juror is prejudiced or partial in the sense of one of the parties is denied a fair and impartial trial. It is not a procedural

one to be determined by the statutory construction but one of vital substantive law under the Constitution."

That petitioner was referring to the United States' Constitution as is made clear in the following paragraphs where he continues and quotes Irvin versus Dowd, Sheppard versus Maxwell and Rideau versus Louisiana for the proposition that the refusal to ask the questions designed to insure the right to an impartial trial is included in this court's pronouncement in those cases.

He further continued and cited the Strauder versus -- Whitus versus Georgia.

Q I take it it is your position that it was in the Supreme Court of South Carolina that that constitutional question was first raised, is it?

MR. SHAPIRO: It was explicitly raised in this fashion, yes. That is correct. We think, however, under South Carolina practice that it was appropriately raised in the way it was in the assignments of the South Carolina Supreme Court and that the fact that the South Carolina Supreme Court did not explicitly refer to the Constitution in its opinion does not indicate that it was not presented.

In fact, there were several constitutional issues that were presented as clearly as this one which the South Carolina Supreme Court equally neglected to refer to in its opinion.

Q Well if, as Justice Brennan pointed out, in dealing with the motion for a continuance, the South Carolina Supreme Court explicitly did deal with it as a constitutional question, citing Powell against Alabama and so on. But with this issue, the only issue now before us, one would never know from reading the opinion of the South Carolina Supreme Court that that court understood that it was faced with a federal constitutional issue.

MR. SHAPIRO: Frankly, I think it is without rhyme or reason, the issues which the South Carolina Supreme Court chose to refer to in the federal constitutional terms. Petitioner also argues that the denial of his rights to a change of venue expressly violated his right to a fair and impartial trial under the sixth and fourteenth amendment, yet the South Carolina Supreme Court makes no reference at all to the federal Constitution in disposing of that issue. So we think that that cannot be taken to mean that they did not consider. We think the issue is whether it was properly presented and we think that under South Carolina law it was.

Q Mr. Shapiro, I think these are cases that in order to successfully raise something in the State Supreme Court that hasn't been raised in the trial court, if the ordinary state rule is that you must first raise it in the state trial court. Don't you have to show that the Supreme

Court of the state passed on the question even though it did not have to, and then you can bring it here?

MR. SHAPIRO: We think that under South Carolina law the issue was presented sufficiently in this case to present the constitutional issue in the South Carolina Supreme Court.

Q You mean South Carolina does not have any rule of state practice that one must make a constitutional objection at one's earliest opportunity?

MR. SHAPIRO: No. We think that --

Q What do you rely on?

MR. SHAPIRO: Well, only the South Carolina decisions which we have cited again in our reply brief on certiorari, cases such as State versus Brown, 240 South Carolina 357 126 S.E. 2nd, and several other cases dealing with voire dire questions we think indicate that under South Carolina law this was adequately raised and we are pointed to no decision to the contrary.

Q Adequately raised as a matter of constitutional law?

MR. SHAPIRO: As a matter of state law and as a matter of constitutional law. I think that when this court looks to a state Supreme Court decision, if an issue is properly raised under state law with respect to the federal issue, then this court has jurisdiction to consider it

regardless of whether the state supreme court considered it.

Q True, but one could raise a voire dire question in the South Carolina courts either as a matter of state law or as a matter of constitutional law and I take it in order to get it here as a matter of constitutional law you must show that it was properly raised in the appropriate time in the South Carolina proceedings or that if it was not, that the Supreme Court of South Carolina, even though it did not have to pass on it, did pass on it.

MR. SHAPIRO: We think that the cases I have mentioned to the court indicate that under South Carolina law a request that certain questions be asked in order to insure an impartial jury raises the question as far as South Carolina is concerned under both state and federal terms and no additional statement is necessary.

Q Where are those cases cited?

MR. SHAPIRO: They are cited in our reply brief on the cert petition.

Q I don't seem to have that but if you filed it, we can find it. Thank you.

Q I would like to hear your opinion of what you think -- your view of the constitutional position?

MR. SHAPIRO: Well, we think that it certainly has constitutional dimensions. The court certainly did not explicitly refer to the Constitution. It did, however,

deal with the issue in terms of the "essential demands of fairness."

Q But it dealt with the District of Columbia statute, did it not?

MR. SHAPIRO: It dealt with a case coming up under the --

Q But Justice McReynold's dissent was addressed only to the District of Columbia statute.

MR. SHAPIRO: Right, but I don't think that the issue was a statutory one. I think the statute dealt with the mode by which this court could review the decision but as far as the issue of whether the particular question should have been asked was --

Q Well, I suppose your argument is anyway, if Aldridge is not a constitutional decision, something like it ought now be the constitutional rule.

MR. SHAPIRO: I think so and I think that this court indicated as much in Swain versus Alabama, where the court stated that the fairness of trial by jury requires that the influence of race on jurors be explored.

Q Mr. Shapiro, if you are pressing, as I assume you are, the pretrial publicity issue, I am a little surprised that you didn't put in your appendix what these newspaper articles contained. The reference at page 12 does not really tell us anything, does it?

MR. SHAPIRO: The newspaper articles, as far as I know, are not in the trial record. As --

Q Shouldn't they be, if we are going to put the situation in context and determine whether these questions were necessary?

MR. SHAPIRO: I think that the issue which we are posing is not whether or not it was such pretrial publicity as to deny a fair trial. We are rather suggesting that where there has been pretrial publicity that the duty of a trial judge is at least to inquire whether jurors have been prejudiced. In a case where --

Q Well, doesn't the content of that publicity, the substance of it, govern the answer to that?

MR. SHAPIRO: Not necessarily. We think that, for example, a juror might be prejudiced by publicity which did not rise to the -- to such as would under this court's decision deprive him of a fair trial if that juror sat. The fact of the matter is, if the juror was exposed, he might have been prejudiced.

Q Well, all I see from this record is that there were some newspaper articles about something.

MR. SHAPIRO: The newspaper articles, as counsel pointed out to the trial judge, dealt extensively with problems relating to drug crimes.

Q Well, where did they get that information from?

MR. SHAPIRO: Well, only from counsel's statement that --

Q Well, that didn't give me anything except that there were the names of the newspapers. Or did I miss something?

MR. SHAPIRO: Well, I think counsel only referred to the fact that --

Q Is this in here from another clipping which refers to a recent television program and an editorial?

MR. SHAPIRO: And -- and the question --

Q Okay.

MR. SHAPIRO: And the question on page 36.

Q 36?

MR. SHAPIRO: Have you --? That he requested that the judge ask -- stated "Have you heard or read about recent newspaper articles to the effect that the local drug problem --"

Q Where is that, now?

MR. SHAPIRO: It is on page 36 of the appendix.

Q Whereabouts in that?

MR. SHAPIRO: Proposed question number four.

Q That is proposed question.

MR. SHAPIRO: That is correct.

Q But I mean, where is the "recent newspaper article" that is mentioned there?

MR. SHAPIRO: They are not in the record. They are not in the record.

Q Well, what good is it to us if it is not in the record?

MR. SHAPIRO: Well, I don't think that it is any good at this point.

Q Well, what -- how can you sustain that point? That they should be asked these questions?

MR. SHAPIRO: Because our position is not that it was such prejudicial publicity as to deny him a fair trial but rather, in view of the showing --

Q Is there anything in this record that shows that there was any publicity on this case?

MR. SHAPIRO: There is nothing in the record that shows that there was any publicity about this specific case.

Q Is there anything in this record that shows there was any publicity about anything?

MR. SHAPIRO: I think that the page 12 indicates that the clippings that the counsel handed to the judge dealt with drug crimes in Florence County.

Q Well, where is that? Now, it says, "I have some clippings which I would like to give to the court showing just the kind of publicity that has taken place. I have a clipping here from the Florence Morning News of May 29th, 1970, another clipping from the Florence Morning

News which referred to a recent television program which in an editorial --" Well, all we got are the names of the newspapers.

MR. SHAPIRO: I think that if you read the proposed question on page 36 in light of that submission of the questions, it indicates that newspaper articles related to the fact that the local drug problem is bad, in the words of counsel.

Q You mean, you suggest that I go down and read those newspapers?

MR. SHAPIRO: No, but we submit --

Q Because I tell you, I am not going to do it.

MR. SHAPIRO: We are suggesting that this was a sufficient showing to at least require the judge to ask whether the jurors might have been prejudiced because of them.

Q Well, wouldn't the judge first have to ask the question as to whether there were papers with articles which the juror could have read?

MR. SHAPIRO: I think that he had been presented with articles which the jurors could have read.

Q Well, we don't have them.

MR. SHAPIRO: But we think even more significant on extrajudicial publicity is the fact that the chief prosecution witness had testified extensively on a local

television program several days before the trial.

Q Where is that in this record?

MR. SHAPIRO: Well, this is -- it, again on page 36 proposed question number four --

Q That proposed question is proof that this man appeared on a program?

MR. SHAPIRO: We think that that is sufficient showing --

Q You do?

MR. SHAPIRO: -- that there was, in fact, such a television program and that the chief witness did, in fact, testify on it. Of course, the judge refused to ask the questions without any determination as to whether in fact there had been such a television program or not. We think that the way the case comes up, it is implicit that he assumes that there was a program and in fact he said that the question was irrelevant. We say that --

Q Well, perhaps he thought it was irrelevant because after reading the newspaper articles he thought they were so innocuous,so vague, that that rendered the whole inquiry irrelevant.

MR. SHAPIRO: Well, of course, the newspaper articles didn't relate to this television program and we think, again, that it must be remembered that this motion and these questions were posed the day after petitioner was

indicted. Counsel had no opportunity to prepare a formal motion, to collect the newspaper clippings, to make a full presentation to the extent of possible publicity. He was forced to go to trial over his objections on the very next day after the indictment was returned and we think, especially in light of that unseemly haste, that it was more than necessary to have the jurors examined with respect to the issues he raised.

Q Well, I understand page 12 that he did hand the judge clippings, the clippings he was referring to.

MR. SHAPIRO: I think it can be assumed that --

Q They just aren't here, though.

MR. SHAPIRO: They are not here and I think that they were not the only clippings, although of course I can't state that as a fact. The fact of the matter is, counsel was not prepared to go to trial on the day after the indictment. He had not been able to prepare a motion which could have set forth all of the clippings, all of the parameters of the publicity and especially in light of that we think that it was more than usually necessary to explore the potential for prejudice on the members of the jury.

Q Of course, Mr. Shapiro, of the four questions that the judge refused to ask, only one of them had to do with pretrial publicity. The other three had nothing whatsoever to do with pretrial publicity.

MR. SHAPIRO: That's right. The fourth question which, of course, is a --

Q So that if you are right about the first three, the matter of pretrial publicity doesn't really -- is not dispositive at all in this case.

MR. SHAPIRO: That is correct.

Q Is that correct?

Yes.

Thank you.

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

The case is submitted.

(Whereupon, at 2:06 o'clock p.m., the case was submitted.)