ORIGINAL

In the

Supreme Court of the United States

JIM ROSE, WARDEN, Petitioner,	)	
v.	)	No. 77-1701
JAMES E. MITCHELL and JAMES NICHOLS, JR., Respondents.	)	

Washington, D.C.
January 16, 1979

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Washington, D. C.
Tuesday, January 16, 1979

The above-entitled matter came on for argument at 1:01 o'clock, p.m.

BEFORE:

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

WILLIAM M. LEECH, JR., ESQ., Attorney General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219, on behalf of the Petitioner.

WALTER C. KURTZ, ESQ., Legal Clinic, University of Tennessee Law School, c/o Metropolitan Public Defender, 303 Metropolitan Courthouse, Nashville, Tennessee 37201, on behalf of the Respondents.

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 77-1701, Rose against Mitchell and Nichols.

Mr. Leech, Mr. Attorney General, you may proceed when you are ready.

ORAL ARGUMWNT OF WILLIAM M. LEECH, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

This case had its origin or its genesis in late October of 1972, when the Respondents in this case were arrested for murder in Shelby County for a homocide committed in Tipton County, Tennessee. They were indicted in November of 1972 before the Grand Jury of Tipton County, which was chaired by an acting foreman who had been appointed by the trial judge under Tennessee's system of appointing the foreman of the grand jury.

The acting foreman was accompanied on the grand jury by twelve other grand jurors selected from the general venire of Tipton County. There was a per se plea in abatement to that indictment. A hearing was held in the trial court, and evidence was taken. The trial judge overruled the plea. It went on to trial, and a conviction was had against both Respondents and each was sentenced to 60 years.

The Respondents then perfected their appeal to the

Intermediate Court of Criminal Appeals, and the Court of Criminal Appeals considered the same assignments of error in the original plea which attacked the method of selecting the foreman of the grand jury, in that the plea originally alleged systematic exclusion in the appointment of the acting foreman of the grand jury by the trial judge.

The Court of Appeals ruled favorably for the state and against the plea. It then was appealed to the Tennessee Supreme Court. Certiorari was denied, and in the per curiam opinion the court found that the case had been adequately dealt with by the Court of Criminal Appeals.

Thereafter, in 1975, petitions were filed by Respondents in the District Court at Memphis for petitions of habeas corpus, writ of habeas corpus. Thereafter, reference to the magistrate was had by Judge Bailey Brown on the bench, and the magistrate did take proof, the trial record was filed and affidavits were submitted.

Subsequently, the case was dismissed by the District Court, in that the District Court found that the foreman of the grand jury had been selected for other reasons than racial. In essence, the proof before the court at that time was to the effect that the trial judge had selected the acting foreman of the grand jury because of his prior experience and the satisfactory manner in which he had performed that duty.

Petition to rehear was filed before the District Court,

which was further considered and overruled and then the appeal, of course, was taken to the Sixth Circuit Court of Appeals and the action of the Federal District Court at Memphis was reversed and the Sixth Circuit did find that there was a systematic exclusion in selection of the foreman of the grand jury.

Our arguments and contentions on behalf of the State of Tennessee, basically, are, number one, that Judge Brown's finding was correct, in that the foreman was selected for reasons other than racial, and that the foreman had been selected, acting foreman, to fill the vacancy of the normal foreman who was unavailable during that term of court, and the affidavits of the trial judge and the foreman of that grand jury both indicated that it was for prior experience and satisfactory work well done.

Further, at that time, it should be noted that the foreman of the grand jury did not vote in the indictment. The voting of the indictment was by twelve grand jurors who were selected from the general venire list.

Further, the record indicates that the race of the defendants, Respondents here, was unknown to them at that time, and that there was no mention or there was no alluding to the race of the Respondent defendants.

QUESTION: Does the grand jury vote have to be unanimous in Tennessee?

MR. LEECH: No, sir, it requires that twelve grand

jurors indict.

QUESTION: In other words, it takes a vote of twelve?

MR. LEECH: Yes, sir, and the foreman is, under Tennessee law, the thirteenth grand juror and may vote.

QUESTION: Under Tennessee law, before a person can be tried for this kind of an offense, must he be indicted by a grand jury or can there be an information?

MR. LEECH: Must be by grand jury, Your Honor.

QUESTION: Are the grand juries statutorily regulated as to size? Are they all theoretically thirteen?

MR. LEECH: Yes, sir, Mr. Justice Rehnquist.

QUESTION: Mr. Attorney General, I may have missed your stating it, but does the record show the race of the victims in this murder case?

MR. LEECH: Yes, sir, the record does show that the race of the victims was also black, as was the race of the Respondent Defendants.

QUESTION: Do you challenge, incidentally, the conclusions of the court below that Respondents made out a prima facie case?

MR. LEECH: No, sir, Your Honor. The court below did hold that a prima facie case was made out by the statement of the prior grand jury foremen, some three to four in number, who said to their recollection there had never been a black foreman of the grand jury in Tipton County.

I think that did make a -- We did not contest that, no, sir.

QUESTION: How about the judges of that court, what's the history there? Any Negroes ever been judges of that court? Is that in the record?

MR. LEECH: Mr. Chief Justice, it is not in the record, and I have no personal recollection.

QUESTION: You have no personal recollection either way?

MR. LEECH: No, sir, either way. I, frankly, am not that familiar with Tipton County. It is in upper West Tennessee, across the Mississippi River from the Missouri line. It is probably closer to St. Louis than it is to Nashville or Memphis.

I would also add that one witness testified before this grand jury panel. That witness was the arresting officer. After that a vote was taken, although there were some other twenty witnesses subpoenaed before the grand jury at that term.

At the trial, there were some five eyewitnesses, as to both defendants.

We contend that the trial court was correct in finding that it was based on pragmatic reasons and was neutral to the race issue.

The second argument that we put forth is that even assuming that error existed and that there was systematic exclusion in the selection of the foreman of the grand jury, that it

would be harmless error beyond a reasonable doubt, when the record is viewed on the whole, with the evidence of guilt being overwhelming at trial, free of reversible constitutional error and free of any constitutional error as to the petit jury make-up or to the grand jury makeup, who were selected from the general venire list.

The third argument and position which the state puts forth is that the federal habeas corpus should be limited when we have an issue involving the selection of the foreman of a grand jury, who is one of thirteen, with twelve voting members, and an opportunity has been had for a full and fair litigation in the state system which Tennessee has -- a three-tiered court system from the actual trial before a jury of a criminal offense, and further an extensive post-conviction relief act. Further, that if the trial is free from constitutional reversible error and no assignments are made to the petit jury; in essence, an extension of the Stone v. Powell case.

We say this knowing that this is the first time, to my knowledge, that squarely there has been any extension of the rationale in Neal in 1881 to extend to the foreman selection of a grand jury.

QUESTION: Is there anything in the record as to what the foreman does?

MR. LEECH: I am sorry?

QUESTION: Is there anything in the record, or any

place else, that tells you what the foreman does?

MR. LEECH: Yes, sir, The statutory description of the foreman's duty is in the record.

QUESTION: Is there anything beyond the statute?

MR. LEECH: Yes, sir. The foreman of the grand jury did submit an affidavit before the Federal Magistrate at the District Court level, in which he stated in this case that he did not vote, and that he did preside.

We contend that the foreman's chore is basically ministerial and administrative, in that it assists in the organizing of the grand jury scheduling of witnesses.

He stated that since he had been serving as foreman of the grand jury, which had been many years -- under Tennessee's system, they are usually reappointed, as was stated by the trial judge -- he had never voted except in one case.

QUESTION: I am not interested in his voting. I mean what does he do? Does he just sit there?

MR. LEECH: He schedules the witnesses who are to appear. He asks them questions and then he turns to the other members of the grand jury and asks them if they have any questions of the witness.

QUESTION: So he does have something to do?

MR. LEECH: Yes, sir.

QUESTION: He is sort of the chairman?

MR. LEECH: Yes, sir. He is the chairman of the grand

jury.

QUESTION: Can Juror A call a witness that he doesn't want? Does he determine who testifies and who does not?

MR. LEECH: No, sir. Under Tennessee law --

QUESTION: You said he calls the witnesses.

MR. LEECH: He schedules them, I would suppose, or does the ministerial function of calling them.

QUESTION: I mean, if the foreman of the grand jury decides who will testify and who will not testify, then that's just not a perfunctory position.

MR. LEECH: Mr. Justice Marshall, he does make -- he is not the sole arbiter of who testifies. Any grand juror can insist on or ask to hear from a witness. As a practical matter, I think most district attorneys general who have charge of the grand jury schedule and report on the indictment form who the witnesses are as a result of the investigation from the law enforcement officer. The foreman does work closely with the district attorney general when the grand jury is not in session. In many of Tennessee's counties, the grand juries are not in continuous session. Of course, in metropolitan areas, such as Nashville and Memphis and Chattanooga, they are in continuous session and there are usually two grand juries operating continuously.

QUESTION: Mr. Attorney General, you say there hasn't been any extension of Neal to foremen, but wouldn't your position

on the Stone v. Powell issue be the same with respect to challenging the composition of the entire grand jury?

MR. LEECH: Yes, sir. On the grand jury, we would, under the rationale encompassed in Stone, in that Tennessee has a full and fair trial and appellate practice and --

QUESTION: That issue on the grand jury just wouldn't be open in federal collateral relief?

MR. LEECH: Under habeas corpus, there is a collateral attack, yes, sir.

QUESTION: So, your position does encompass that. So I take it you are saying that even if Stone v. Powell would pick up challenges to the grand jury in general, it shouldn't pick up challenges to the foreman; is that it?

MR. LEECH: Yes, sir.

QUESTION: Or should they both be treated the same?

MR. LEECH: I would say, of course, there is a line at some point -- there is a breaking point. Obviously, we haven't gone to the arresting officer. We haven't gone to the committing magistrate, in the manner in which that individual is selected. There must be a breaking point.

Our position is that that breaking point should be after the petit jury for that relief.

I am candid to say that if the matter was brought before the Tennessee Appellate Court and systematic exclusion was shown, systematic exclusions of blacks to serve as grand

jurors, it should, I maintain, be reversed by the Court. But if a collateral attack --

QUESTION: Yes, but habeas corpus has been available on grand jury for a long time, hasn't it?

MR. LEECH: Yes, sir.

QUESTION: Well, I had understood your position to be, with respect to singling out the foreman of the grand jury, that not necessarily just under federal habeas, but as a matter of federal constitutional law, in this particular case, where the foreman doesn't vote, the general rule applying in the presumption of prima facie case to grand jury shouldn't apply just because of this particular foreman.

MR. LEECH: In this particular case, yes, sir.

QUESTION: I understand your position to be that, too.

QUESTION: Mr. Attorney General, just so I'll be sure I understand your position -- I understood it to be that quite without regard to the foreman -- Let's assume that you didn't have any foreman. You had a twelve-man grand jury that indicted the defendant, and thereafter the defendant was tried before a petit jury, the composition of which was not questioned, and the defendant was found guilty. And then the case wends its way through direct review, and ends up in federal habeas corpus.

I understand your position to be that federal habeas corpus does not apply to that type situation, that it cannot be invoked to review the question of whether or not the grand

jury was properly composed.

Is that your position?

MR. LEECH: Yes, sir.

QUESTION: Well, I wonder why you talk so much about the foreman. I take it that's an alternative position.

MR. LEECH: Yes. We just simply say that since it has never been extended to the foreman, it has been extended, as has been pointed out, to grand jury composition.

QUESTION: But in how many cases was it extended to the grand jury in habeas corpus, where the composition of the petit jury also had not been attacked?

MR. LEECH: A number, I think.

QUESTION: Well, how many?

MR. LEECH: I really don't know the number.

QUESTION: Was this question ever raised in any of those cases? Perhaps it was. I don't know. I am asking for information.

MR. LEECH: I really don't know the numerical breakdown.

QUESTION: But your point, I take it, is that whatever may be the law, with respect to the membership -- the voting members of the grand jury -- that has no bearing on the selection of the foreman?

MR. LEECH: Yes, sir, Mr. Chief Justice, that's correct. We are saying first that federal habeas corpus should

not be the writ available for a collateral attack on the grand jury composition itself in the absence of the other factors that were discussed in Stone v. Powell, or more particularly where there has been a full and fair and impartial trial and appellate review.

We first say that, but then we also say that certainly, assuming this, certainly we should not depart and extend it to include even the selection of a foreman.

QUESTION: Yes, but that's on the basic constitutional issue. It isn't on the applicability of Stone v. Powell.

MR. LEECH: Yes, sir.

QUESTION: And on the basis it was harmless error beyond a reasonable doubt.

MR. LEECH: Yes, sir.

Also, that's our other, in addition to the Federal District judge being correct in finding that the prima facie case was rebutted by neutral evidence that the decision was made for reasons other than racial.

QUESTION: Mr. Attorney General, in the harmless beyond a reasonable doubt argument, would it not always be true that any defect in the grand jury proceeding would be harmless beyond a reasonable doubt, if you got a finding of guilt beyond a reasonable doubt at the trial by the petit jury?

MR. LEECH: Yes, sir, in the absence of an actual showing of prejudice which I cannot imagine --

QUESTION: How can there ever be one when the man is proved beyond a reasonable doubt to be guilty. So, wouldn't that position effectively give the state free hand in doing whatever it wanted to do with a grand jury?

MR. LEECH: In the absence of an actual showing of prejudice --

QUESTION: Even if there was prejudice, wouldn't it still be harmless beyond a reasonable doubt -- i.e., prejudice at the grand jury stage, because you see the man had a fair trial -- if we assume the man had a fair trial and was found guilty?

QUESTION: In other words, it isn't the petit jury that determines guilt beyond a reasonable doubt. Doesn't that wash out any possible error in selection of the grand jury?

MR. LEECH: Yes, sir, Mr. Chief Justice, although I would hesitate to say any possible, because I could envision some grand jury participation beyond their regular role or --

QUESTION: Well, if it turned out that there were only ten grand jurors and the Tennessee law requires twelve, maybe there wouldn't be any indictment. That's a possibility.

MR. LEECH: Right.

QUESTION: Wouldn't that even be harmless beyond a reasonable doubt, because he had been proven guilty at a fair trial? I don't see how you are ever going to have any error under your rationale. Maybe that's right, but it seems to me

we just eliminate review of grand jury proceedings.

MR. LEECH: Well, it's the indictment itself that's faulty in the Tennessee law. Whatever occurred in the trial is void, because a defendant cannot stand trial in Tennessee without first being indicted. So, if the indictment is faulty, and it is shown that it is defective, even in state court --

QUESTION: That's a matter of state law, is it not, essentially?

MR. LEECH: Yes, sir.

QUESTION: I would think then that a bad grand jury could never be harmless error.

MR. LEECH: No, sir, not in state court. In state court, if you could show that the defendant on trial --

QUESTION: Wasn't validly indicted? Then his entire conviction must fall under Tennessee law.

MR. LEECH: Yes, sir.

QUESTION: And no one in federal habeas could say that's harmless error.

MR. LEECH: I would request to reserve a few moments for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney General.

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

ORAL ARGUMENT OF WALTER C. KURTZ, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

This case involves simply, I feel, the enforcement of the Fourteenth Amendment in federal courts.

The Court of Appeals found discrimination in the selection of the grand jury foreman, of the grand jury that indicted the Respondents and reversed their convictions.

The Respondents are asking you to affirm that judgment.

I see the issues as being three. One, whether there was discrimination in the selection of the grand jury foreman. If so, what is the proper remedy?

And then the third issue, the Stone v. Powell issue, is federal habeas corpus available in this kind of issue?

Now, the Attorney General has conceded --

QUESTION: Which one of those do you reach first?

MR. KURTZ: I had planned to begin with the discrimination issue in my argument, but of course logically if Your Honors were to expand Stone v. Powell --

QUESTION: That's sort of non-constitutional, isn't it?

MR. KURTZ: The jurisdictional --

QUESTION: Yes, the Stone v. Powell issue -- If Stone v. Powell bars any review here, we never reach a

constitutional issue, I take it.

MR. KURTZ: That's correct, Your Honor.

I had planned to begin with the discrimination issue and I will do so, but I do concede that point, of course.

The Attorney General has conceded that there was a prima facie case proven in the District Court. The District Court judge found there to be a prima facie case. And, of course, obviously, the Court of Appeals agreed.

The District Court and the Court of Appeals, however, disagreed on whether the prima facie case was rebutted.

Now, what did the state produce in the District Court in an effort to rebut the prima facie case?

QUESTION: Mr. Kurtz, before you get to that, would you tell me what period of time your evidence covered with respect to no black ever serving as foreman on the grand jury?

MR. KURTZ: Yes, Your Honor, it covered a period of time from the early '50s to 1972. I say the early '50s --

QUESTION: Continuously?

MR. KURTZ: That's what the Court of Appeals found, Your Honor.

QUESTION: What does the record show? Aren't there gaps in that evidence?

MR. KURTZ: Nobody has found there to be gaps, but there were three prior grand jury foremen testifying, one who had served in the early '50s. All of whom testified that

within their memory they could not recall a black grand jury foreman.

I suppose it's possible that there was a grand jury foreman who served in that period of time not called, and in that respect there may be a gap, but --

QUESTION: One of the three testified he didn't know at all, so you are down to two.

MR. KURTZ: I don't recall that, Your Honor. As I recall the record, all three said that they did not believe there had ever been a black grand jury foreman.

QUESTION: While we are in that area and since I take it you are a practitioner in that area, do you know, as an officer of the court, whether any judge of that court has, since 1900, let us say, been Negro?

MR. KURTZ: No, Your Honor, I do not. I'm from Nashville, which is approximately 180 miles from Tipton County and have no personal knowledge, just as the Attorney General. It is a good deal geographically removed from where I am.

QUESTION: What's the city near?

MR. KURTZ: Covington, Tennessee, is the county seat, Your Honor.

And I would correct the Attorney General in one thing. Tipton County does border on Shelby County, and rather than being in the Northwest corner, it is in the Southwest corner of the state.

QUESTION: Well, Shelby is Memphis.

MR. KURTZ: Yes, Your Honor.

QUESTION: Well, there is at least one Negro judge in Memphis.

MR. KURTZ: Yes, Your Honor.

I will return to the state's efforts to rebut the prima facie case in the Federal District Court.

They submitted an affidavit from the state trial judge in which the state trial judge said that he had chosen the grand jury foreman that indicted the Respondent, because this individual had served before and his regular foreman was going to be out of the county. Then he sums up, in his last sentence of his affidavit, quote -- this is in the Appendix at page 113 -- "I don't think I have really given any thought to appointing a black foreman, but I have no feeling against doing so."

He had never given any thought to the appointing of a black grand jury foreman.

The state also submitted the affidavit of the grand jury foreman who tells us that he did not vote on the indictment.

Now, once a prima facie case is shown, I say the state has a much greater obligation than to just come into court with an affidavit of the selecting officer saying that he didn't choose this person because of race.

As a matter of fact, the affidavit is much stronger

than that because the affidavit indicates that he did not even consider blacks.

But what didn't they show? There is no proof that a black had ever been considered, no proof that a black had ever served, no proof as to what criteria was used, no proof of any rational selection procedure, like personal interviews, etcetera. And there is absolutely, certainly no proof that the blacks in Tipton County were unqualified to serve.

QUESTION: What if you had a case -- this is hypothetical now -- where since Tennessee was admitted to the Union the record showed that the judge of this court that we are dealing with had always been a white male. Would you be making the same argument you make here in this case?

MR. KURTZ: I don't think so, Your Honor, because --

QUESTION: Why not?

MR. KURTZ: In Tennessee, judges are elected.

QUESTION: Well, the electorate can be biased and discriminatory, as well as individuals; isn't that so?

MR. KURTZ: That's certainly true, Your Honor, but I don't think that this Court has ever involved itself in the motivation of individual voters that comprise an electorate.

QUESTION: That shouldn't stop you. We never decided what the Sixth Circuit decided here either.

MR. KURTZ: It may not stop me, Mr. Chief Justice, but of course I am not here to argue that point.

QUESTION: No, but we often explore with hypothetical questions the reach of an argument that's presented to us.

MR. KURTZ: Yes, Your Honor.

But I do think the selection process there is certainly different, certainly susceptible to the exercise of racial prejudice, but nothing that this Court has ever entered into. I don't believe that it would be proper for the Court to enter into that sort of political judgment as to why voters are motivated to elect who they do.

The prima facie case is important, and what the state failed to prove is important, because the prima facie case shifts the burden of proof.

Now, the judge did tell us that he did not consider blacks. He gave them no thought. A person who selects members of the grand jury has a duty to become familiar with persons eligible for jury service, a duty to refrain from a course of conduct that naturally tends --

QUESTION: He didn't select the members of the grand jury, did he?

MR. KURTZ: No, I use that in a sort of generic term, Your Honor. I am talking about the grand jury foreman.

-- but a duty to refrain from a course of conduct.

This Court's cases have never allowed a simple protestation that "I didn't mean to discriminate" to be sufficient to overcome a prima facie case.

In this case, we have far more than a simple protestation that "I didn't mean to discriminate." We have the statement that "I did not consider blacks." "I didn't give them any thought, although I don't have anything against them."

I think we have clearly proved a case of discrimination.

QUESTION: In the process of the petit jury that tries criminal cases, who does the selecting there?

MR. KURTZ: The petit jury is chosen from the master jury list or venire, Your Honor, and it comes from the same basic pot of jurors that the grand jurors are drawn from.

QUESTION: What's the mechanics of actually bringing forty or fifty or a hundred people in at a given time? District Court or jury commissioner, or what?

MR. KURTZ: Commissioners choose the master jury list, but then, as I recall, the clerk administers a system by which names are put in a pot. Until recently, a 10 year-old child was brought in and drew out names at random. They went to serve the grand jury. They went to serve the criminal court juries, the civil court juries.

But then completely outside of that is the judge's personal sort of selection procedure, where he can reach out into the general population and choose anybody he or she wants as the foreman, or foreperson, of the grand jury.

QUESTION: Mr. Kurtz, I am a little bit concerned

about the same point that Mr. Justice Blackmun raised with you earlier about the actual existence of a prima facie case.

As I understand it, the magistrate to whom the District Court referred this matter decided that you had made out a prima facie case. The District Court then, without opinion, denied relief, and the Court of Appeals reversed the District Court.

Now, what standard does the Court of Appeals review? Is that clearly an erroneous test?

MR. KURTZ: I don't believe it's a clearly erroneous test, Your Honor, because, for one thing, there was no evidentiary hearing in the District Court, none whatsoever. It was based solely upon the statistical information available, that there hadn't been any blacks, and the judge's affidavit. So, I don't think a clearly erroneous rule applies for an additional reason also, in that we have mixed questions of law and fact here, obviously. And the clearly erroneous rule does not apply to that.

I also agree with your --

QUESTION: The Court of Appeals didn't send it back for an evidentiary hearing. It simply said the habeas issue, didn't it?

MR. KURTZ: Yes, Your Honor, because I think that they felt competent that the district judge had applied the facts -- or the law improperly to the facts.

QUESTION: Did the state ever have an opportunity to rebut the prima facie case, even if the district court had agreed with the magistrate that a prima facie case had been made out?

MR. KURTZ: Yes, Your Honor, and I do disagree with you that the District Court did not find a prima facie case. I would refer Your Honor to the District Court's decision on page 99 of the Appendix, the first paragraph. This is the District Court judge saying, "It would appear that a prima facie case has been made with respect to discrimination in the selection of the foreman of the grand jury."

Only then did the district judge allow the state an opportunity to file affidavits, and only then did the state file the affidavit of the District Court judge -- excuse me, the affidavit of the state court judge and the affidavit of the foreman of the grand jury.

QUESTION: You said the District Court gave the state an opportunity to respond.

MR. KURTZ: Yes, Your Honor.

Now, let me turn quickly to the issue of relief, which I think is one of the key issues in the case, obviously, and I suppose what legitimately -- the legitimate questions about the fact that the foreman did not vote in this matter.

The traditional remedy has always been avoiding the indictment for discrimination in grand jury cases as well as

petit jury. But many of this Court's cases have involved solely grand juries. Bush v. Kentucky, the first one that involved solely the grand jury, 1883. And then through more recent cases, Alexander v. Louisiana, Peters v. Kiff and then Castaneda.

What of the importance of the foreman in this case? The record in that regard does not contain many facts. The only thing we know, on page 23 of the Appendix, is the foreman who served at this particular grand jury, telling us, "I usually question the witness first to get basic information to the attention of the members of the grand jury. And then I ask each witness that has been examined if there is anyone in the room that wants to ask further questions of the witness. They are, each and every one, given an opportunity to question the witness."

So, he controls the availability of the witness and when to break off the giving of evidence.

But what more does he or she do?

Under Tennessee law, the grand jury is an entity made up of thirteen members. The foreman is the presiding officer and leader of the grand jury.

Studies in small group dynamics would certainly indicate the force that a leader of such a small group can exercise. All of us who practice criminal law and have some knowledge of grand juries and petit juries realize the

tremendous influence of the foreman.

QUESTION: Are you suggesting that --

QUESTION: I don't know what happens in a grand jury room. Now, if you are in the habit of going in, you are in a different category from me. I don't go in on them. I thought all lawyers were prevented from going in. Is that true in Tennessee?

MR. KURTZ: That is also true in Tennessee.

QUESTION: How do you know what goes on in there?

MR. KURTZ: Well, we don't know exactly what goes on, but I think we are well aware of certainly the power of the foreman of the petit jury, the power of any chairman or leader of a small group. And we can extrapolate from that as to the power of the foreman.

Yes, Mr. Chief Justice?

QUESTION: Are you suggesting that a member of the grand jury, any member of the grand jury, can call any witness he or she wants to call?

MR. KURTZ: No, Your Honor, I don't suggest that, and I don't disagree with what the Attorney General said about that.

QUESTION: You implied in your statement that the foreman dictated what witnesses were going to be heard. That's not so at all, is it?

MR. KURTZ: Not as a matter of law, but I think as a

matter of just controling the proceeding.

QUESTION: When they are satisfied with what's presented to them, that's one thing, but is not the prosecuting attorney some factor in what witnesses are going to be presented to a grand jury?

MR. KURTZ: Oh, absolutely.

QUESTION: He is the dominant factor, isn't he?

MR. KURTZ: That is true.

QUESTION: Unless Tennessee is different from all the other states of the Union.

MR. KURTZ: Tennessee is not different in that regard, Your Honor, and I didn't mean to create that impression. But I wanted to impart the information that the foreman does occupy a most important role. In this particular case, the foreman interviewed the witnesses ahead of time and brought them in. But I don't suggest that the foreman is more powerful in that regard than, say, the District Attorney General.

QUESTION: Are you coming back to the Stone v. Powell issue? Because I would like to ask you some questions whenever appropriate.

MR. KURTZ: Yes, Your Honor. I will reach that, but of course I'd be glad to address it.

QUESTION: No, if you are arguing another point, but you mentioned Castaneda and some other cases a little while ago

and I thought you were going to continue with the Stone v. Powell argument.

Carry on and let me know when you get to it.

MR. KURTZ: I will definitely get to it, Your Honor.

Furthermore, the grand jury foreman must sign the indictment in Tennessee or the indictment is void, even if the grand jury foreman does not vote. And, of course, the grand jury foreman has certain statutory duties even out of term.

I think all these things are outlined in great detail in the briefs of this case.

Why the voiding of the indictment?

QUESTION: You said the grand jury foreman must sign the indictment.

The indictment need be returned by only twelve of the grand jurors?

MR. KURTZ: Yes, Your Honor.

QUESTION: So, if the foreman were the thirteenth and he disagreed with the action of the twelve, he would nonetheless be required to sign it; is that correct?

MR. KURTZ: Yes, Your Honor.

The foreman is the spokesperson of the grand jury. The grand jury can only act vis-a-vis the court through the foreman, but I don't suggest that the foreman could somehow refuse to sign. He would have to sign or I assume he would be subject to mandamus.

This Court has always supported the remedy of the voting of indictments, by two theories, both used, I think. The presumption of prejudice. Certain circumstances are so susceptible to abuse that the Court will assume prejudice. I think this is a recognition of the evidentiary problems that are present if you had to prove actual discrimination in court. Grand jury secrecy. Most difficult.

In the Castaneda case, for instance, I don't believe that there is any proof of actual prejudice. This Court has always assumed that to be a legitimate rationale in support of that rule.

Then the rule of judicial integrity. While the rationale of judicial integrity has fallen in, well, bad times in the Fourth Amendment area, it has not fallen in bad times in this area.

For instance, in Your Honors' case, Peters v. Kiff, you allowed a white defendant standing to challenge grand jury discrimination because blacks had been excluded. I think that that is a strong statement that this Court adheres to the rationale of judicial integrity.

Chief Justice Stone said, in an older case, Hill v. Texas, "The conviction cannot stand because the Constitution prohibits the procedure by which it was obtained. Equal Protection of the law is something more than abstract right. It is a command which the state must respect, the benefits of

which every person may demand. Not the least of our constitutional system is that its safeguards extend to all, the least deserving as well as to the most virtuous."

Now, Mr. Justice Powell, I will turn to the Stone argument.

QUESTION: May we start out by my asking you who was injured in this case by the foreman of the grand jury having been selected in a discriminatory manner?

MR. KURTZ: I think the Defendants.

QUESTION: How was he injured?

MR. KURTZ: Both of them were injured, Your Honor, because their personal Fourteenth Amendment rights were violated.

QUESTION: In what respect? Are you challenging the composition of the petit jury?

MR. KURTZ: No, Your Honor.

QUESTION: Is any error before us today in the trial that you are asserting?

MR. KURTZ: No, Your Honor.

QUESTION: So you stand here today challenging only the validity of the grand jury that indicted him?

MR. KURTZ: Yes, Your Honor.

QUESTION: And, again I ask you: How was your client injured if he were tried and convicted by a jury properly selected?

MR. KURTZ: Well, again, I must say because their personal Fourteenth Amendment rights were violated.

QUESTION: Were your clients' rights violated in terms of judicial integrity, as you use that term, any more than the public generally?

MR. KURTZ: Well, I think they were both violated, Your Honor.

QUESTION: You concede your client had a fair trial, and he was found guilty. That guilt has been affirmed by at least three courts. You are not challenging that?

MR. KURTZ: For purposes of this hearing, I do not challenge that, Your Honor.

QUESTION: What is the purpose, the historical purpose, of habeas corpus?

MR. KURTZ: I believe the historical purpose of habeas corpus prior --

QUESTION: It had something to do with innocence, didn't it?

MR. KURTZ: Yes, Your Honor, it had something to do with innocence.

QUESTION: Is innocence involved in this case at all?

MR. KURTZ: No, Your Honor.

QUESTION: All right.

MR. KURTZ: But habeas corpus law has changed considerably since it had something to do with innocence, as you

say, and also has to do with the jurisdiction of the court.

QUESTION: Habeas corpus has to do with release from unlawful confinement that may or may not have something to do with innocence in a particular case. But it is release from unlawful confinement, isn't it?

MR. KURTZ: Yes and Congress --

QUESTION: Sometimes it has to do with innocence, sometimes it doesn't.

MR. KURTZ: Yes.

QUESTION: But is there any unlawful confinement in this case?

MR. KURTZ: Yes, Your Honor. If we look back over one hundred years of this Court's decision enforcing the Fourteenth Amendment, I think there is no doubt that this conviction was obtained in violation of the Fourteenth Amendment and, therefore, under the federal habeas statute --

QUESTION: The indictment --

Which is the first case you rely upon?

MR. KURTZ: I would start with Strauder v. West Virginia, Your Honor.

QUESTION: The attack there was on the petit jury as well as the grand jury.

MR. KURTZ: That's correct, Your Honor.

QUESTION: What was the next case?

MR. KURTZ: Bush v. Kentucky, an 1883 case, in which

the attack was solely on the grand jury.

QUESTION: Was the issue you are arguing here today argued in that case?

MR. KURTZ: No, Your Honor, but there is a case in which the issue that interests Your Honor was argued.

QUESTION: Which case was that?

MR. KURTZ: That is Cassell v. Texas, a 1950 case --

QUESTION: Was that a habeas corpus case?

MR. KURTZ: No, it is not, Your Honor.

QUESTION: That's a very different case then.

MR. KURTZ: The issue on habeas corpus has never been addressed by Your Honors.

QUESTION: This is a novel case in that respect?

MR. KURTZ: It is, Your Honor.

QUESTION: That's my point.

MR. KURTZ: But I would like to submit that there are tremendous differences in this case and in Stone v. Powell which should not lead to the same result. They are the differences between the exclusionary rule and the remedy in this case. The rationales are different. The rationale voiding the indictment in this case is supported by presumed prejudice, judicial integrity, and maybe deterrence, but only maybe, possibly, deterrence.

This Court's decisions have never rested on that.

The exclusionary rule is based on deterrence alone.

The recognition that deterrent effect is attenuated so greatly on federal habeas corpus that in a balancing procedure this Court recognizes that there are certain interests more important than the deterrent effect in enforcing --

QUESTION: Are you familiar with Justice Stewart's opinion to the Court in Elkins v. United States?

MR. KURTZ: No, Your Honor.

QUESTION: That came out a number of years ago. I think it spoke quite substantially about judicial integrity in connection with the Fourth Amendment.

MR. KURTZ: Yes, but as I read Stone v. Powell, Your Honors have rejected such a rationale in the area of the Fourth Amendment, or if not rejected certainly entered into a balancing test, a balancing test that has never been used by this Court in grand jury discrimination cases.

QUESTION: That had to do with the exclusionary rule, and it did, as my brother Rehnquist correctly recollects, emphasize the interests of judicial integrity in connection with the exclusionary rule --

MR. KURTZ: Yes, Your Honor.

QUESTION: -- which is a corollary to the Fourth Amendment --

MR. KURTZ: I certainly recognize that and support it, but I don't think that that rationale is supported by this Court's decision in Stone v. Powell.

QUESTION: You said in response to a question from Mr. Justice Stewart earlier that indictment can be only by twelve votes of a grand jury and not by information, as in some states.

MR. KURTZ: Yes, Your Honor.

QUESTION: Suppose Tennessee law allowed a charge to be instituted, even in a homocide case, by information from the prosecutor, and it appeared that prosecutors ever since Tennessee had been a member of the Union had been white males appointed by the Governor, since you don't want to get into the election process. Would your argument be the same if the charge had been instituted by that particular prosecutor?

MR. KURTZ: I think that that could raise substantial questions as to the validity of the charges, if it was shown that racial discrimination had been exercised in the selection of the prosecutor.

I would admit that that would raise tremendous difficulties in our system of justice. It obviously would not be as easy to administer as this rule is in a grand jury.

QUESTION: First you would try out the prosecutor before you could try the defendant. As here, you want to try out the grand jury before you try the defendant.

MR. KURTZ: That's possible, Your Honor.

QUESTION: Obviously, the integrity of the grand jury is important to society. No one questions that. What other

ways may the grand jury integrity be protected legally, apart from the type action that you have here today?

MR. KURTZ: Well, of course, the grand jury integrity could be protected by the Federal Criminal Statute. There is such a statute, 18 U.S. Code 243. Class action lawsuits as used in Carter v. Jury Commission.

QUESTION: And Turner v. Fouche.

MR. KURTZ: Yes, Your Honor.

QUESTION: And, of course, there can be direct attack on direct appeal in the state court and this Court also.

MR. KURTZ: Yes, Your Honor.

QUESTION: So, there are at least three other ways, without resorting to habeas corpus.

MR. KURTZ: That's correct. There are alternatives available, but I think that there are legitimate differences between the exclusionary rule and the rule in this case. It does not appear that we are going to be able to get into -- My time is up now.

Thank you, very much.

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

REBUTTAL ORAL ARGUMENT OF WILLIAM M. LEECH, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

Just very briefly, I would conclude that the Fourteenth Amendment rights have not always, universally, uniformly been protected by the vehicle of habeas corpus, such as where a state law requires that the plea be filed in advance and it isn't done. Then the individual would be barred from raising it for not having raised it timely.

Another is in a case where there is a guilty plea, as in Pollack (?), where a guilty plea some twenty years later the defendant could not come back to be heard.

I would simply say that there are other means for attacking discrimination in the systematic exclusions of members of recognized classes from participation in society, whether it be -- whether or not it's a school board appointment or whether it affects the judiciary. If it affects the judiciary, the Supreme Court of the State involved may, by its inherent rule-making power, promulgate guidelines and procedures to follow for the trial bench in functioning through its appointed powers.

In addition to the class action in the traditional --

QUESTION: Mr. Attorney General, you are not suggesting this Court should promulgate rules for the Tennessee

courts to follow, are you?

MR. LEECH: No, sir. I said the state court. If the Supreme Court of the State of Tennessee perceives -- this is a statewide system we have -- perceives that there have been numerous violations or it is not working as a system because of the propensities of some appointed judges --

QUESTION: What if, as in this case, the Supreme Court of Tennessee perceived there was no problem and the federal judges thought there was a problem? Isn't that the heart of the matter?

MR. LEECH: That's the heart of the matter, yes, sir.

And I would say that that, I suppose, is the deterrent factor under which the rationale of federal habeas corpus has been used heretofore in Fourteenth Amendment questions.

We are simply saying in modern context, today, that ample remedy is available and that in this kind of case, where a full and fair and impartial hearing has already transpired, that should be limited.

QUESTION: Is it generally considered a full, fair and impartial hearing when the judge whose conduct is under review is the judge who is reviewing that conduct, which is what we have here? The trial judge was passing on the sufficiency of his own handling of the matter, wasn't he?

MR. LEECH: Passing on the plea in abatement, which went to the selection of the fore -- which would be his

appointment, yes, sir.

QUESTION: Is that normally an adequate, full and fair hearing of the issue, when you have a judge trying himself, in effect?

MR. LEECH: Your Honor, he would be trying the issue presented to him as to whether or not there was -- and he did submit his affidavit --

QUESTION: They said he did not follow the proper procedure. That was the challenge, whether he followed the proper procedure.

MR. LEECH: If Your Honor please, it wasn't so much following the proper procedure as much as it was the charge being discriminating by intentionally excluding blacks. And I don't think that,when his affidavit is read as a whole, submitted into the record, is what he said. He simply said he seldom, if ever, appointed people and when he did he simply reappointed those who had been there, and he had really never considered --

QUESTION: And then he read his own affidavit and decided that didn't show discrimination.

MR. LEECH: Yes, sir. And then he also presided as the trial judge for the petit jury, but then that was reviewed by the Criminal Court of Appeals, in reviewing the entire record, and then the Supreme Court in reviewing the record.

QUESTION: But the issue as to a full and fair trial, as I understood it, didn't relate to whether or not the foreman of the grand jury had been properly selected. The issue so far as habeas corpus being a proper remedy relates to whether or not there was full and fair trial of the defendant by the petit jury and the judge who presided over it.

MR. LEECH: Yes, sir, on the merits of the indictment as returned.

QUESTION: That's a different test from the Stone v. Powell test. Under Stone v. Powell, the issue on the full and fair hearing isn't just the trial; it is whether there was a hearing on the issue of whether or not the evidence had been illegally seized. Isn't that right?

MR. LEECH: Yes, sir.

QUESTION: Is that what you are asking for? Or are you just saying whenever there is a fair trial that's the end of the matter? That's kind of an extension of Stone v. Powell.

MR. LEECH: I am not saying that at all. I am saying that it does involve -- We say there was a full and fair hearing on the plea in abatement itself, but that did not go to the trial of the case.

QUESTION: But in order for your theory of Stone v. Powell to apply, we would have to decide that there was a full and fair hearing by the judge on the issue of discrimination in

picking the grand jury foreman.

Isn't that right?

MR. LEECH: Your Honor, maybe I missed it, but I was under the impression that our theory is that there was a full and fair hearing on every aspect in the accusatory spectrum, including a full appellate review and post conviction remedy, as a system.

QUESTION: Let's be precise. If there was not a full and fair hearing at the trial court level in the state system on the question whether the grand jury foreman had been picked improperly, there was not a full and fair hearing by the trial judge in Tennessee, would or would not Stone v. Powell bar review, in your view?

MR. LEECH: Yes, sir, it would be reviewable in the state court. If the state court felt that he did not --

QUESTION: No, no. I said would it be reviewable in the federal court on that hypothesis?

MR. LEECH: No, sir, under our contention that it should be expanded to include this issue --

QUESTION: You say Stone v. Powell would bar, even if there was not a fair hearing by the state trial judge on the issue raised in the federal habeas corpus proceeding?

MR. LEECH: Yes, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:00 o'clock, p.m., the case was submitted.)