In the

Supreme Court of the United States

JACK ROLAND MURPHY,

Petitioner

v.

STATE OF FLORIDA

No. 74-5116

Washington, D. C.
April 15, 1975

Pages 1 thru 39

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Tuesday, April 15, 1975

The above-entitled matter came on for argument at 2:10 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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:

HARVEY S. SWICKLE, ESQ., One Lincoln Road Bldg., Miami Beach, Florida 33139 For Petitioner

WILLIAM L. ROGERS, ESQ., Assistant Attorney General of Florida, Sunset Executive Center, 8585 Sunset Drive, Suite 75, Miami, Florida 33143 For 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. 74-5116, Murphy against Florida.

Mr. Swickle, you may proceed, I think, whenever you are ready.

ORAL ARGUMENT OF HARVEY S. SWICKLE, ESQ.

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

There are two issues that are presented here for this Court's consideration today, both dealing with pre-trial publicity in a criminal matter.

The first question that is presented is whether the jurors' knowledge through the news media of a defendant's prior convictions is so inherently prejudicial that the jury should be excused for cause or a change of venue granted, notwithstanding those jurors' assurances of impartiality.

The second question which this Court has to deal with is whether the totality of circumstances in this particular case warranted a change of venue on behalf of the defendant in the state court.

The pertinent facts with regard to this issue are as follows:

On January 8th of '68, the defendant was arrested for the commission of an armed robbery in Dade County,

Miami Beach, Florida. During the pretrial proceedings of that case, he filed a motion for change of venue as well as a plea of not guilty and a plea of not guilty by reason of insantity.

While this particular case was pending -- and that case number in that first case was 68530 -- the Defendant was indicted in the Broward County, which is a northern county directly north of Dade County and charged with the crime of first degree murder.

Those cases gained notoriety in the news in Dade and Broward County known as the Whisky Creek murder cases.

After that case, he was also indicted in federal court with regards to transportation of stolen securities arising out of the Whiskey Creek murder case so at one time or another, there were three prosecutions pending against Mr. Murphy.

In Dade County, Judge Steadman, after a lengthy hearing, found the defendant incompetent to stand trial. The defendant was then committed to South Florida State Hospital.

Mr. Gerstein, the state attorney, then nul prossed that case.

I think it is important to point out here that at the time of the insanity ruling, there was a tremendous outcry all the way up to the Governor's mansion and

Governor Clerk ordered an investigation into the sanity ruling that Mr. Shevin, who was a state senator at the time and who is now the Attorney-General in the State of Florida, initiated an investigation of Judge Steadman with regards to this particular incident, all while legal proceedings were still pending.

On March 1st of 1969, the Defendant was found guilty of the murder case. Subsequent to the nul prossing of the Dade County case Mr. Murphy was transferred to Broward County. There were legal proceedings for almost a year and on March 1st, he was found guilty of first degree murder.

QUESTION: Was this at Fort Lauderdale?

MR. SWICKLE: That would be Fort Lauderdale, yes, sir.

QUESTION: Does Fort Lauderdale have a large newspaper of its own or does it have to rely on the Miami newspapers?

MR. SWICKLE: There are several newspapers in Fort Lauderdale. The Fort Lauderdale News would be the biggest. The substantial amount of publicity, however, was from the Miami Herald and the Fort Lauderdale News.

The record in this case will show articles from both of those newspapers as well as from the lesser newspapers. However, the Miami Herald is a prevalent

newspaper in Fort Lauderdale and Broward County and throughout the state, in some instances.

QUESTION: Does it have statewide circulation?

MR. SWICKLE: Yes, sir, to a degree. To a lesser degree than in the southern counties.

Five months after the Defendant was convicted on the first degree murder case, Mr. Gerstein reinstituted the Wofford robbery case under a new case number, 697464.

In December of '69, prior to the trial -- which was almost a year prior to the trial of the Wofford case, Mr. Murphy then entered a plea of guilty in the federal case before Judge Eaton in Miami.

Prior to trial in the second Wofford robbery information --

QUESTION: This is the same robbery.

MR. SWICKLE: Same robbery case, new information.

QUESTION: And he had been earlier held to be incompetent to defend.

MR. SWICKLE: That is correct.

QUESTION: And did that ruling get reversed somewhere along the line?

MR. SWICKLE: Somewhere along the way. What had happened was, when we got down to the trial proceedings, the record will show that the judge went to the jury selection, selected the jury panel, but did not empanel

impanel the jury,then held a hearing dealing with the competency of the defendant, then found the defendant competent to stand trial, then empaneled the jury and then proceeded with the trial.

QUESTION: And this was a different judge from the judge who had earlier found him incompetent?

MR. SWICKLE: No, sir, this was the same judge.

QUESTION: The same judge.

MR. SWICKLE: Judge Carling Steadman was the same judge throughout the period of time.

The judge reserved his ruling on the motion to change venue until he had an opportunity to examine each of the jurors. The jurors were examined individually as opposed to collectively, a total of approximately 78 jurors.

The record will show that 20 of these jurors were excused for cause.

The defendant exhausted his preemptory challenges and had requested of the court additional preemptory challenges which were denied. In each instance, the defendant moved to excuse each juror individually and that motion -- many of those motions were denied with particular reference to the six jurors and the two alternates which eventually did serve.

To summarize very briefly the knowledge of these jurors, all of the jurors either knew of the defendants

conviction for first degree murder in Broward County or for his somewhat infamous theft of the Star of India and DeLong Ruby in New York several years prior.

QUESTION: The theft, or the alleged theft of the Star of India jewel from New York had occurred a good many years before the --

MR. SWICKLE: I believe either four or five years prior to the trial.

QUESTION: Back in 1964, maybe.

MR. SWICKLE: That is correct.

QUESTION: And the murder conviction had occurred how long before the --

MR. SWICKLE: 17 months prior to the trial of this case.

QUESTION: 17 months earlier.

MR. SWICKLE: Yes, sir.

QUESTION: 17 months.

MR. SWICKLE: That's correct.

QUESTION: Mr. Swickle, I notice in Judge Atkins' opinion, the district judge in denying habeas corpus at page 40 of the Appendix, said, "Prior to his involvement in the crime which was the subject of this petition, Murphy had focused nationwide attention on himself for his role in the 1964 theft of the Star of India sapphire."

Do you think it makes any difference in a case

like this whether the publicity coming to a defendant about a prior conviction is involuntary on his part or whether he has generated it himself?

MR. SWICKLE: I think it would make a difference. Now, when we say that Mr. Murphy brought it upon himself, he brought it on himself, not that he went out and spoke to reporters. What Judge Atkins meant there was that he was arrested, he was convicted and that was a result of publicity arising out of that case.

He didn't go out and seek the publicity, just as he didn't go out and seek the publicity in the murder case. It accompanied him because of the fact that he had been arrested and because of the nature of the theft.

QUESTION: That is one reading you can give to Judge Atkins, but I mean, it certainly isn't the only one, I don't think.

MR. SWICKLE: Well, except that there is nothing in the record, if your Honor please, to support any other determination. There is nothing in the record to show that in any of the proceedings Mr. Murphy went out and solicited advertisements or solicited news articles about himself.

There is nothing in the record to support that position. There is evidence in the record to support the position that we take, that the news followed the crime and was done as a matter of news reporting as opposed to

Mr. Murphy going out and soliciting magazines and that type of thing.

QUESTION: Where did he get the name "Murph the Surf" from? Himself, didn't he?

MR. SWICKLE: The name "Murph the Surf" originally came from the fact that he was a surfer on Miami Beach.

QUESTION: He liked that name, didn't he?

MR. SWICKLE: Oh, yes, sir, he likes the name.

QUESTION: Well, that is the name that got him with the Star of India.

MR. SWICKLE: Yes, sir.

QUESTION: So he had a little to do with it himself.

MR. SWICKLE: Well, this is the name that was attributed to him. He didn't publish the name, Murph the Surf.

QUESTION: No, he didn't oppose it. He enjoyed it.

MR. SWICKLE: Oh, I won't dispute the fact that there was recognition --

QUESTION: And a day of reckoning.

MR. SWICKLE: I don't feel that with regard to that recognition it is something he went out and solicited because of the Star of India and I point out to the Court that this question came up in the trial court with regard

to whether Mr. Murphy could get a fair trial in any other county in the State of Florida and it was pointed out to the judge that three months prior to the trial of this case, the co-defendants, who were set for trial before Judge Eaton in the federal interstate transportation of stolen securities case, Judge Eaton entered an order of removal.

They went up to Pensacola, selected a jury in one day and concluded the case in, I believe, a day and a half and we brought this to the attention of the court indicating that although the publicity was extremely extensive in Dade County and in Broward County, you could go to other counties in this state and obtain a fair trial, as was done in the federal case.

QUESTION: In spite of the statewide circulation of the Miami Herald.

MR. SWICKLE: Yes, sir. Yes, sir. Jury selection in the federal case, as was pointed out at the time of the trial, took less than a day and the case was concluded in, I think, two or three days, the actual trial.

QUESTION: May I ask, Mr. Swickle, is the essence of your argument really that Marshall ought to be considered as a constitutional ruling applicable to the states which, I gather, the Court of Appeals, in disagreement with the Third Circuit said it would not. Is that right?

MR. SWICKLE: Yes, sir, it is.

QUESTION: Is that what the whole case is all about?

MR. SWICKLE: That is the crux of the case, yes, sir. My position on this is simply, one, when you look at the case law, Marshall actually was the first case that departed from the old ruling, both in the federal and the state courts--

QUESTION: There is no question Marshall was purely supervisory, was there?

MR. SWICKLE: That is correct.

QUESTION: It said so in the opinion --

MR. SWICKLE: Yes, sir, and it has been ruled upon. There seems to be some conflict between the circuits, the Third Circuit and the Ninth.

QUESTION: Well, the Third Circuit said that because of -- what's the one -- Sheppard and Irvin versus Dowd --

MR. SWICKLE: That's right. Because of the interpretation of Sheppard and Irvin versus Dowd --

QUESTION: That we had made Marshall constitutional.

MR. SWICKLE: That is correct.

QUESTION: And this court below said, no, we don't read it that way.

MR. SWICKLE: That is correct and I would point out additionally that -- and we did argue this in the brief

with regards to the Duncan versus Louisiana. That case, which was prior to Murphy was a ruling wherein this Court held that the Sixth Amendment of the United States Constitution entitles each and every individual in the state court actions to jury trials in certain cases.

This would be one of those cases.

My argument there would be that Murphy is a subsequent to Duncan and that we feel that the Fifth Amendment under Duncan now being applicable to the state, the decisions under the Sixth Amendment -- which Marshall was and Marshall ruled that in supervisory capacity that the defendant in that federal case was denied a Sixth Amendment right.

QUESTION: Supervisory power is very different from constitutional power.

MR. SWICKLE: Yes, sir, I'm aware of that.

QUESTION: Marshall was not a Sixth Amendment decision.

MR. SWICKLE: Well, Marshall ruled --

QUESTION: Marshall ruled that it was supervisory power.

MR. SWICKLE: That is correct and ruled that the defendant's right to a fair trial, as guaranteed to a federal prisoner under the Sixth Amendment, was violated because of what came before the Court.

Now, I am not saying that that decision made it applicable to the states. It didn't. But when you read Duncan and you read Sheppard and you read all of the other cases that have come down, this is what has been inferred and this was how I feel.

There can be nothing of a collateral nature more prejudicial to a defendant other than the facts of the particular case he is involved in -- there can be nothing of a more collateral nature which would be prejudicial to him --

QUESTION: Well, I gather, Mr. Swickle, that what you are now arguing is that we should accept the Third Circuit's analysis in Duncan.

MR. SWICKLE: That is correct. That is correct. I think it is substantiated by the subsequent decisions -- or the prior decisions of the Court.

I would like to -- if it please the Court -- to argue some of the points that counsel has raised in his brief at this point, since we are at the crux of the matter, so to speak.

Counsel, of course, takes the contrary position with regard to the decisions cited in his brief with regard to the Ninth Circuit case saying that the Marshall was not applicable because of its supervisory power. I think what we have to do is, notwithstanding that, we still have to

look to what was -- these jurors had before them to determine, even if we don't hold Marshall to be a constitutional question, we still have to look and see if the totality of circumstances in this case require a reversal and I think when you look at what was said by counsel with --

QUESTION: You mean a constitutional reversal?

MR. SWICKLE: Yes, sir.

QUESTION: By totality?

MR. SWICKLE: Totality of circumstances, yes, sir, as separate and apart from the Marshall ruling itself. This is what we are talking about when we are talking about point 2.

Now, counsel went to great lengths in his brief to review the jurors' statements. He went to great extent to say how the jurors , notwithstanding their knowledge of Murphy's convictions and notwithstanding their knowledge of t he murder and notwithstanding what they had read in the paper over the period of time, that they still had these impartial -- could form an impartial verdict in this particular case.

But I think you have to look to the statements of the jurors and just very briefly, the first two jurors who were selected in this particular case, Mrs. Esher and Mr. Collins.

Now, I'm going to the motive and I'm going to the nature of the testimony. Each of them assured the Court that they could -- they could rule on this matter in an impartial manner and that the statements were true and correct because they were under oath. But I would point out just very briefly that four prospective jurors who came before and who came after, these particular jurors, had statements somewhat contrary to what these jurors had stated.

Mrs. Esher stated, at page 101 of the Appendix, that she heard some persons discussing this case in the jury room. This is another point I would like to bring out.

This is the first case that I have been able to find in all the cases that I have read, where the judge took absolutely no precautions during the jury selection. News articles were permitted into the jury room, news articles which branded the defendant as a hoodlum, as a convicted felon, as a convicted murderer.

Each of the jurors testified that they were permitted to read these articles, that they were permitted to discuss this case among themselves, and we see some of the comments of some of the jurors who said, what was the consensus of the opinion of the jury? The consensus was, hang him, he's no good. Now, this was the discussion --

QUESTION: Did you raise this point in your Florida proceedings?

MR. SWICKLE: Yes, sir.

QUESTION: And in your petition for habeas corpus?

MR. SWICKLE: Yes, sir. Yes, sir. All of these points were raised in the trial court and the habeas petitions and before the Fifth Circuit Court of Appeals.

We have Judge Steadman who, back in July of '68, entered an order transferring the co-defendant, a removal -- a change of venue in the co-defendant because the judge, citing Sheppard, said, "I did not take the necessary precautions to protect the interests of these defendants."

It comes to 1970 when these two -- when Mr. Murphy goes on trial. And Mr. Murphy now, you assume is the substantial portion of the publicity, and he does -- he continues to do nothing to protect this defendant.

He allows the jury to -- I have yet to find a case -- allows the jury to openly discuss this case and each juror was asked, "Were you given any cautionary instructions not to discuss this case? Were you reading news articles in the jury room?" "Yes, we were."

And, in fact, counsel attempts to distinguish the Marshall case by saying, in Marshall, the news articles came before the jury when the case was in progress.

In this case, when you check the appendix and you

check the jurys' questioning, three of the jurors -- as amazing as it may sound, but three of the jurors actually did not know that Mr. Murphy was a convicted felon until they got into the jury room.

When they got into the jury room and they discussed the case with the other jurors and had read the news article, then they became aware that Mr. Murphy was a convicted felon for the first time, and those witnesses, I might add, two of which actually sat on the case in chief in this particular matter.

Now, getting back to the point of the jurors' actual --

QUESTION: Well, they shouldn't have been dismissed for cause, those three, I take it, since they didn't -- at the time they were challenged for cause they didn't know.

MR. SWICKLE: No, at the time they were challenged for cause, they did know.

While they were waiting in the jury room to come out before being questioned --

QUESTION: Well, you are not talking about the deliberation. You are talking about the place where the jury waits to be chosen. I see.

MR. SWICKLE: Yes. There is a room where the jurors wait. There were 100, 110 jurors in that room. It is a small room. And they were openly discussing this case and

Mr. Murphy's convictions.

QUESTION: Was this the idea, that the three of them said, we first learned about this when we met with the other members of the panel?

MR. SWICKLE: Yes, your Honor, that is correct. It is in the record.

QUESTION: And were they challenged for cause?

MR. SWICKLE: All of the juries were challenged for cause, each and every juror.

QUESTION: Mr. Swickle, could you tell me which of the names appearing in the index and whose voir dire colloquy appears in the Appendix -- which of those actually served? There were six regular jurors and two alternates.

MR. SWICKLE: Yes, if your Honor please, the jurors -- the jurors that actually served -- I'll give you their names and the page numbers.

QUESTION: Good.

QUESTION: Is that page Roman II?

QUESTION: Yes, page Roman II of the index.

MR. SWICKLE: Patricia Esher, whose testimony appears on page 100.

QUESTION: She served.

MR. SWICKLE: She was the first juror.

QUESTION: Umn hmn.

MR. SWICKLE: The second juror was James Collins.

He appears on page 118 of the Appendix.

QUESTION: James Collins, thank you.

MR. SWICKLE: The third juror was David Edvabsky, E-D-V-A-B-S-K-Y. He appears on page 137.

QUESTION: David Edvabsky, yes.

MR. SWICKLE: William Izzard, page 142.

QUESTION: Umn hmn.

MR. SWICKLE: Louise Scoggins, page 146.

QUESTION: Umn hmn.

MR. SWICKLE: Daniel Ferguson, page 158.

The two alternates --

QUESTION: Those were the six regular jurors.

MR. SWICKLE: Those were the six regulars.

QUESTION: Right.

MR. SWICKLE: The two alternates were Mary J. Kane, at 175 and Jack Etheridge, page 183.

QUESTION: Well, the alternates don't go in the jury room.

MR. SWICKLE: No. I am just giving it for the Court's information.

QUESTION: Right. Mary Kane andJack Etheridge were the alternates.

MR. SWICKLE: That is correct.

QUESTION: Who did not, in fact, serve as jurors.

MR. SWICKLE: They do not sit. In fact, the last

juror I think probably summed up the total circumstances in the jury room -- the last juror who was selected -- I mean, the last regular juror was Mr. Ferguson.

QUESTION: 158, umn hmn.

MR. SWICKLE: That is correct. When he said -- when Mr. Nageley was asking him questions about discussions in the jury room and he said it "made him sick to his stomach as to what" he had heard in the jury room, that the jurors were saying, "Hang him. He's guilty."

Now, this is Mr. Etheridge, who was the last regular juror who, notwithstanding hearing all this, was able to say on an impartial basis that he could render a fair and impartial verdict in this case.

QUESTION: You wouldn't suggest this decision is erroneous under Irvin against Dowd?

MR. SWICKLE: I'm sorry, Mr. Justice --?

QUESTION: Would you suggest that this decision is erroneous under Irvin against Dowd?

MR. SWICKLE: I believe -- yes, it is. It is, because --

QUESTION: So you mean you don't need -- you don't need Marshall at all?

MR. SWICKLE: I don't need Marshall on the totality issue because I feel that what occurred in the jury room and what the jurors knew of the Defendant -- I don't feel

that the Defendant has to show actual prejudice. I think that his inherent prejudice shows here.

QUESTION: So you -- but if you have Marshall to help you --

MR. SWICKLE: If we really have Marshall, we never really have to reach the second question.

QUESTION: That's right.

MR. SWICKLE: If your Honor please, I have reserved 10 minutes of my time, so at this time I will conclude my argument.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Rogers.

ORAL ARGUMENT OF WILLIAM L. ROGERS, ESQ.

ON BEHALF OF RESPONDENT

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

The issue presented by this case that has been stated by counsel for Petitioner is essentially whether a state defendant's trial by jury is rendered essentially unfair and therefore, violative of due process, when members of that jury have some knowledge of the defendant's prior criminal background and knowledge of some of the facts of this case.

Now, the Petitioner asserts this error at the level of constitutional violation on the basis that there

failure to excuse these jurors for cause and, in the alternative, that his motions for change of venue were denied.

We submit that these issues were properly decided by the two federal courts below and that their reasoning should be dispositive of this case.

I would submit that the reasons therefore are rather extensive and there is no precedent that either of these lower federal courts had for requiring disqualification of a state juror because he had knowledge of the defendant's criminal past.

It would require the elevation of this Court's holding in Marshall, not only to Sixth Amendment standards, but also require that that be then enforced against the states as an aspect of due process.

No court has expressly gone so far.

Secondly, we would submit that on the question of a change of venue, the Petitioner did, in fact, receive a fundamentally fair trial in the venue in which the crime occurred and that was Dade County, Florida.

The jurors who actually served, the six whom counsel mentioned just a few minutes ago, met the Court -- this Court's standards for determining the reliability of these jurors in Irvin versus Dowd.

This standard is even set forth in Florida as a

statute, Florida statute 91303 which requires that the Irvin v. Dowd standard be carried out in the Florida trial courts.

Second, I would point out that the publicity to which the defendant was subjected was not the kind of publicity which the cases on which he relies and point to were actually decided. There is quite a disparity between the degree of prejudice which was found in those -- or I should say, the type of facts on which those cases were based from which a determination that prejudice was inherent and the facts in this case.

QUESTION: Have we ever had a case where the jurors, while waiting for the trial, all together had a trial of their own?

MR. ROGERS: Your Honor, I believe that that is not --

QUESTION: Huh?

MR. ROGERS: -- the case that this record shows.

QUESTION: Well, he says that every juror testified that they had heard discussions in that room.

MR. ROGERS: Your Honor, I would respectfully assert that there are qualifications to that and that it was not every juror who, in the jury room, was exposed to that. In fact, as our brief points out, there was quite a discrepancy between the jurors who were examined which

indicates that they were not all discussing the case.

Some of them flatly denied it.

QUESTION: Well, by now, shouldn't you give me the name of one juror who didn't?

MR. ROGERS: Yes, your Honor, Mrs. Essie Schweid was one juror who disagreed and Mrs. Patricia Esher also.I --

QUESTION: That is two? That is two.

MR. ROGERS: Mrs. Essie Schweid is at page 124 of the Appendix.

QUESTION: Well, that is two.

MR. ROGERS: Well, there was a discrepancy between t hem. Not all of the jurors -- not all of the other jurors said they had been discussing the case.

QUESTION: But they had heard it.

MR. ROGERS: No, your Honor, the jurors did not all -- were not all asked the same questions and therefore, they did not all say they had been discussing the case in the jury room.

Some of them said that they had heard discussions of the case. One man who had heard discussions --

QUESTION: Well, that is not normal in Florida, is it? I hope.

MR. ROGERS: That the jurors discuss the case beforehand?

QUESTION: Yes.

MR. ROGERS: No, your Honor. This is because this was such an extensive voir dire that the jurors had so much idle time.

I would point out that these jurors were examined in camera. They were examined individually rather than as a panel, which is the normal procedure. The reason --

QUESTION: By in camera you don't mean that all of the panel was not in the courtroom?

You mean that each was called into the courtroom?

MR. ROGERS: Called in individually -- the jurors were called in one by one and they were examined separately on voir dire, which is the reason that there were so many jurors who were waiting and why the procedure took so much time.

QUESTION: And not in public?

MR. ROGERS: No, this was an in camera proceedings.

QUESTION: In the judge's chambers?

MR. ROGERS: Oh, excuse me. As to whether the members of the public -- this was not a sealed proceeding but the judge did make sure that the prospective jurors did not have the opportunity to hear the answers of the jurors who went before them.

QUESTION: But it was in the courtroom?

MR. ROGERS: Yes, your Honor.

QUESTION: And there were presumedly spectators

and that sort of thing.

MR. ROGERS: Yes, your Honor, that is correct.

QUESTION: Umn hmn.

MR. ROGERS: And I would point out that the procedure which the trial judge then used was to examine these jurors and allow counsel to examine the jurors and then upon counsel's reaching a tentative agreement as to whether the juror would be selected to serve, each tentative juror was personally instructed by the trial judge at length as to what his conduct should be while awaiting trial as to what he should avoid reading, as to what influences he should avoid exposing himself to.

This was repeated for each juror and representative examples of these instructions appear at page 928 of the original transcript, page 866 of the original transcript, and can be found, in fact after each of these jurors appeared and was selected as a tentative juror.

I would also point out that publicity, since this is deemed to be a totality of the circumstances at issue on the second point, that the publicity had been, in effect, at its height a year and a half to three years prior to this trial and that in the period of six months preceeding the trial of the cause, that the publicity was found to be diminshing and that, in fact, there were very few articles which surrounded this trial.

The lower court so found.

So as far as a totality of the circumstances test, there was no infection of the community as has been found to violate the requirements of this Court in Irvin versus Dowd, in Rideau versus Louisiana -- there was no inherent prejudice in the community, thereby leaving no question but that prejudice must have infected the panel.

The court exercised its voir dire ability to exclude those jurors from the panel who had any actual prejudice.

QUESTION: But they used all of those up.

MR. ROGERS: The defense used up all of the preemptories. Yes, your Honor, there is no question about that.

Now, that is not to say that the trial judge refused challenges for cause but the standard which the judge used was the standard which this Court laid down in Irvin versus Dowd, a juror who could reasonably apply himself to the law and the facts and exclude any extraneous influences.

QUESTION: That a juror that said, what I heard about this case made me vomit?

MR. ROGERS: The full quotation is enlightening, your Honor. I don't have the passage before me but the reason that he said it was because he said that he had such

a strong adherance to constitutional safeguards that this concept made him sick and it was on this basis that we submit that he had a very reasonable assurance that he gave to the trial judge that he would be, in fact, a qualified juror and would not consider any extraneous influence.

Regarding --

QUESTION: That was Edvabsky? Is that --?

MR.ROGERS: Edvabsky, I believe is his name, your Honor.

QUESTION: All right,

MR. ROGERS: I have attempted to summarize our position in this issue. There are a few more details which I would like to go into if I may return to the first point and that is that it is most significant that the trial in this case involved a defendant who had drawn not only statewide but nationwide attention to himself with some of his previous exploits -- among these, the highly-publicized story of the Star of India jewel theft from the New York Museum of Natural History.

After his release on this and prior to the robbery in the instant case, there were two other highly-significant crimes which he committed also in the State of Florida and each of these crimes drew intensive publicity at the time but, of course, they were long prior to this trial.

The Miami Herald, which was -- it represented most broadly in the Appendix to this case -- is the leading paper statewide; in addition to other papers which appear in various regional parts of Florida, the Miami Herald does have a statewide circulation.

It would have been extremely difficult to find a panel of jurors anywhere within this state who, as a result of the Star of India and publicity on the subsequent crime, would not have had some concept that these events had transpired.

In addition, the district judge on habeas corpus had no constitutional precedent by which he could decide that Marshall should be the test which should have been applied in the state courts.

Marshall would serve, indeed, as poor precedent in a case such as the one at bar. The requirement that the states should be controlled by Marshall would impose a severe hardship in a situation of the notorious defendant who would then not be able to find -- where the state, I [sic] should say, would not be able to find the defendant for such a case probably anywhere in the state who had not known of a conviction for one of these prior crimes.

The extent of publicity had reached the point, I may point out here, that there was even a movie made of some of these exploits so the district judge, who was quite

justified in finding that this was a notorious defendant.

QUESTION: Mr. Rogers, do you tie that in to the change of venue for the other codefendants however?

MR. ROGERS: Yes, your Honor. I would point out two factors regarding that change of venue on a separate federal crime. That is, that one, the declaration by this defendant that he was guilty and was a codefendant with the others would necessitate the federal judge change the venue for that particular crime and, secondly, the ease with which the codefendants obtained the jury in Pensacola, a remote part of Florida, is easily explained by the fact that the codefendants did not have anything like the notoriety that this defendant had so once we remove Mr. Murphy from the four defendants, then the other three defendants can quite easily get a jury as they have virtually no notoriety and very little fame or reputation.

Mr. Murphy's name would not enter into a jurist's consideration as to whether he could give any of the three codefendants a fair trial.

The requirement that the state be bound by the Marshall doctrine would place the state in a position quite different from the federal trial courts in that any federal trial court does have jurisdiction over a federal crime and under Rule 21, a federal defendant who was so put upon could succeed in getting his cause transferred to the most

remote federal district court in this country. The states would be hard-pressed to have the same flexibility and, indeed, a defendant who would be known statewide for a particular crime within that state could very well find himself without a jury and there would be no possibility of affording the man a trial at all.

That is probably the strongest reason which we can assert, that the more flexible Irvin v. Dowd standard is the one that is properly applied to the states, whereas the Marshall requirement can continue as a viable standard for the federal judiciary.

It is just such a situation as this which prompts the distinctions between federal and state practice and the distinctions, indeed, which have been proved in Spencer versus Texas of there being the possibility of variations in practice between the state and federal courts.

If I may address the second point with my remaining time, we did not have the situation in Dade County which would qualify under any of the tests or any of the factual patterns in Rideau versus Louisiana, Estes versus Texas or Irvin versus Dowd in which it was clear from the nature of the case, the size of the community, the intensity and the viciousness of the publicity which infected those small communities that it was clear that we could have presumed that any defendant brought -- that

these defendants brought before any jury and that selected from a venerae from any community could not receive a fair trial.

The concept that too many jurors, too many times had announced their prejudice in Irvin versus Dowd would not find any parallel in the transcript in the instant case.

The jurors who actually served gave quite viable and quite rational explanations of their impartiality and the passage of time was not the least of these.

Clearly, although they had some knowledge prior to the time they entered the courtroom of the defendants' background and the defendants' prior crimes, there is no doubt that the passage of time does dim these recollections.

What made matters worse as to some of these jurors was that the manner of examination on voir dire refreshed all of their recollections and, indeed, led some of the jurors into saying that I did not know that that was the fact until counsel mentioned it during voir dire.

So the passage of time certainly had dimmed the recollection of these facts as far as many of these jurors were concerned. The size of the community in Dade County also removed it from the inherent prejudice category and places this judge as very reasonably having denied a motion for change of venue. He did this after he observed the demeanor of all the witnesses on the stand.

He deferred ruling on this motion at the time it was made and declared that he would not rule on it until he had observed the panel so, indeed, he did have every opportunity for filtering out any prejudice that may have been latent in the community and presents a record before this Court which represents a reasonable basis on which to say that the courts below are quite correct.

We submit that affirmance is warranted on these cases because the Petitioner was afforded a full measure of due process as that has been defined by this Court in Irvin versus Dowd.

Indeed, the Irvin versus Dowd standard has been adopted by at least 12 of the states which have had an occasion to pass on the issue. It would be quite surprising to most of the state courts if the Marshall standard were now deemed to be superimposed and required after what appeared to have been settled precedent in the area.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Swickle?

REBUTTAL ARGUMENT OF HARVEY S. SWICKLE, ESQ.

MR. SWICKLE: Yes, your Honor, just very briefly.

Mr. Justice Marshall, your concern with regards to the jurors who said that they have discussed this or

heard discussions in the jury room was not, I would say, all the jurors. This was the point I was trying to bring out.

I would say 70 or 60 percent of the jurors who were actually questioned indicated that there were discussions.

What I wanted to point out is that, seeing that the jurors who sat on the jury panel were the ones who didn't hear any discussions and the ones that were excused for various reasons -- either for cause or for medical reasons or excused by the state or excused by the defendant, those jurors seemed to have a different view of what transpired and I would just like to give you a quick run-down.

Patricia Esher, who is the first juror, said she heard one person discussing the case and that one person had formed an opinion.

The immediate two jurors after her, Frank Cale and R. Fleming, Mr. Cale said the majority of the prospective jurors had formed an opinion that the defendant was guilty.

That is at page 108.

Mr. Fleming, who came immediately after Mr. Cale said, the jurors discussing the case stated, put him away, throw away the key. That was the consensus of the opinions.

The next juror who sat was Mr. Collins. Mr. Collins, who was able to sit and impartially listen to this case, said no one in the jury room had formed an opinion of this

case.

However, the jurors both before him and after him, referring to, again, Mr. Fleming and Mr. Perraro -- Mr. Perraro says the discussions about Murphy -- there were discussions about his prior convictions and the jurors had formed an opinion of guilt.

QUESTION: Do you -- are you suggesting that that is just -- those two concepts are not compatible?

MR. SWICKLE: No, I am suggesting when we are talking about motive and jurors' testimony, we seem to have a situation where the jurors, some of the jurors who sat in this case -- who sat in the jury room for three days came out and said they heard no discussions of this case.

QUESTION: Well, it is a big room. You said --

MR. SWICKLE: No, sir.

QUESTION: -- there were more than 100 people in it so it has got to be a fairly big room.

MR. SWICKLE: The discussions from all of these jurors with anybody sitting in that room would have heard discussions regarding this case, Judge -- your Honor and I say that -- I say that because unfortunately, I was there so I know. Now, I --

QUESTION: Well, does the record show the size of the room?

MR. SWICKLE: No, sir, it doesn't. But the record -

QUESTION: It can't be a very small room if it held 100 jurors waiting to be called in.

MR. SWICKLE: Well, I would also point out the direct --

QUESTION: You say you were in that jury room?

MR. SWICKLE: No, sir, I was there at the trial.

QUESTION: Oh, yes.

MR. SWICKLE: No, I wasn't in the jury room.

I'd also point out, if your Honors please --

QUESTION: Incidentally, Murph the Surf's reputation was what, as a --

MR. SWICKLE: I'm sorry?

QUESTION: Murph the Surf's reputation was what? A sort of glamor figure or --?

MR. SWICKLE: Originally he was a surfer and he gained notoriety as a surfer, as a concert violinist and then the first criminal activity which -- for which notoriety was gained was the Star of India.

QUESTION: Well, wasn't that the one that became a motion picture or something?

MR. SWICKLE: Eventually, yes. Not until long after these proceedings were over.

QUESTION: None of the actual jurors in the case said that he himself or she herself had formed an opinion about guilt.

MR. SWICKLE: There were some jurors who said, if you look at the --

QUESTION: They may have heard other people say something, but they didn't say they --

MR. SWICKLE: There were jurors --

QUESTION: -- had any firm view about guilt or innocence.

MR. SWICKLE: If your Honor please, the jurors -- and I am sure your Honors have read the Appendix -- would indicate that some of these jurors, when asked questions by Mr. Nageley said, they would have trouble reaching a verdict in this without considering his prior convictions.

Yet, when questioned by the state and questioned by the Court --

QUESTION: Well, that isn't what I asked you. None of them said they had formed an opinion about guilt.

QUESTION: On this particular charge.

MR. SWICKLE: On this particular charge the only one who indicated something to that effect was Mrs. Scoggins. At pages 149 and 150, she said she would be influenced in her verdict by all of the publicity but she had no fixed opinion.

QUESTION: All right, so no one said they had --

MR. SWICKLE: No one said they had a fixed opinion.

QUESTION: Well, none of those who actually sat

on the jury included the one who you pointed out to us said, hang him.

MR. SWICKLE: Had a fixed opinion. None of them did. None of them said they had a fixed opinion.

QUESTION: No, no. Is any of the -- one of the jurors who actually sat --

MR. SWICKLE: Yes.

QUESTION: -- and convicted him --

MR. SWICKLE: Yes.

QUESTION: -- include the person who said, hang him, before the trial.

MR. SWICKLE: He is the one who said that the jurors had been discussing and in the discussion said, let's hang him.

QUESTION: I see. He didn't say that.

MR. SWICKLE: No, he didn't say it.

QUESTION: Right.

MR. SWICKLE: That was the consensus of opinion of the jury.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:50 o'clock p.m., the case was submitted.]