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In the

Supreme Court of the United States

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ARIZONA, RICHARD BOYKIN, SHERIFF, PIMA COUNTY,

Petitioner,

vs

GEORGE WASHINGTON, JR.,

Respondent.

No. 76-1168

Washington, D. C.
October 31, 1977

Pages 1 thru 38

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ARIZONA, RICHARD BOYKIN, SHERIFF, PIMA COUNTY, Petitioner,	:	
v.	:	No. 76-1168
GEORGE WASHINGTON, JR., Respondent.	:	

Washington, D. C.,

Monday, October 31, 1977.

The above-entitled matter came on for argument at 2:11 o'clock p.m.

BEFORE:

WARREN R. 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

STEPHEN D. NEELY, Esq., Pima County Attorney, 900 County Courts Building, 111 West Congress Street, Tucson, Arizona 85701; on behalf of the Petitioner.

ED BOLDING, Esq., Bolding, Oseran & Zavala, La Placita Village, Suite 402, Toluca Building, P. O. Box 70, Tucson, Arizona 85702; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1168, Arizona v. George Washington, Jr.

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

ORAL ARGUMENT OF STEPHEN D. NEELY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. NEELY: Thank you, Your Honor. Mr. Chief Justice, and may it please the Court:

We are here in this matter on petition for writ of certiorari to the Ninth Circuit Court of Appeals granted by this Court on April 18, 1977, pursuant to 28 United States Code, section 1254.

The case involves ultimately the question of whether the state is barred from retrying George Washington, Jr. by the double jeopardy clause of the United States Constitution. It involves more precisely a factual situation involving the granting of a mistrial by state trial judge without the defendant's consent because of improper remarks made by the defense counsel during his opening statement, the issue being whether the state is properly barred from retrying the defendant in federal habeas proceedings solely because of the trial judge's failure to make specific findings based on the standards set out in Jorn regarding his actions.

The facts are lengthy and have been in dispute throughout this matter. Essentially, George Washington, Jr. is

presently in the custody of Sheriff Boykin, Sheriff of Pima County, Arizona, accused of the murder of one James Hemphill. He was originally tried and convicted of this offense in May of 1971. He was granted a new trial in June of 1973. The basis for the granting of the new trial was the state's failure to comply with this Court's ruling in the Brady case. Ultimately, a denial of due process was found and the new trial was granted on the grounds of newly discovered evidence.

The state appealed that matter, that decision of the Arizona Supreme Court. The Arizona Supreme Court affirmed the finding of the trial court in June of 1974 in a memorandum opinion. The fact that it was a memorandum opinion becomes important later during the course of the facts.

A new trial was held in the matter in January of 1975, shortly following the defendant's motion for continuance on the grounds that he didn't have all his witnesses ready and able to go to trial.

QUESTION: Was Judge Truman the trial judge in both cases, both the first trial and the second trial?

MR. NEELY: No, Your Honor. Judge Truman was not and there --

QUESTION: There were two different trial judges?

MR. NEELY: Yes, Your Honor.

Shortly after the commencement of the trial, there was questioning on voir dire of the jury engaged in by the

prosecutor in the case, Mr. Butler, regarding credibility of witnesses wherein reference was made to the possible use of transcripts from -- and I use his term -- two prior proceedings. At the end of that time, counsel for the defense moved for a mistrial on the grounds that the reference to the prior proceedings was prejudicial to the defendant and that motion was denied.

Shortly thereafter, defense counsel commenced his voir dire. At that time, he informed the panel that the defendant had in fact been previously tried for the offense and in fact been convicted of the offense and had in fact spent some time in prison in the State of Arizona.

Sometime subsequent to that, there was some indication by the trial court judge about his concern about the poisoning of the panel in this matter, requests by the prosecutor to conduct individual voir dire, which was conducted at short length, to determine whether or not in fact any of the prospective jurors were aware of the reason behind the granting of the original new trial.

Subsequently, the opening argument or opening statement commenced. During the course of the opening statement given by defense counsel, there were comments regarding misconduct by the prosecutor, comments regarding the prosecutor's willful withholding of evidence, the removal of the previous prosecutor from the case apparently as a result of this, and finally there was a comment to the effect that the jury was told

that they would hear that because of these things the Arizona Supreme Court granted a new trial in the matter.

The lunch recess was held shortly thereafter, there was a motion made by the prosecutor in the case for a mistrial; the grounds for thatmotion were that due to the improper statements of defense counsel, the jury had been prejudiced. The trial court listened to argument, quite length argument regarding the propriety of granting a mistrial at that point; based upon the comments made by defense cou sel, indicated some reluctance to rule at that time on the admissibility of the matter referred to regarding the Supreme Court, denied the motion and granted the prosecutor the opportunity to reopen the motion at a later time.

The court at that time expressed some concern about the case turning into one in which the county attorney's office was being put on trial. After that, two witnesses were called to testify and did in fact testify. The following morning, after further research on the matter, the prosecutor again moved for a mistrial, citing two Arizona rules, one of which precludes reference to a past trial at a new trial, the other which forbids the citation of memoranda opinions. As I mentioned earlier, the opinion sustaining the finding of the need for a new trial by the Arizona Supreme Court was a memorandum opinion. There was again extensive argument during which the subject of manifest necessity was raised, during which both counsel argued on the

possible question of taint of the jury panel by the statements made by defense counsel, and as well defense counsel suggested the possibility of curity of admonition and the state argued against it by virtue of what it deemed to be the prejudice to the jury as a result of defense counsel's comments.

QUESTION: The rule of court that you referred to, was that still a rule of court that was still in effect?

MR. NEELY: I'm sorry, Your Honor?

QUESTION: The rule of court that you referred to as having been mentioned by the prosecutor --

MR. NEELY: Not the original one, Your Honor. The original case took place --

QUESTION: The statement you just made is what I am addressing my question to, the rule referred to, a rule which was at that time still in effect?

MR. NEELY: Yes, Your Honor, and the rule regarding the memorandum opinion is still in effect, that they are not considered citation for the purposes of authority.

QUESTION: Yes.

MR. NEELY: Other than within very limited circumstances that have been referred to by the Ninth Circuit, Your Honor.

Ultimately, after the extensive argument was concluded for the second time, the court indicated that it was ready to rule and essentially ruled that the mistrial was going to be

granted based upon defendant's remarks concerning the Arizona Supreme Court case.

Subsequently there was special action filed by Washington's counsel challenging the ruling of the court. That special action was filed with the Arizona Supreme Court, who declined jurisdiction. Our special action really incorporates all three of the extraordinary writs, and presumably this is in the nature of either cert or prohibition.

The following step was to file a motion to quash the information in the Superior Court. This was heard by Judge Birdsall and denied. And sometime during this period counsel had also filed a petition for writ of habeas corpus with the federal court and had been told that his state remedies had not yet been exhausted.

The ultimate step in state court was the filing of a habeas petition to the Arizona Supreme Court, again challenging our right to put Mr. Washington on trial again. That petition was denied, and finally the matter was undertaken by the Federal District Court.

During the course of the proceedings before the Federal District Court, Judge Walsh raised on his own motion the question of whether or not the findings of the trial court reflected manifest necessity or reflected that the trial court had specifically found that there was jury prejudice involved.

The court indicated that there had been a rather

extensive review of the record by himself prior to asking this question and indicated in effect that his main question that remained was what are the findings, indicating at the same time that if the findings were there to the effect that the court had found a manifest necessity before granting a mistrial or had found jury prejudice, that that would settle it -- and I use his terms -- for him.

QUESTION: When you say "the court," you have used it interchangeably.

MR. NEELY: I'm sorry.

QUESTION: You used it when you referred to Judge Walsh and the other time you were referring to the Superior Court.

MR. NEELY: I apologize, Your Honor. This is -- we are now in the District Court in the federal habeas petition, and Judge Walsh is the one who indicated that he had reviewed the record and essentially raised the issue of whether or not there had been specific findings with regard to either manifest necessity being existent or with regard to jury prejudice being existent. He indicated that he felt under ordinary circumstances after his review of the record that the trial judge had thought so, then he should have said so, and essentially at that point said in his own words that that would settle it for me. He went ahead and ruled that habeas should follow. The case was then taken to the Ninth Circuit Court, and the Ninth

Circuit Court again based its ruling in affirming the District Court on the fact that there had been no specific findings by the trial court with respect to the question of manifest necessity with respect to the question of alternatives available to the jury.

QUESTION: Which opinion is controlling?

MR. NEELY: Under these circumstances?

QUESTION: You had one opinion with two judges and one opinion with one judge and all that trouble.

MR. NEELY: Do you mean the Ninth Circuit's opinion, Your Honor?

QUESTION: Yes.

MR. NEELY: I have had a great deal of difficulty in understanding the purpose of the concurring opinion. It addresses itself to the question that there was a great deal of argument at the time of the original trial, the second trial in Superior Court before Judge Buchanan regarding impropriety. It appeared to me at that time that that was a logical course for the argument to take, but the Ninth Circuit's concurring opinion doesn't seem to think so.

QUESTION: But both of them were against you?

MR. NEELY: That's correct, there is no question about that, Your Honor.

QUESTION: I still don't know which one is here, because two judges went one way and the concurring opinion, and

one judge wrote for all three of them.

MR. NEELY: Well, I don't think that the impact of the two opinions is substantially different, but I believe that we are properly here on the basis of the original opinion that was not noted to be a concurring opinion.

QUESTION: But the point is, the judgment was for all three.

MR. NEELY: Yes, Your Honor.

It is our position at this point that there are a number of issues that are before this Court, but that the first issue that must be addressed by the Court is the question of whether or not it was proper for either the District Court or the Ninth Circuit to conclude that in the absence of specific findings by the trial court, that they were therefore prohibited from upholding the state's position in denying the petition for writ of habeas corpus.

Our position here today is that this goes one step beyond previous requirements of this Court, in the sense that this Court has specifically maintained in the past that the question of whether or not a mistrial is properly granted is a question of whether or not the trial court has abused its discretion. The Court has consistently maintained from the days of Perez onward that it requires a consideration of all the circumstances, which in our judgment would certainly make the finding of facts dealing with all the circumstances somewhat

onerous for the trial court. But in any event, there has never to my knowledge been a holding that specifically says that the position of the court cannot be upheld and that jeopardy must by necessity attach precluding retrial merely because the trial judge failed to make specific findings of fact on these issues presented of manifest necessity and the question of alternatives, when the record clearly supports the fact that there was extensive argument in the case, that the trial court expressed on more than one occasion in this instance his concern over the possibility of a poisoned panel, his concern over the possibility of the county attorney's office being put on trial, and clearly his concern over the impropriety of comments made by defense counsel to the jury.

The arguments of counsel were lengthy. At one point, the trial court denied the motion for mistrial, giving leave to reopen it, which indicates certainly that he wasn't taking his responsibility lightly. And finally, upon ultimate argument, granted the motion for mistrial because of the impropriety of the remarks and presumably the circumstances surrounding it.

I think that the essence of the opinion in the court immediately below is such that it requires trial courts essentially to make lists, if you would, of findings which taken at face value would relieve the appellate courts of the opportunity of going into the record.

It has never been my understanding, nor do I read that

in the cases that have been cited by this Court, that when the question of an abuse of discretion, particulary involving double jeopardy is involved, that the Appellate Court is precluded merely by conclusory findings of fact by the trial court from delving into the record.

QUESTION: You think the ultimate question is in a case like this, whether or not there was manifest necessity, in other words, not -- and there might not have been, even though the trial judge found that there was, and there might have been even though the trial judge had neglected to put a label on it. Is that your point?

MR. NEELY: Your Honor, I think that the question even more precisely, if I may, is whether or not from the record in this case, the entire record in this case, manifest necessity is apparent. It is my contention that it is apparent from the entire record in this case, and I believe that narrows Your Honor's positions somewhat.

QUESTION: Well, is that true if there was some reason in the record to think that the judge applied the wrong legal standard?

MR. NEELY: I think, Your Honor, that very probably that question could go either way, depending upon the facts, but I am inclined to think that the question of what the judge said is far less important than the question of what the judge did and what the circumstances dictated. This Court has indicated

many times in the past its reluctance to characterize --

QUESTION: Well, if the judge indicated that he didn't think a finding of manifest necessity was necessary at all in this case as he read the cases, and that all he had to do was to find some possible prejudice --

MR. NEELY: I think it is very probably under that circumstance an appellate court would be justified in saying that there has not been an adequate consideration, he has failed to completely --

QUESTION: Even though you might canvas the record and find that there was manifest necessity.

MR. NEELY: Had there been any real misconduct in the Jorn case, I think it is very possible that the premise that you stated could have applied there.

QUESTION: To what extent is a habeas court, if any, obligated to give deference to a state trial court's findings or implied findings on a subject such as this?

MR. NEELY: I don't believe that that obligation extends or the extension of that obligation is any great factor. It has always been my understanding, and I believe the law is clear, that the state court is permitted, in fact perhaps required to go into the facts and the circumstances surrounding the allegations of what was incorrect in the original proceedings which would justify the granting of the writ.

QUESTION: When you say state court, do you mean

federal court?

MR. NEELY: I'm sorry, federal court. I think in following, the question first I think I would ask this Court to resolve is the question of whether or not the findings themselves are necessarily controlling on the determination that is made by the federal courts in reviewing the question of whether habeas corpus should be granted in situations where a mistrial has been granted without the defendant's consent.

I think the second question would be that, even if the Court finds that that is not the case, there is still a remaining question here and that is whether the standard that was applied by the Ninth Circuit Court of Appeals in this matter on reivew of the District Court's judgment was the correct standard.

I think the standard that is implied at least by the Court's past decisions with respect to cases and situations wherein the mistrial is based upon a finding of misconduct or improper conduct on the part of the defense attorney is somewhat different than the standard that was applied by the court in the Ninth Circuit. The standard clearly there was the Jorn standard. I think the standard should have been the Somerville standard.

I think that if we are lining up the question of manifest necessity, the question of whether the ends of justice will be defeated by the continuing of the proceeding, that

one of the things that should be considered in terms of the ends of justice is the fact that the state also has a right to present its material, its case to an impartial and fair jury. I think a situation where, for example, in this case, the Supreme Court of the State of Arizona was improperly called as an unsworn witness essentially to bolster the position of defense counsel and the defense, that there clearly are subtle implications on a jury that can best be perceived by the trial court that could very well result, and in fact probably would result in the trial court's attitude being prejudiced against the state and against giving the state a fair hearing on its trial of the case.

I think the additional references to the long time that Mr. Washington has spent in prison, the references to the prosecutor being removed from the case, I think all of those references, taken in conjunction with the again attempt to call upon the Supreme Court as unsworn witnesses to bolster the defense position could very well have been found by the trial judge under the circumstances to have compelled the granting of a mistrial in this case and could almost not have been found to meet the standard of the question of whether the ends of justice necessitated the mistrial. I think it is clear that the possibility of prejudice is so strong here that it clearly justified the finding of the trial court.

I would like to reserve some time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Neely.

Mr. Bolding.

ORAL ARGUMENT OF ED BOLDING, ESQ.,

ON BEHALF OF THE RESPONDENT

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

A few differences with my brother regarding the facts of this case as pointed out originally by Mr. Neely: Number one, there was no short length of voir dire by the prosecutor of this jury panel regarding their knowledge of the reasons for a new trial. The trial judge gave the prosecutor all of the time that the prosecutor wanted to inquire into this jury panel's mind to see whether they, number one, knew the reasons for the granting of the new trial; and, number two, whether that would prejudice their position, their feelings in this case.

QUESTION: Did the defense counsel have any part in that at all?

MR. BOLDING: Yes, Your Honor.

QUESTION: It was both sides?

MR. BOLDING: Both sides, individual questioning by the jurors outside of the presence of all of the jurors. That was fully inquired into, Your Honor, at the request of the prosecutor, incidentally.

Number two, the petitioner here, Your Honors, omits the fact that the type of statement made by defense counsel in

this particular case was made in a context of varying statements made by the prosecutor and by the defense counsel all through the voir dire, all through the opening statements.

The prosecutor, over objection and with a motion for mistrial following it, stated four years ago, there were other proceedings, prior proceedings four years ago, would you as jurors hold that against us, that some of these people might not be able to remember things after four years, and we will have transcripts of these prior proceedings.

QUESTION: Well, the jurors would sooner or later find, if the transcripts were there, that a prior trial had been held, would they not?

MR. BOLDING: Your Honor, in my opinion they knew already but, yes, I believe that is correct.

QUESTION: Is there any question about it at all, if you bring in a transcript of a prior trial, that the jurors in listening to that case are going to know that there was a prior trial?

MR. BOLDING: I think there is no question at all, Your Honor.

QUESTION: But you seem to be using that as a justification for the conduct of the defense counsel that followed.

MR. BOLDING: Your Honor, I do not use that as justification, that particular part of it as justification for defense counsel's words.

QUESTION: Let me turn to one of the things said. After the warning by the trial judge to desist, the statement was made, "You will hear evidence that will show you that there was another eyewitness," and then "You will hear evidence that evidence was suppressed and hidden by the prosecutor, you will hear that the evidence was purposefully withheld," and so forth.

MR. BOLDING: Yes, Your Honor.

QUESTION: Well, how was the jury going to hear about that?

MR. BOLDING: From testimony from the witnesses, Your Honor, from testimony of the witnesses. The county attorney in this particular case, not the present county attorney, Your Honor -- the county attorney in this particular case engaged in a course of conduct which was specific misconduct as held by the Supreme Court of Arizona, including --

QUESTION: And the state paid its penalty for that by having the new trial ordered.

MR. BOLDING: Your Honor, that is part of the penalty that they paid, yes, sir.

QUESTION: Now, in what way would this evidence, these items that I just read, that you will hear, how would that be relevant evidence admissible?

MR. BOLDING: Yes, Your Honor, that would be admissible, for many reasons. Number one, in Arizona, the law is a bit different than many of the other states. There is a broad scope

of cross-examination allowing impeachment, concerning bias, prejudice, motive, interest of the prosecution in its witnesses. Just like a defendant who goes out and tries to wire up a witness or tries to get someone to say something that is not true, so can the state, so can the defendant prove that against the state, Your Honor, we submit.

QUESTION: Well, you are representing now to this Court that under Arizona law that kind of evidence would have been received so that the statements made by defense counsel were correct statements, all of them were correct?

MR. BOLDING: Yes, Your Honor, absolutely, and for that --

QUESTION: The Supreme Court did not think the same, did they?

MR. BOLDING: No, sir. Your Honor, they did make the ruling in that area. They declined to accept jurisdiction of the special action and on the habeas filing with the Arizona Supreme Court it was denied without an opinion, so we don't know what they thought.

QUESTION: Well, the trial judge certainly didn't agree with your reading of Arizona law.

MR. BOLDING: No, Your Honor, evidently he didn't, although I can't say that for sure. We did not present to the trial judge, because -- may I add this, there was a motion for mistrial denied, absolutely denied; two witnesses presented,

then the next morning a rule 314 -- and Mr. Chief Justice, I must insert here that that rule was not in effect at that time, rule 314, this was an old rules case, Arizona has new criminal rules, this second case was begun after the new rules were in effect but used the old rules. However, that old rule 314, unknown to defense counsel at that time, was in two-thirds part declared to be unconstitutional, so the trial judge gave defense counsel 15 minutes the next morning to research the area. The Burruell case was not cited to the trial judge, and I would like to quote shortly from State v. Burruell, an Arizona Supreme Court case, to show you what kind of things would be considered proper by the Supreme Court.

The Supreme Court said this argument, this opening statement was proper, a frame-up, ladies and gentlemen.

QUESTION: Mr. Bolding, let me -- you are certainly free to go back to that, but I would like to ask you a question first. As you may imagine, there are presumably hundreds of double jeopardy rulings by various courts throughout the country in any given year, and we don't try to review all of them on their facts.

MR. BOLDING: Yes, sir.

QUESTION: If the trial judge in this case, on precisely the record that there is here, had made a finding that the jury, there was a probability of jury taint and the prosecution could not get a fair trial as a result of the defendant's

examination and therefore it was manifestly necessary, citing U.S. v. Perez, to grant a mistrial and empanel a new jury, do you think you would still be entitled to habeas corpus?

MR. BOLDING: Yes, Your Honor, simply for the reason that I think that does not go far enough and inquire into the facts of the particular case, which is what the Ninth Circuit held should be done in this particular case.

QUESTION: But, Mr. Bolding, the Court of Appeals didn't reach this point at all. The Court of Appeals didn't look at the record to see if it would have supported any kind of a finding of manifest necessity.

MR. BOLDING: Your Honor, I'm sorry, it is my understanding that they did.

QUESTION: Well, I thought they just said that the District Court hadn't made the findings that were necessary and set it aside.

MR. BOLDING: I believe, Your Honor, that the Ninth Circuit said, number one, we would liked to have seen something about manifest necessity or some kind of finding; number two, we would like to have the trial court have considered some alternatives to just a declaration of mistrial; and, number three, notwithstanding all of that -- and in the concurring opinion, Justice Marshall, the two members concurring, I think that makes it probably the ruling that we look at, said we don't know --

QUESTION: They carry it in one man's name.

MR. BOLDING: Yes, sir. The two judges that were there --

QUESTION: And the other two join.

MR. BOLDING: Yes, sir. The two judges in the concurring opinion though said we don't know what was in the trial judge's mind because here was a motion for mistrial denied, then the prosecutor comes in with a new rule --

QUESTION: Mr. Bolding, where did they go on and say that if there had been a finding of manifest necessity the record would not have sustained it?

MR. BOLDING: Your Honor, I believe they say in the opinion that, based on the record, they can't tell whether the judge relied on 314 --

QUESTION: That's different.

MR. BOLDING: All right, sir.

QUESTION: That's different.

MR. BOLDING: All right. I misunderstand you then, and I perhaps --

QUESTION: Suppose the trial judge had said and mouthed all of the right rule and made the findings, would you think it would have been -- the Court of Appeals did not say the record would not have sustained that sort of an approach?

MR. BOLDING: I believe that they stated, Your Honor, that they wanted some basis for the ruling by the trial judge.

QUESTION: Exactly, they want the trial judge to do it first. They didn't do it themselves.

MR. BOLDING: They wanted -- and I believe they did state, as did the district judge, that the record just didn't reflect --

QUESTION: I thought I had understood, perhaps I am wrong, that the issue here was whether or not the Court of appeals was correct in saying that the District Court erred in not making findings and in stating the standard, the legal standard, and if the Court of Appeals was wrong in making that decision, we would simply tell the Court of Appeals that they were wrong in doing that and they could go on and look at the record themselves.

MR. BOLDING: Yes. Your Honor, I would have to rescan that. I believe that what you say may be correct. It was my understanding that they did talk about the record.

QUESTION: What is the rule that when a record is silent, wholly silent as to the legal standard involved and the findings, no express findings have been made, let's suppose the rule is that a state judge at least, it will be presumed that the state judge applied the right legal standards and made the necessary findings in his own mind at least, although he didn't write them down. What if that were the rule?

MR. BOLDING: Well, Your Honor, if that were the rule, then that would effectively wipe out the right of the defendant

to have an appellate review of that particular case.

QUESTION: No, it wouldn't. Then the Court of Appeals would look at the record and see if the facts were sufficient facts in the record to sustain the presumed finding.

MR. BOLDING: Well, perhaps, sir, but I just feel that that would effectively preclude appellate review, and the appellate review in the Ninth Circuit did sustain Judge Walsh at the District Court level. Judge Walsh at the District Court level did take a look specifically at the record --

QUESTION: But he was express in saying that he thought the record would have supported a finding by the Superior Court judge of manifest necessity but ruled that since there hadn't been any express finding, he was going to grant habeas.

MR. BOLDING: Your Honor, I think a rereading perhaps of what Judge Walsh said was that he would not have -- in essence he would not have declared a mistrial because he could not see from the record that it would have been supported, however, he would also like some findings by the trial judge. That is what Judge Walsh said, in my opinion, sir, from reading that opinion.

Your Honors, an example of what the Supreme Court of Arizona says is proper -- opening statements. We will prove that the county attorney's office has knowledge of this narcotics running. We will prove this from officers of the Pima County Sheriff's Office and the City of Tucson Police

Department. We will prove they investigated Mr. Lugo. We will prove that they presented a case to the county attorney's office, one case will try to show is iron-cladd. We will try it right here in this courtroom. We will show that the county attorney's office refused to prosecute the state's witness. We will show that Mr. Lugo is under this ax, this ax of a criminal charge being placed against him, putting him in jail, removing him from his heroin. We will show the interest of the state's witness in testifying, as you will surely hear him testify that he received a bonus. We will show you that he went on the payroll and, finally, when it is all over, we will prove to you that the defendant was not guilty.

That is the type of opening statement that is specifically approved by the Supreme Court of Arizona in State v. Burruell. And for those reasons and the reasons previously stated, including, Your Honor, the opening of the door by the prosecutor talking about these prior proceedings, we say that while the courts have held, and so it is a hard position for me to argue that this is not improper words, that these words that were uttered were not improper at their termination, it is a hard position for me to argue that, since the judges have said the other way. Still, the law is there.

We feel that the prosecutor opened the door by talking about these prior prosecutions, and this is one thing that was omitted from the fact presentation here, of course.

After the prior proceedings were mentioned, after the trial was talked about, then the prosecutor also talked about the fact that there was a preliminary hearing with a magistrate who filed an information -- and information filed based upon the magistrate's ruling.

Now, you are not hearing a claim before you today that the words of the prosecutor at that particular time were improper.

QUESTION: But none of that is any of these opinions?

MR. BOLDING: Yes, Your Honor, it is in the -- it might not be in the opinion itself, it is in the appendix regarding Judge Walsh's, the District Court's ruling, in his colloquy with the prosecutor at that time.

QUESTION: But it is not in his opinion?

MR. BOLDING: No.

QUESTION: It is not in either one of the Court of Appeals?

MR. BOLDING: No, becuase that point was not taken up on appeal in any manner.

QUESTION: So why are you arguing it?

MR. BOLDING: That opens the door, Your Honor, to the defense counsel's last statements.

QUESTION: Well, I don't see how we can get in that door --

MR. BOLDING: Well, sir --

QUESTION: -- if no one else went in there.

MR. BOLDING: Well, it is our contention, Your Honor, that that is exactly one of the reasons for allowing this type of a statement. In other words, the prosecutor was, according to the finding by the Supreme Court, the Arizona Supreme Court in its original opinion, a finding that the case should be upheld by the trial court if there was misconduct of the county attorney. And that opinion, Your Honor, which you have, states fully or semi-fully the facts upon which that conclusion was based.

QUESTION: Is that the memorandum?

MR. BOLDING: Yes, Your Honor, and that is --

QUESTION: Well, why do you call it an opinion if it is a memorandum?

MR. BOLDING: Well, Your Honor, under 48(c), rule 48(c), this is the law of the case. It is a memorandum opinion which may not be cited by another in another case at another time, but this is specifically under 48(c). It has a provision saying that is the law of the case notwithstanding, and so that is why we feel that we are entitled to cite it here, Your Honor.

QUESTION: Well, did we grant to review these matters you are talking about now or were they not washed out when a new trial was granted?

MR. BOLDING: Your Honor, I do not believe they were washed out when the new trial was granted, because what we are

getting at in part here I thought was the fact that the county attorney is saying, well, he had no right to say what he said and that you therefore should take a look at it.

QUESTION: I thought we were reviewing here whether the misconduct of the defense was so gross that it warranted the declaration of a mistrial, and that is the question before us, and whether it was appropriately analyzed.

MR. BOLDING: Yes, Your Honor, I think that is correct. We feel that the background is a part of the determination as to -- because you have to take the defense counsel's conduct in context as it happened during the trial, Your Honor.

QUESTION: If you wish to use your limited time arguing that, go right ahead.

MR. BOLDING: Well, Your Honor, I mention that. I think that is an integral part of it and I think that that is adequately covered in the brief also.

The evidence, Your Honor, Mr. Chief Justice, that you mentioned, could have come in regarding credibility of the witnesses, in particular the chief detective handling this case -- and it is cited on page 8 of our brief -- talks about the fact that there is -- in response to a question by defense counsel at another hearing -- talks about the fact that there is a number of times when I talked to you, Mr. Defense Counsel, when I really don't tell you the truth. This is the type of credibility that we would be getting into with this testimony, and we

feel that Arizona law clearly allows us to go into that type of testimony, Your Honor, and that type of statement in the voir dire and in the opening.

QUESTION: Mr. Bolding, one Arizona case that most clearly supports your view that this testimony about the prosecution suppressing the evidence of the witness who saw the man run away, that that would have been admissible as impeachment, what is the strongest case you've got for that proposition?

MR. BOLDING: Burruell.

QUESTION: Burruell?

MR. BOLDING: Yes, Your Honor.

It is our contention, if it please the Court, that the opinion of the Ninth Circuit accurately states what happened here. The opinion of the Ninth Circuit says we don't really know what happened, why the trial judge granted the mistrial. It could have been because he, as shown in the concurring opinion, it could have been because he recited this rule 314 which, as I stated before, in two of its sentences, two out of its three sentences was held to be unconstitutional, and which was not in effect at that time, which was the old rule that was in effect for this case only.

However, we recognize upon research that it was in effect at this particular time. The Ninth Circuit says maybe it is possible for the trial judge to have ruled that the remark was error, therefore we have to have a mistrial, as it was for

the trial judge to have looked at the record, considered everything, determined that there was a manifest necessity for a mistrial, for a new trial. The Ninth Circuit, we submit, Your Honors, states the situation very accurately.

The Court of Appeals in this case, the Ninth Circuit, used a totality of circumstances test in which one of the factors considered was whether a finding of manifest necessity was made or whether there was a consideration to the alternatives to the mistrial.

The court expressly said it did not require the recitation of these talesmanic words, manifest necessity, but said that on review that their record reflected that the trial court did not make any such finding and did not consider any alternatives.

The court did not express that any impropriety by the defense counsel was of a magnitude that it would prevent the jury from arriving at a fair and impartial verdict. And in the concurring opinion, sir, it was stated that there was no explicit or implicit finding of manifest necessity. It was stated that a greater part of the argument was devoted to whether the defense counsel's remarks were improper and whether the Supreme Court's decision could be brought to the jury's attention.

When the motion was first argued, the --

QUESTION: Well, the conclusion of the Court of Appeals was that it was just as likely that the Superior Court judge had

granted a motion for mistrial without finding manifest necessity, it would necessarily follow then that the Superior Court judge would have dismissed or granted a mistrial of the prosecution's case for what it conceived to be misconduct of the defense counsel in a situation which would not have permitted retrial. That is just an absurdity.

MR. BOLDING: I'm sorry?

QUESTION: Well, you say that the Ninth Circuit says the Superior Court judge may not have found manifest necessity or might not have thought there was manifest necessity.

MR. BOLDING: Yes.

QUESTION: Well, if that were the case, the Superior Court judge would have granted the prosecutor's motion for a mistrial based on defense conduct's claimed misconduct in such circumstances that the case could never have been brought again. That just doesn't make any sense in a rational system of jurisprudence.

MR. BOLDING: Well, Your Honor, it was granted only without any additional matters being brought to the trial judge's attention, only with the additional thought of this rule 314, which says don't talk about the previosu conviction, in essence. And that is when the mistrial was granted.

QUESTION: Well, was the mistrial motion argued at all, was that it?

MR. BOLDING: Yes.

QUESTION: And did people talk about what the rules were?

MR. BOLDING: Yes, Your Honor, to an extent.

QUESTION: Well, are you suggesting that the judge was ignorant as to what the controlling standard for a mistrial was?

MR. BOLDING: I think that this judge thought, Your Honor, that because of rule 314, which says don't talk about the previous conviction, because that was mentioned, that therefore there was error and therefore the mistrial was granted, because he did previously say --

QUESTION: You are suggesting that he was ignorant of the controlling federal standard, is that it?

MR. BOLDING: Yes, sir. I am saying that he previously stated that --

QUESTION: So you think judges have to say what the standard is in order to avoid being thought to be ignorant?

MR. BOLDING: No, sir. No, sir. All I want them to state is what the -- on what basis they are granting the mistrial, why they are granting the mistrial.

QUESTION: Well, suppose you got up and argued and said, "Judge, the only way you can grant this mistrial is if you follow Perez," and the judge says, "I know that," and then he just grants the motion for mistrial?

MR. BOLDING: Well, it is a serious problem and one that perhaps this Court could address, although we feel that

this is not the case in which a broad policy decision needs to be made, because of the ruling of the Ninth Circuit, because of rule 314 that the Ninth Circuit talked about. And we still feel that a good rule to follow and one which has been talked about by --

QUESTION: Do you seriously think that we took this case to pass on local rule 314 of the State of Arizona?

MR. BOLDING: No, sir. No, sir, I don't.

QUESTION: Suppose the judge had said, in granting the motion for a mistrial, "I'm granting a mistrial because of grossly unprofessional conduct of the defense counsel which has tainted the minds of all the jurors to the point where there can't be a fair trial," do you think that would be equated by a reviewing court to a finding of manifest necessity?

MR. BOLDING: Probably, if he went on that particular point, it could well be, sir.

QUESTION: Well, why do you think he granted it in this trial?

MR. BOLDING: I think he granted the mistrial because of the mention of the granting of the former mistrial -- the new trial, I'm sorry, and because of rule 314 of the Arizona rules.

QUESTION: Well, even if rule 314 had never existed on the books or had become obsolete, had been eliminated and you had no rule, does not the law of Arizona permit the judge

to use sound judicial discretion to determine whether or not there has been taint that would impair a fair trial?

MR. BOLDING: Yes, sir.

QUESTION: Then why is the rule important one way or the other?

MR. BOLDING: Well, only because of the sequence of events in which they happened, and that is the mistrial motion denied, previous discussion about the admissibility of whether the Supreme Court agreed that the new trial should be granted, and then the granting of the mistrial after the rule was shown to the judge. It was that simple, Your Honor, and we submit that --

QUESTION: Is what you are saying, if the 314 rule had never come up, never been mentioned, there would have been no mistrial?

MR. BOLDING: That's correct, sir.

QUESTION: And the inference being that there would have been no mistrial because there had been no finding of manifest necessity?

MR. BOLDING: There had not been thus far in the trial, yes, Your Honor, I agree with that.

QUESTION: And you say this, even though it was the defense that made the first motion for a mistrial?

MR. BOLDING: It was the defense that made the first motion for a mistrial upon the prosecutor's improper remarks, we

feel improper remarks, and an objection later on to the prosecutor's remarks about the magistrate and the preliminary hearing, again an objection, again overruled.

QUESTION: With all this wrangling and counter-wrangling, couldn't the judge have determined a fair trial just could not be had, and doesn't that equate with a finding of manifest necessity?

MR. BOLDING: He could have, sir, but we submit that we don't know that. We don't know what he found. We know only the sequence of events, sir.

Thank you very much.

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

ORAL ARGUMENT OF STEPHEN D. NEELY, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. NEELY: Just for a moment, Your Honor. Mr. Chief Justice, and may it please the Court:

One thing I do want to make clear, particulary reflected by a question by Mr. Justice Rehnquist, I did not take the position that Judge Walsh would necessarily have stated or found that the record supported the finding of the mistrial position. What I take is that Judge Walsh indicated that he had read and reread the record and that had there been a specific finding, that would have basically settled it for him.

The implication that I read from that is that we

don't really know whether or not he agreed with the trial judge's finding but that the basis for his granting the writ of habeas corpus was purely and simply that the trial judge didn't say I find a manifest necessity.

I think that it is clear from arguments of counsel and the answers to the questions that this case is one that turns on the facts, but again I would suggest that the position taken by the Ninth Circuit Court of Appeals in this matter is essentially that in ordinary circumstances questions are raised, arguments are heard and findings are made, and that the only thing that is missing in this case is the findings; and I think that their position clearly is that if those findings had been there, it would have been a different story, because they talk about reluctantly dismissing. And I think it is also clear that the basic approach they used here was to say we decline to imply from the impropriety committed by defense counsel that this court made a specific finding of manifest necessity. I don't believe that that is a fair standard to apply against trial judges. I believe that there has to be, when you have set out your standard as being an abuse of discretion on the part of the trial judge, that there has to be in addition to the scrupulous exercise of discretion by the trial judge a scrupulous exercise of the Appellate Court's review of the record. In essence, I think that the Appellate Court has to go back to the record and has to determine whether or not the

trial judge's position was or was not abuse of discretion.

Surely, if I came up here as a defendant and said there was abuse of discretion, you would not hear me; on the other hand, to say as a prosecutor, well, there may have been but there are findings here that specifically state that there was a manifest necessity and that all the alternatives were considered, and that is final on the issue.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 3:01 o'clock p.m., the case in the above-entitled matter was submitted.]

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