In the

ORIGINAL

Supreme Court of the United States

HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, Petitioner,	)	
v.	)	NO. 80-1082
WILLIAM R. PHILLIPS	)	

Washington, D. C.

November 9, 1981

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HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, Petitioner, v. WILLIAM R. PHILLIPS : No. 80-1082

Washington, D. C.

Monday, November 9, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:03 o'clock p.m.

APPEARANCES:

ROBERT M. PITLER, ESQ., Assistant District Attorney, New York, New York; on behalf of the Petitioner.

WILLIAM M. KUNSTLER, ESQ., New York, New York; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Smith against Phillips.

You may proceed, I think, whenever you are ready.

ORAL ARGUMENT OF ROBERT M. PITLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PITLER: Mr. Chief Justice, and may it please the Court, in this case, federal habeas corpus has been granted to a state prisoner because of so-called reprehensible prosecutorial error, even though an analysis of the case demonstrates that this error did not prejudice the accused. Thus, the issue that is presented here is whether this prosecutorial conduct in fact prejudiced the accused, and if it did not prejudice him, whether a federal court to express disapproval of that conduct can grant habeas corpus relief to a state prisoner.

Also presented in this case is whether this Court should overrule long and well settled precedents. These precedents establish that the right to an impartial jury guaranteed by the Constitution is one which only requires that jurors remain free from actual bias.

Respondent wants this Court to replace that principle with one which requires the removing of a sitting juror upon facts which might render a hypothetical juror biased, even though it is shown that the particular juror in

the case remained actually impartial.

QUESTION: Would you say that the court of appeals for the Second Circuit affirmed Judge Pierce's grant of habeas corpus in the district court on the same ground?

MR. PITLER: No, I would think it is a completely different ground. To place that decision in context, I would like to go back to the state proceedings, and then just bring it to the Second Circuit decision and Judge Pierce's decision.

Let me answer your question directly. Judge Pierce used the implied bias standard. The circuit court, I think without regard to prejudice at all, just said the prosecutor's error -- there is prosecutorial error here, consequently there must be a reversal. They didn't look to implied bias at all.

QUESTION: You mean the court of appeals in effect took a per se standard?

MR. PITLER: Yes, I believe so.

QUESTION: And you think Judge Pierce -- implied bias was not the same? Do you think it is different?

MR. PITLER: I think it is different.

This case arose out of a killing on Christmas Eve, 1968, when after unsuccessfully trying to extort money from a person, Respondent William Phillips, then a New York City police officer, killed that person whom he was

extorting, or sought to extort, killed another eye witness, and sought to kill even -- killed an eye witness and sought to kill a second eye witness. That person survived.

Three years later, in 1971, Respondent was indicted and his first trial in 1972 ended in a mistrial because of a hung jury. In 1974, he was brought to trial again and convicted.

During the voir dire at the second trial, the defense found one John Dana Smith acceptable as a juror. Smith was a Vietnam veteran who was about to graduate Columbia College, and he was accepted by the defense even though he worked as a security guard or in a security position in Bloomingdale's, and was then actively seeking a law enforcement job, and at the time had an application pending with a federal law enforcement agency.

Subsequently, during trial Smith was having lunch with a friend, a court officer in a court that had nothing to do with this case, and was sitting and talking, and the court officer, who knew Smith's wife from John Jay College, said, "I am applying for a job in the District Attorney's Office as an investigator. There may be some jobs there that you might be interested in," and Smith asked about the jobs. They didn't know much about it, but Smith said, "Well, how should I apply," and he says, "Well, write a resume and send a letter to the District Attorney's Office,

and I will find out more details on how to apply for you."

And that is what Smith did a week later, sent a letter saying, "I hear you have positions open in major felony investigating unit, I am interested," signed John Dana Smith, and he sent his resume. Didn't mention at all anything about him being a juror.

QUESTION: When did the trial prosecutor learn of that letter?

MR. PITLER: In the middle of the trial.

QUESTION: In the middle of the trial?

MR. PITLER: That is correct.

QUESTION: And at that time, do I understand that there were several alternates?

MR. PITLER: Yes, there were.

QUESTION: And had this been brought to the attention then of the trial judge, had the trial prosecutor told him about it, I take it an alternate could have been substituted?

MR. PITLER: It would have been up to the discretion of the trial judge.

QUESTION: Whether he would or not. But he might have?

MR. PITLER: Yes, he could have.

QUESTION: There were four alternates.

MR. PITLER: I believe that is correct.

QUESTION: Isn't that really the key fact in this whole case?

MR. PITLER: Well, if you -- it seems to me that under New York -- if you look under New York law at the time, and even today, the judge would have discretion provided he found the juror actually biased, or actually influenced, and that discretion is virtually unreviewable as it is in federal court.

QUESTION: Well, you are not saying he had discretion if there had been actual bias.

MR. PITLER: No. No, in other words, in making that determination he would give great weight to it, if he found actual --

QUESTION: But if he found actual bias, he would have had a clear duty.

MR. PITLER: That's correct. Yes, he would have to exclude the juror.

QUESTION: Then he would have risked, I suppose, if the defense hadn't consented to it, a charge of double jeopardy if he had tried to go ahead with the trial.

MR. PITLER: The exact scope of the double jeopardy clause in that context I am not sure of, whether it would bar a subsequent trial.

QUESTION: Do you mean that in New York, if a juror is excused and replaced by an alternate juror, that

gives rise to a double jeopardy --

MR. PITLER: No, I don't think it does.

QUESTION: Well, if the judge is given this information at that time, and he didn't find that this man was biased, he could still have removed him.

MR. PITLER: I think a reading of the state -- if he found that he was not biased, I don't think the judge could have removed him under New York law at the time.

QUESTION: He has to have actual bias?

MR. PITLER: I believe that is correct, under the law at the time.

QUESTION: Give me that case. I would like to see it.

MR. PITLER: I believe that would be the way I would read CPL Section 270.35.

QUESTION: Which one?

MR. PITLER: Criminal Procedure Law Section 270.35, Subdivision 2, which is repeated on Page 2A of our brief.

QUESTION: I gather that the Second Circuit, at least, thought that as a matter of the federal Constitution that that situation did not require a determination of actual bais. Isn't that right?

MR. PITLER: It is not clear what --

QUESTION: Well, in any event, surely the Second

Circuit did not follow, as you have now described it, the New York rule, did it?

MR. PITLER: No, they don't really discuss it at all. They say it is a good likelihood the judge would have removed him and consequently the Defendant was -- Respondent was denied a fair trial. That is all they said.

QUESTION: Well, how do you understand that? How does that differ, do you think, if it does, if you think so, from the New York --

MR. PITLER: Well, I think this -- at least under New York law they would be suggesting there is a good chance the judge would have found him actually biased and removed him.

QUESTION: Is that what you think they said?

MR. PITLER: Well, if they were saying that he would exercise a discretion that I don't think he has to remove the juror, then I don't think that --

QUESTION: Well, surely, I thought there was a difference between how you construe the New York rule and the way the Second Circuit looked at, isn't there?

QUESTION: That's right.

MR. PITLER: I am not sure I understand your question.

QUESTION: Well, surely, the standard applied by the Second Circuit is different from the one that you

suggest is the New York rule.

MR. PITLER: I don't think they applied any standard at all. I think what they said is, the prosecutor failed to disclose that this juror applied for a job with his office, the defendant was entitled to that disclosure, and wherefore we reverse. They say at the end of the opinion, we simply -- their holding is --

QUESTION: Well, they said, we reverse because we think that fact, circumstance establishes a violation of the federal Constitution.

MR. PITLER: Well, yes, and if they are saying that, if you are suggesting to me that they are saying that that juror is in fact biased --

QUESTION: I don't know that they even addressed whether he was in fact biased.

MR. PITLER: Well, but if he is not, if he is not biased, it is hard for me to see what constitutional right would be violated by the prosecutor.

QUESTION: Well, they say just as a matter of per se -- that conduct per se was a violation of the federal Constitution.

MR. PITLER: The application for the job.

QUESTION: Yes. No, the knowledge of the prosecutor, and his failure to disclose it to the trial judge.

MR. PITLER: But unless the prosecutor's failure prejudices the defendant in some way, I think this Court has made clear that you do not get a reversal. The Agurs case stands for that proposition.

QUESTION: Well, the court of appeals said you do get a reversal.

MR. PITLER: That is why they are wrong.

QUESTION: That is why the case is here?

MR. PITLER: And I believe that is why the case is here. Thank you, Justice White.

QUESTION: Well, does the Second Circuit holding amount to reading the word "may" in 270.35(2), where the provision is, the court may in the circumstances, may if an alternate juror is available, discharge the juror -- is the Second Circuit in your view reading that as the court must?

MR. PITLER: Well, this is really --

QUESTION: Is that the effect of the Second Circuit holding?

MR. PITLER: Yes, but I think if the judge -- the answer to your question is yes, but if the judge in fact found the juror biased, I think the Constitution would require him to remove the juror, but that is not what the Second Circuit's holding is all about.

I think they didn't care about whether this juror was baised actually or impliedly. They said the prosecutor

breached a duty, and that ends our inquiry. They don't care about whether or not -- you know, what would follow from that, and indeed in their holding at the end of their opinion, we simply hold when someone has applied for a job with the prosecutor's office, he must disclose it. That is the holding of the Second Circuit.

QUESTION: Well, Mr. Pitler, in the case of the application of 270.35, if the judge determines somewhere in the course of the trial that a juror is actually biased, and says, I am going to remove this juror and substitute an alternate, does that require the consent of the defendant?

MR. PITLER: No, it would not, although as a practical matter if the defendant objected, it would seem to me he would probably be waiving any right that he might assert, and if I were a trial judge and I said to the defendant that I think this juror is actually biased and the defendant said no, keep him on, as a practical matter I would leave the juror on. It is the defendant's right. Unless there was prejudice against the prosecutor.

QUESTION: Then wouldn't the defendant have a right to argue on appeal in the New York courts that the judge improperly applied the statute?

MR. PITLER: Not where the defendant consented. I think it would be out of court in the New York courts, if the defendant consented. Certainly it would be out of court

in the court of appeals, and I don't think any appellate division would exercise discretion in that case to reverse.

But assuming that -- I know this is going to be a hard assumption to take, but assume the prosecutor didn't find out about it until after trial, the juror's application. What this Court has held the remedy in that situation to be is, you have a post-trial hearing to determine the bias or lack of bias of the juror. That is what this Court has held.

Now, unless we are going to punish the prosecutor -- and that hearing is adequate to protect the defendant's constitutional right to a jury trial. Now, unless you are going to say, because of the prosecutorial misconduct, that procedure is not adequate, I mean, that is the only way you could say that, and in effect what you are saying is, you are going to punish the state for the prosecutor's misconduct, even though there is a procedure available which can determine whether or not that juror was baised, and we don't think the law requires such a holding by this Court.

Now, in Agurs, you had -- the Court found that there would be prejudice, and Agurs is a case, of course, dealing with guilt or innocence context, where the prosecutor fails to disclose clearly exculpatory evidence or doesn't respond to a request or lets perjured testimony come into trial, and in that context, this Court held that no, it

is not a rule of automatic reversal. You have to look to see whether or not the defendant was prejudiced, and they built into those three standards a prejudice rule, in effect.

We are saying the same thing -- a similar requirement is true here, but the nature of the right is different. There, you are dealing with a right to submit evidence to the jury, and the only remedy that you could have once you found a prosecutor's breach of duty, the only appropriate remedy is then to submit the case to a new jury.

When you are dealing with the impartiality of a juror, however, where the judge was going to hold -- would hold an inquiry during trial, how is the defendant prejudiced if the prosecutor fails to hold -- turn over information if the hearing is held after trial? That hearing has been recognized as adequate.

In other words, I think it is what Justice White said in the Morrison case. You have got to tailor the remedy to the conduct involved. Here, the conduct involved was the right to an impartial jury, and did the prosecutor -- the appropriate remedy under the Remmer case is to have the pretrial hearing.

Now, the Court in Agurs said, well, we have to take into consideration somehow that the prosecutor failed to disclose, and in Agurs what you did was, you said, well, we won't follow the ordinary newly discovered evidence rule

which requires the defendant to prove that he was -- prove by a preponderance of the evidence that the result would have been different.

What the state judge did here is, he required that the prosecutor establish beyond a reasonable doubt that the juror was impartial.

QUESTION: Mr. Pitler, do you think there is a role for a rule of implied bias under some circumstances?

MR. PITLER: Perhaps, yes, but not in the circumstances of this case. In United States versus Wood, which we cite in our brief, there is a case for the argument that government employees should automatically be impliedly biased in any criminal prosecution of the federal goverment brought, and that case held there would be no requirement of implied bias in that situation, and they went further, I think, because they talked about particular circumstances, and they raised the situation, what about a situation when a juror works, a potential juror works for an agency very interested in the case, or interested in the case, and the court said there, an inquiry about actual bias is more than enough to deal with that situation.

Whether or not there would be situations that one could conjur up where you would want to find someone impliedly biased is a question that is not before the Court today, but certainly on the facts of this case I think the

Wood case would control, and at least where a juror has only applied for a job there should be no rule of implied bias.

QUESTION: Well, didn't the juror think it was -- didn't he mention it to the prosector?

MR. PITLER: No, Your Honor, the juror --

QUESTION: How did the prosecutor find out about this?

MR. PITLER: The way the prosecutor found out is that the letter eventually got to the person in charge of hiring, and a friend of the juror mentioned to an assistant district attorney that this person was on the jury. The juror himself never mentioned it. Indeed, there is --

QUESTION: But his friend did?

MR. PITLER: His friend did. There is a finding both in the state court --

QUESTION: He was kind of involved, wasn't he?

MR. PITLER: The juror? No, sir, the friend took an interest and the juror --

QUESTION: Well, didn't you just say he told the friend? Were they meeting every day or something?

MR. PITLER: No, absolutely not. This is a friend by the name of Fontane. It's the gentleman that --

QUESTION: I don't care a word about the name.

MR. PITLER: Okay.

QUESTION: But the juror in listening to a case,

and at the same time he is carrying on a conversation with -- what's this man's name, Fontane, that he knows he is talking to the -- while the trial is going on.

MR. PITLER: No. Your Honor, there is nothing in the record, indeed there is a finding to the contrary, that the juror knew anything about Fontane talking to anybody about the job.

QUESTION: But, Mr. Pitler, right on that point, who mailed the letter in to the office?

MR. PITLER: Mr. Fontane.

QUESTION: How do you explain that?

MR. PITLER: What happened was that the juror brought the letter to a luncheon meeting and said, here it is, submit mine when you submit yours. He told that --

QUESTION: A rather unusual way to apply for a job, isn't it?

MR. PITLER: No, I don't think so. Just giving the letter --

QUESTION: He had a man working for the prosecutor mail the letter to the prosecutor?

MR. PITLER: No, no, Your Honor.

QUESTION: Didn't Fontane work at the --

MR. PITLER: No, he did not.

QUESTION: He worked in the district attorney's office.

MR. PITLER: No, he did not. He was a court officer in an -- in New York City. He was not working for --

QUESTION: Oh, I misunderstood.

MR. PITLER: He did not work for the prosecutor.

QUESTION: And was he applying for a job, too, in that same office?

MR. PITLER: He was, yes. He was applying for a job, and the juror said, look, when you submit yours, submit mine, and when he went to submit his, they said, that is not your application, and he said, no. Well, we will only take yours from you personally. Why don't you just put that one in the mail? And that is what he did. He did not work for the prosecutor's office at all.

QUESTION: But he worked for the state.

MR. PITLER: He worked as a court officer for the state.

QUESTION: And did Fontane then have further conversations with people in the prosecutor's office?

MR. PITLER: Yes, he had at least one with an assistant district attorney, where he said, listen, you know, my friend applied for a job and he is a juror, do you think there is anything wrong about that, and that was when the assistant district attorney said, look, we are not going to process that application, and they -- and he went back and told the person in charge of hiring, and that person put

a hold on the application.

QUESTION: And who told the trial prosecutor about all this?

MR. PITLER: The assistant district attorney in charge of hiring for that position, Ms. Sudolnik.

QUESTION: And at that stage, the juror thought that possibly there might be a problem?

MR. PITLER: No. No.

QUESTION: Well, I misunderstood you. Why did he ask him to mention it to the district attorney's office?

MR. PITLER: He didn't ask him to mention it. He just asked him to submit the application with his, because he was applying at the same time.

QUESTION: And didn't he say to find out whether there was any problem?

MR. PITLER: No, there is nothing in -- no, nothing, no discussion about any problem or anything. As a matter of fact, there is a finding, both by the district court and the state court judge that the juror was totally unaware and did not authorize anything that was going on, and the juror testified, which was credited by the state judge, that he saw absolutely no connection with his job application and his service on the jury, he did not know anything that anybody, you know, was talking to anyone.

You know, you can look at facts, and you can put

one interpretation or another.

QUESTION: Well, why didn't the prosecutor at that stage, since there was no problem, mention it?

MR. PITLER: The prosecutor was wrong not to do that. We don't take issue with that. That is not the --

QUESTION: Mr. Pitler --

MR. PITLER: Yes, sir.

QUESTION: -- this is irrelevant, but your statute is not the most artfully drawn, is it?

MR. PITLER: No, that statute was -- what happened was, that statute was subsequently amended so that it would apply -- requiring must, you must remove the juror when he finds substantial misconduct, or --

QUESTION: I am just looking at the last sentence. If, and this is not this case --

MR. PITLER: Yes.

QUESTION: -- if no alternate juror is available, such trial juror may not be discharged, and the trial must proceed, and yet he might have been found to be grossly unqualified to serve.

MR. PITLER: That statute has been subsequently amended to require that a mistrial be declared, Justice Blackmun.

QUESTION: It is a good thing that case isn't here.

MR. PITLER: It certainly is.

You know, the Court hasn't asked me about why isn't this hearing -- why is this hearing adequate. The Remmer case, of course, held that these post-trial hearings are adequate, and they are adequate in federal court and adequate in state court, and it seems to me unless you want to say that you have a per se rule because the prosecutor failed to disclose it, that these hearings should be held adequate on federal habeas corpus review of a state conviction.

It seems to me that it might be beneficial for the Court for me to tell you about Judge Birns's finding, because there is some concern here, and here, Judge Birns found that the juror was honest but naive. He was naive because, you know, he didn't realize that someone would see a connection. He saw no connection between applying for a job -- and the judge found that he was under no influence during the trial. On the voir dire -- this is not like a juror coming out from nowhere and saying, I want something in exchange for my participation on the jury.

On the voir dire, he indicated that he was interested in law enforcement, and he applied well into trial, when he just met a friend at lunch, and he did nothing else with respect to this application. He merely sent it. That is what the findings of the state court are,

and despite Respondent's attempt to change that, those are the facts. He didn't do anything, Justice Marshal. He merely sent the letter. It was an innocent act by a naive young man, and I don't think that that calls for the kind of habeas corpus review by a federal court of a state conviction.

The state court held the hearing that this Court requires all the time in federal cases. Why, then, merely because of the prosecutor's misconduct, is that hearing going to be held inadequate?

Returning to your question of implied bias, in Frazier versus United States, and of course the Wood case says you have a right to an impartial jury, and that constitutional right, Wood says, means a jury that is free from actual bias, and if the jury is free from actual bias, that really generally ends the inquiry, and Wood --

QUESTION: Mr. Pitler, under that rule in New York, suppose you had a juror who had been the victim of an armed robbery, and then he was called as a juror on an armed robbery case, and he didn't disclose the fact that he had been himself the victim of an armed robbery. Would your procedure require a determination of actual bias in that case, no implied bias?

MR. PITLER: He deliberately failed to disclose?

QUESTION: He just didn't disclose it. That's

right.

MR. PITLER: And there was no question asked?

QUESTION: No questions asked.

MR. PITLER: And when is the discovery made?

QUESTION: After the trial.

MR. PITLER: I think under the New York --

QUESTION: And there is a conviction.

MR. PITLER: -- under the New York statute you would have to have a showing of actual bias in that case.

QUESTION: You still would or would not?

MR. PITLER: You would. I believe that is the law of New York.

QUESTION: Do you think the court of appeals would have come out the same way if the prosecutor had never known about this until after the trial?

Suppose no one -- none of the prosecuting staff knew anything about this until after the trial?

QUESTION: I don't think the court of appeals would have -- I doubt very much the court of appeals would have come out this way.

QUESTION: Well, why not?

MR. PITLER: Because I think they --

QUESTION: The possibility of bias was --

MR. PITLER: I think they focused entirely on the prosecutor's misconduct, and that is what they were

concerned with.

QUESTION: Didn't they make that pretty plain in the closing pages of their opinion?

MR. PITLER: Yes, and that is exactly what they did. I don't think they would have had -- they may have had a little bit more difficulty. I can tell you during the oral argument before the Second Circuit which I did, that is what Justice Nickerson was concerned about, and he wrote the opinion, from the very start, the prosecutor's conduct, the prosecutor's conduct, and that is exactly how that opinion is written.

QUESTION: But in terms of the possibility of bias, it doesn't make a whole lot of difference whether the prosecutor knew about it or not.

MR. PITLER: That is exactly our point, Justice White. And in that context, the post-trial hearing under the Remmer case in federal court would be more than adequate to deal with the situation, and consequently it should be more than adequate to deal with the situation here, and the Second Circuit opinion can only be read as saying, we don't like what the prosecutor did, and I might say if the juror -- if the procedure was adequate and the juror was found to be actually impartial, I don't see how the defendant's conviction has been obtained in violation of the Constitution.

QUESTION: Do you think the Second Circuit would have come out the same way if the prosecutor had found out about it, told the judge about it, the judge had held a hearing at that very moment and come out just as he did in the hearing here, and then refused to remove the juror? Do you think then the Second Circuit would not have set the conviction aside?

MR. PITLER: I do not think they would have. I think again, a fair -- you know, by way of emphasis, a fair reading of their opinion is that they were concerned with the prosecutorial misconduct, what they viewed as prosecutorial misconduct.

QUESTION: You keep talking about what the Second Circuit might do. Why don't you ask me some time? I mean, you can't predict what a court is going to do, can you?

MR. PITLER: Well, I --

QUESTION: Can you sir?

QUESTION: Well, that may be true about the Second Circuit, Mr. Justice.

QUESTION: Can you?

MR. PITLER: Sometimes you can take a look at past opinions and precedents and predict what a court is going to do. Not all the time.

QUESTION: Have you ever been wrong?

MR. PITLER: Yes, sir.

QUESTION: All right. Thank you.

(General laughter.)

MR. PITLER: Although I would say, with all due respect, I am right more often than I am wrong, although sometimes it is a close question.

QUESTION: That is your opinion.

QUESTION: Mr. Pitler, let me just ask one quick question. I am not quite sure what your view was. If the hearing had been conducted during the midst of the trial, and the judge had found the facts the way he did, do you think he would have let the trial go forward without replacing the juror?

MR. PITLER: He said in his opinion -- I don't want to speak for the trial judge. I will let the trial judge speak. He said that as a matter of law, he would not have found that juror biased. That is correct.

QUESTION: But you don't know whether he would have construed New York law nevertheless to authorize it. You --

MR. PITLER: No, I think the reality would have been, he would have said to the prosecutor, don't you think you should consent to the removal of the juror, and I don't know what the prosecutor would have done in that situation, but that is how I think a state trial judge would have handled that situation.

QUESTION: It is pretty important what the defense counsel thought of it, too.

MR. PITLER: Yes, he would have asked both in that situation.

QUESTION: Are you suggesting that if both counsel did not consent, he would not have, on the basis of his statements, that he would not have disqualified the juror?

MR. PITLER: I think that is a fair reading of his opinion.

QUESTION: It is a fair reading of his own statements.

MR. PITLER: Of his own view. That is correct.

Again, and I guess it is -- your questions to me brought that out, Justice White, that the Second Circuit here is concerned with the prosecutorial misconduct. That is how they are --

QUESTION: I didn't mean to ask for a prediction of what the Second Circuit would do. I just wondered how you read their opinion.

MR. PITLER: No, I read it that way, but analytically I think that that is important, and the reason I think that is important is that they would have come out the same way, if they would have come out a different way. But for the prosecutorial misconduct involved, then in

effect you are punishing the prosecutor -- you are punishing the state because the prosecutor made a mistake, and the way I read the precedents of this Court, unless the defendant is prejudiced by the prosecutor's conduct, federal habeas corpus should not lie.

With that, I will --

QUESTION: What is the rule in the cases in this Court with respect to the possible bias of a juror?

MR. PITLER: With respect to possible bias of a juror? United States versus Wood, I think, is the leading case, and that is the case I referred to in my discussion with Justice O'Connor, and that says that in recent jury selection, and I think there is a tougher standard during trial, that has to be actual bais, and that case has stood for 45 years as the laws of this Court, and to change that rule, to go to an implied bias standard based on this case, in effect, you are no going to have to sit in review of all the various state implied bias statutes, and as we point out in our brief, they are many and numerous, and they are going to be sat both in direct appeal to this Court and federal habeas corpus review, and I don't think that is necessary.

Wood has served very well in the 45 years, and there is no reason to abandon it at this point in time.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Kunstler.

ORAL ARGUMENT OF WILLIAM M. KUNSTLER, ESQ.,

ORAL ARGUMENT ON BEHALF OF THE RESPONDENT

MR. KUNSTLER: Mr. Chief Justice, and may it please the Court, I first want to apologize for what may be a very hoarse voice, something that I picked up in Oregon two days ago, and there is nothing much I can do about it.

This case is a unique one. It was called that not only by myself in our brief, but it was called by the trial judge himself as unprecedented imprudence on the part of the prosecutor, unique misjudgment by the prosecutor, extraordinary, about the submission of the application for a job in the middle of trial.

It involves essentially, and I think Mr. Pitler has stated some of it, a juror applying for a job in a capital prosecution, and his course to the application began on the very day that he was selected, when he heard, even before other jurors had been seated, when he heard in a lunch with court officers about the opening of a job on the major felony squad of the district attorney's office.

That was on, I believe, September 23rd, 1974.

QUESTION: Mr. Kunstler, do you agree that the reasoning of the court of appeals was somewhat different than the reasoning of Judge Pierce?

MR. KUNSTLER: Justice Rehnquist, I do, but

differently than Mr. Pitler does, because I thought that what the court of appeals was doing in using Agurs as a standard was to say essentially that the prosecution's misconduct prevented the defendant from exercising a right that he had under 270.35, that because he didn't know about it, he couldn't go to the trial judge at a time when removal of a juror is far simpler than it is after conviction, and utilize that statute, and that statute does not say that you need an actual biased juror. It says a juror -- the fact that a juror is grossly unqualified to sit in a case -- that is one standard -- or, and I think that is what we have here, a juror engaged in misconduct of a substantial nature.

Phillips never had that opportunity, because of the non-disclosure.

QUESTION: But those are state statutes. I mean, you have got to find the violation of a federal constitutional --

MR. KUNSTLER: I understand that, but I think one of the aspects of due process is preventing the utilization of available statutes, remedial statutes. I think if a prosecutor engages in conduct that prevents that utilization, you have a substantial due process question that has not been fully briefed on either side here, but I think it has existed.

QUESTION: Even if without the statute there

would be no due process violation?

MR. KUNSTLER: Well, to a degree. I think a statute that gives you a remedial right presents a due process situation. The Second Circuit, if it is read the way Mr. Pitler is saying, is saying, under Agurs, you have a right where something is withheld deliberately which may in some way affect your trial to utilize it. And I think if you divorce the statutes out of it, 270.35, you can read another ground, but I thought the Second Circuit was very much concerned about the fact that they were denied a right that they had under state law to utilize, which I think is a due process -- rises to due process proportions.

If a right is existent under state law and the prosecutor deliberately prevents you from achieving that right, I think it is a due process violation. But I am not sure, Justice Rehnquist, which way the circuit went. I don't think it is the most artful of opinions that I have ever read, and you can read it under Agurs and you can read it under my interpretation, but either one I accepted because they affirmed it.

QUESTION: Did the prosecutor who was trying the case and learned about this testify?

MR. KUNSTLER: Yes, he did, and so did the assistant prosecutor.

QUESTION: What was their explanation for not

telling --

MR. KUNSTLER: The rationale, Justice White --

QUESTION: -- for not telling the judge?

MR. KUNSTLER: -- I was in the middle of cross examination of the defendant, I was preparing summation, and therefore I just couldn't get around to it. I was filled -- my mind was filled with other things.

QUESTION: I wondered, if they testified, why they didn't reveal what they learned to the judge in the middle of the trial.

MR. KUNSTLER: Well, I think that is the reason that he gave, that his mind was so filled with summation and so filled with cross examination of the defendant, who was, I believe, on the stand at the time --

QUESTION: He just omitted to do it?

MR. KUNSTLER: He omitted to do it, but it is very strange, Justice White, that he did admit --

QUESTION: He disavowed any tactical --

MR. KUNSTLER: He did. I am not sure I take that except with cum grano salis, but --

QUESTION: Yes. The judge seemed to have believed him.

MR. KUNSTLER: He may have, but a very interesting thing is that another juror he did bring to the attention of the judge. So his mind was not so filled with

summation and cross examination to forget Juror, I believe, Number Three, a Mr. Lawrence Bethel, or Juror Number Six -- I can't remember the numbers -- who they found out in the middle of trial was a witness for the district attorney, or a special narcotics prosecution of the district attorney, and they did bring him to the attention, a little late, because they discovered it early in October, and they revealed it some time in November, I believe, but I think that belies his testimony that my mind was too filled.

QUESTION: And what happened, Mr. Kunstler, with that one?

MR. KUNSTLER: That judge was excused --

QUESTION: Juror?

MR. KUNSTLER: -- with the consent of all parties. I mean, that juror was excused with the consent of all parties. The judge had a hearing and excused that juror. And by the way, the statute now reads "must excuse". Then it was a "may" standard. But in any event, Phillips never got the opportunity to even have the May portion of the statute put into operation because of the failure to disclose.

To go on with the juror's conduct in this particular case, the day he is sworn he learns of the opening, from court officers. He expresses an interest. He gets the court officer to find out for him how to apply, and

then the court officer goes to or calls the district attorney's office, gets the procedure, ultimately finds out who is in charge, the district attorney, by the name of Joan Sudolnik, comes back to Mr. Smith and says, here is how you do it.

Mr. Smith fills out an application form which is brief -- it is in the record; it is very short -- with a resume, and then Mr. Fontane takes it with his own to the district attorney's office, but apparently the district attorney said, you must mail it in personally. We don't accept another person's application from you. And so, he then stamped it and mailed it, and it arrived on October 23rd in the district attorney's office. The trial was then into the third of its seventh week at that time.

His letter went to a district attorney Convoy, who referred it to Ms. Suldonik, who was in charge of personnel recruitment at that time. She referred it to an Assistant District Attorney Lang, who was Suldonik's subordinate, and then there was a lot of communication between Lang and not only this court officer but another one in which Lang is told that Smith is a juror in the Phillips trial.

So, whether Mr. Smith told him to tell that or Mr. Piazza or Mr. Fontane did it on their own, but both informed the district attorney's office that Smith was a

juror in that trial. I am sure they both knew about it from meeting him in the courthouse, and learned it from him or from courthouse gossip, but in any event, the district attorney knew it very shortly after the application was received, and then the district attorney, or at least the assistant district attorneys told the prosecutors on November 14th, I believe, a week or so before judgment in this case, or the jury's verdict, that there was a juror who was applying for a job.

The prosecutors decided to tell nobody in this situation. On the 14th --

QUESTION: Well, now, you say they decided.

MR. KUNSTLER: They decided.

QUESTION: They get together --

MR. KUNSTLER: They got together, they testified at trial that they had met on it, that they had discussed it, and they decided to do nothing more but tell assistants Lang, Holmes, Sudolnik not to consider it until after the trial.

QUESTION: Was there a decision, an affirmative decision not to tell the judge?

MR. KUNSTLER: There was an affirmative decision not to tell the judge or defense counsel. That occurred on the 14th of November.

QUESTION: Do you distinguish between the

prosecutors and the --

MR. KUNSTLER: I am using the trial prosecutors, a man named Litman and his assitant.

QUESTION: You mean, who is trying the case in the courtroom?

MR. KUNSTLER: Who are trying the case.

QUESTION: And the assistant district attorneys weren't trying the case.

MR. KUNSTLER: No, the assistants who were running the recruitment program were not trying the case. The case was --

QUESTION: Well, how many were together at this meeting at which they decided not to tell the judge or the defense?

MR. KUNSTLER: There were two of them.

QUESTION: Just the two trial prosecutors?

MR. KUNSTLER: LaPenta and Litman, the two trial prosecutors.

QUESTION: Trial prosecutors. They did not meet with someone otherwise in the DA's office?

MR. KUNSTLER: No, except, Justice Brennan, after they had reached their decision, they informed these people whose names I have been using, Lang, and Holmes, or Sudolnik, they were informed not to process it any further and not to communicate with the jury until the trial was

over. They never told the district attorney at all.

QUESTION: Well, is it those two prosecutors who met and decided not to reveal --

MR. KUNSTLER: That's correct.

QUESTION: Are they the two that --

MR. KUNSTLER: They both testified.

QUESTION: And they testified?

MR. KUNSTLER: They testified.

QUESTION: And they are the two who said their minds were so full?

MR. KUNSTLER: That was the explanation given by Mr. Litman. I can't remember Mr. LaPenta's --

QUESTION: Who is Mr. Litman? Was he one of them?

MR. KUNSTLER: He was the chief trial prosecutor. He was the assistant district attorney in charge.

QUESTION: Well, if the prosecutors actually met and made a deliberate decision about this, this wasn't in the middle of cross examination or anything.

MR. KUNSTLER: No, it was undoubtedly a recess, evening. In fact, there was one meeting on the 15th of November, the next day after the prosecutors discovered it, that Holmes, one of the district attorneys who was involved in the processing of the application, met with Mr. LaPenta, who was the second in command of the trial team, and tried

to talk to him about it, and LaPenta told him, I don't want to listen to that, I don't want to hear that any more, and that was the end. That was the last that you have as far as the prosecutors, but it was deliberate, wilful decision not to tell anyone, including the district attorney himself, Mr. Kuh, who never learned of it.

After -- as soon as the trial ended, then, of course, Mr. Smith called Ms. Sudolnik up, the very next day after judgment, after verdict, he called Ms. Sudolnik up. He couldn't reach her, and so he got a friend of his, a Mr. Reilly, who ran, and I think still does, the Bloomingdale security office in New York, he got Mr. Reilly to call up Ms. Sudolnik, and Mr. Reilly said, what gives with Smith's application. He was a juror in the just completed Phillips trial. And I think the implications of that statement were hardly lost on anyone.

In any event, Ms. Sudolnik told him then that the juror's application would be considered in the normal course of business. That is the day after the jury's conviction. The district attorney, Mr. Kuh, never learned of this until December 4th of 1974, some two weeks or so after verdict, when Mr. LaPenta told Mr. Kuh's assistant, John Keenan, in an elevator in the Federal Building where Phillips had a habeas on another matter going, told Mr. Keenan that one of the jurors had applied for a job during the trial.

Mr. Keenan told the district attorney, Richard Kuh, and then five days later they informed the trial judge. And the trial judge did hold a hearing, both on Juror Number Three and Juror Number Six.

So, the sequence you have is that at least by the 13th of November the district attorney's office, many people knew that Smith was a juror in the Phillips case, and that Smith had an application pending in the office.

QUESTION: Any effort to explain why Mr. Kuh was not told until after the trial?

MR. KUNSTLER: I can't remember the transcript that well, Justice Brennan, but he was not told until December 4th. I guess the reason is, the prosecutors, the trial prosecutors did not tell Mr. Keenan until that day, when they were at the federal court hearing, when he said, in words of substance, by the way, did you hear this, and told him, and then Mr. Keenan on the 4th told Mr. Kuh, so it was the suppression at the lower level, the trial prosecutor's level, as well as by all these other district attorneys who knew of it.

QUESTION: Well, the record doesn't indicate that they made any knowing decision not to tell their superiors, or not?

MR. KUNSTLER: Justice White --

QUESTION: There certainly was a failure to.

There is no doubt about that.

MR. KUNSTLER: I think, as I remember the testimony before Judge Birns in the hearing, the decision was made not to tell the court or defense counsel on the 14th of November, and then the instructions were given to the assistant district attorneys who were working on the applications to just not do anything with the application or talk to the juror, communicate with him, until after the trial. I don't remember any testimony saying, don't tell Mr. Kuh. I don't remember that at all.

QUESTION: All right.

QUESTION: What did the trial judge find about that?

MR. KUNSTLER: He found out on December 9th.

QUESTION: No, what did he find about the consequence of it?

MR. KUNSTLER: Oh, the consequences, he held a hearing --

QUESTION: As to the bias.

MR. KUNSTLER: -- Chief Justice Burger, where he found no actual bias. He did not even consider implied bias. It isn't mentioned in his opinion, and I don't know whether counsel spoke about it. I was not trial counsel or even appellate counsel. But he found only no actual bias.

QUESTION: Does a finding of no actual bias make

it unnecessry to reach the next question you suggest?

MR. KUNSTLER: No, I think you must go to the next question, because actual bias --

QUESTION: You mean, a per se bias from the circumstances.

MR. KUNSTLER: That is correct. I think if you don't go to the next step --

QUESTION: That is a little more than implied bias, isn't it?

MR. KUNSTLER: Well, implied bias is --

QUESTION: You don't need an implication if there is a per se rule.

MR. KUNSTLER: Well, when you say per se rule, I am not sure I quite understand what you mean, except as I understand what you are saying --

QUESTION: The way we usually mean it in every other context where the phrase is used.

MR. KUNSTLER: Well, I don't see a per se rule here. I see a rule in case to case, and I see some situations where bias must be implied. This Court has found it in several cases. The cases all referred to by Mr. Pitler are the District of Columbia cases. Is there implied bias in a man who works for the Bureau of Engraving and Printing to serve on a federal jury in a narcotics case? I agree there is no implied bias. At one time this Court held

that there was, but I am not too sure I subscribe tc that. You would never get a jury in the District of Columbia if everyone who worked for the government was excluded, and I don't see implied bias because you work for the Bureau of Printing and Engraving.

But take the situation if the juror works for the prosecutor, the district attorney for the District of Columbia. That would mean implied bias to me. I don't see where anybody working for the prosecutor cannot be impliedly biased. That doesn't mean they are actually biased.

QUESTION: Wouldn't that problem take care of itself in the jury selection process?

MR. KUNSTLER: Would it take care of itself?

QUESTION: Wouldn't it take care of itself?

MR. KUNSTLER: No.

QUESTION: Wouldn't it be -- you mean, if he disclosed --

MR. KUNSTLER: Oh, no.

QUESTION: -- that he worked --

MR. KUNSTLER: If he disclosed it during the voir dire, then you have a chance to take care of it. Of course. I agree with that.

QUESTION: yes.

MR. KUNSTLER: In this case, there was nothing to disclose because he didn't make his move until he was

sworn. So that was precluded from operating. I am certain had it been disclosed, he would never have gotten on the jury: I have an application pending with the very office which is prosecuting the defendant. Or, if he had said so in the middle, I am certain Judge Birns would have excused him. Judge Birns is speaking ex post facto. He has just gone through a highly publicized, very significant murder trial, and the prospect of setting it aside now is a much more difficult task for a trial judge, as we all know, than doing it in the middle of trial, when all you can do is excuse the juror and put an alternate in his place.

QUESTION: Mr. Kunstler, what are the possibilities of biasing the jury if he files this application for a job? What are the possibilities of his becoming biased one way or the other?

MR. KUNSTLER: Well, you never can tell actually, of course, because the only --

QUESTION: But what are the possibilities?

MR. KUNSTLER: The possibilities are that this man, who was totally unqualified -- in the record, you will find that his application was later rejected because he was unqualified for the job.

QUESTION: Oh, a vote to convict in order to get a job? Is that it?

MR. KUNSTLER: Well, to be more inclined to

convict than not. I think the defendant was entitled to a hung jury, if that was possible in this case. More inclined to convict, yes, and I think there is one more point, Justice White.

QUESTION: And if he innocently filed it, as the claim is, he certainly would have thought -- or the argument is that he would have been less -- he would have thought it would hurt his chances to get the job if he voted to acquit? Is that it?

MR. KUNSTLER: I think a reasonable man might find that conclusion. I think as Justice Marshal said, the first Mr. Justice Marshal said in the Burr case, there are some situations where we must imply bias, and one of those is where a man is a job seeker with the prosecutor, in my lexicon, because a reasonable man or an ordinary average man, as Justice Black used in the jury selection --

QUESTION: Well, if you are right about that, then if it had come up on voir dire, it wouldn't have been a may thing. You would have said that you had a challenge for cause.

MR. KUNSTLER: I think you would have a challenge for cause. I think it would be --

QUESTION: Don't you have to take that position?

MR. KUNSTLER: Yes, I think it would be a causal challenge. The judge might say, if he denied it -- a

challenge for cause is difficult, because if the prospective juror says, I have applied for a job but I am not prejudiced, I can decide this case fairly and squarely, many judges say that is it, that is not cause in the true sense of the word.

QUESTION: Well, if you were trying the case and picking the juror, I bet you would use a peremptory right quick.

MR. KUNSTLER: I would use peremptory --

QUESTION: And you lost out on the case.

MR. KUNSTLER: I would try cause first. When I came acropper on that, I would go to peremptory.

QUESTION: How do you square that with what this Court said in Witherspoon, that you can be against -- you can have conscientious objections against the capital punishment, but you can still sit on a jury?

MR. KUNSTLER: Well, I think that is true. I am not so sure I have always agreed with some aspects of Witherspoon, but I think you can have conscientious objections to the death penalty, and still be a fair juror. I don't like the death penalty, but I am going to decide this case on the merits. But that is a little different here, because however you feel in your conscience, you are not beholden in any way to the prosecutor. You are not thinking in your mind, if I go this way or that way I have a

better chance or a lesser chance for a job. And I think an average man would consider this. I don't believe Mr. Smith's protestations. I can't prove it, but I just think, Justice Burger, you have to take human life for what it is, and the psychology of people for what that is.

QUESTION: What are the proceedings in New York for finding out after the fact how a particular juror voted? Does the juror have to disclose how he voted? Assuming it were a hung jury or something.

MR. KUNSTLER: Not at all. In fact, many of the judges tell the jurors, you don't have to speak to anybody. Some even prohibit it. And in the federal courts that is quite general now. But in the state courts, they are usually given an option. If the defense wants to speak to you, or the prosecution, and you want to talk, you can talk.

QUESTION: Doesn't that militate against then finding implied bias for a juror who has a job application in?

MR. KUNSTLER: No, I don't think so.

QUESTION: Might not that person feel that nobody would know or be entitled to know, so it wouldn't matter?

MR. KUNSTLER: Well, because the juror has the option of being quiet --

QUESTION: Right.

MR. KUNSTLER: -- I find you rarely find out

anything. They leave the courtroom and the courthouse, you try to talk to them. Many judges say you shouldn't talk, because that raises the specter of upsetting the jury verdict, or of contradicting jurists.

I don't know what was said in this case. In most of the cases I have been in on the state level, Justice O'Connor, it is a may. You may talk if you wish, you may not if you don't wish.

QUESTION: I just wonder whether that fact doesn't militate against finding implied bias here.

MR. KUNSTLER: I don't think so. Just take this as an example. If they had gone up to Mr. Smith and questioned him after the verdict, I don't think he would have said, listen, by the way, I sent a letter in in the middle of trial. I think he would have just said, the questions are, how did you decide, why did you decide this way, I did it for X, Y, and Z. But you would never find about the letter, and it is the letter that makes the situation -- he is a job seeker with the prosecutor.

QUESTION: You don't allege that the post-trial hearing which was held was anything but fair, do you?

MR. KUNSTLER: No, but it is an impossible hearing, because it is not like the Remmer hearing, that Mr. Pitler relies on. In Remmer, the standard was not the internal workings of a juror's mind who is guilty of

misconduct, because everything militates against saying, I was guilty of misconduct. This man wanted to go to law school. Law enforcement was an interim occupation for him. He was going to take a job with the DEA, the Drug Enforcement Agency, overseas for a year, come back and go to law school.

So, imagine if he had ever said on the stand, assuming it to be true, I decided this case the way I did because I wanted a job with the district attorney's office. He could never go to law school. He could never get a job in law enforcement. And he might be prosecuted for contempt, certainly, if not under the criminal statutes we put in our appendix.

I don't think those criminal statutes, to be candid, apply to this juror. I have tried to read them 40 times, and they just don't seem applicable for this kind of misconduct. But certainly contempt would not be inapplicable.

QUESTION: Did he disclose these future plans about his ambitions for law enforcement?

MR. KUNSTLER: Under voir dire. Yes, he said, I have been working as a security guard while I have been going to Columbia University School of General Studies. I am graduating in October. That is a month later after his selection. I then intend -- I have applied to the Drug

Enforcement Administration for a job overseas so that I may get enough money to go back, to go to law school. He said that this is an intermediate step for me.

And so he really wasn't interested much in law enforcement as a permanent career, but being an attorney, and that is one reason why I think that when he said what he said in the post-trial hearing, that he could not be candid if the truth were as I think it well may be, he couldn't say it. It would ruin him for life. And that is an awful big burden to put on a man, to accept his word in all due conscience as being the last word, and that is what Justice Birns did. He said, this is the word of this man. He told me he would be fair and was fair, and I accept it, because all the other evidence had nothing to do with him, when the letters were mailed, and who was spoken to.

I might indicate that when he was rejected as being unqualified, he probably knew he was unqualified, because what did he have in life? He had been a security guard at Bloomingdale's, and he wanted to get on the major case felony squad of the district attorney, and was rejected for being inadequately prepared, and I think he knew that, too. This was a golden opportunity for this man. He got on the jury of a major case that had been ten to two to for acquittal when Mr. Bailey tried it the first time around.

QUESTION: That is all speculation on your part.

MR. KUNSTLER: No, they admit that in their brief. I thought it was all speculation from the newspaper reports, but then I noticed in their brief they say the same thing. I think in their petition for certiorari, they said it was ten to two for acquittal. I think everybody accepted that, Chief Justice Burger, although it came from the newspapers.

QUESTION: I was speaking of your psychoanalysis of his mental processes.

MR. KUNSTLER: It has to be speculation. But I think it is speculation -- when you go into implied bias, you have to do it. When Blackstone said, you can't have the employer, for example, a juror on a jury who was employed by the other side, that is all speculation, too. That man could be fair in some actual standard of life, but there are some places you must say, as Chief Justice Marhsall said, we have to draw the line. You cannot permit people on juries who are seeking favors from one side or the other.

And New York has so held. We cited the Tableporter case in our brief, where a juror's son applied for a job with the defense, and our court said, that is implied bias. He applied for a job during the course of the trial. True, it is only a municipal court decision, but it is the only one I have found in New York that is at all similar to what we have.

I might just add in closing, because I see the orange light, that we have submitted a number of cases, very, very extremely recent ones, and Haak against the State in Indiana, I think, is the proper rule, where a juror's husband had been offered a job with the district attorney's office, and she knew only his application was pending, and they held that was an implied bias.

We don't think that 2245(D) applies or that the Sumner case has any applicability here. It is a wholly different situation than our case, and in reading the case -- it is mentioned quite prominently in their brief -- we didn't mention it because we didn't think it was at all applicable in this case.

We don't think the Remmer type hearing is sufficient here. You have a serious situation where you have a juror who is expecting a favor, hoping for a favor, and it is more important in this case because he is seeking a job. I wouldn't feel as strong, although I would be almost as strong, if he had the job already, because I think it is harder to be fired for voting not guilty than it is to be hired. I think the standards are totally different in this situation.

We have raised the appearance of justice standard. I think I don't have to belabor that point. I think it is obvious, is this man any different than the

judge in Tumey's case, who was going to get a financial benefit. What if you had a hearing there, and he said, I would be perfectly fair, even though I share in the proceeds, I would be perfectly fair in this case? I don't think this Court would accept that any more than it did in Tumey.

In Rose against Mitchell, this Court said, the harm is not only to the accused, but to society as a whole, when the appearance of justice is destroyed, and I know you could stop 100 people on the streets in Washington, D. C., and say, do you think it is fair that a juror in a capital case has an application pending with the district attorney, do you think that would be a fair juror, and I would be very seriously surprised if any one of those hundred or thousand or ten thousand would say, that is fair to me. I just think it affronts the entire law to hold that a juror like that should sit on a jury in a capital case, and that the prosecutor should withhold the information.

I like the prophylactic standard that the Second Circuit hinted at in its decision. I think there are some cases where the prosecutor does deserve to have a new trial.

QUESTION: How many judges refused to set this aside?

MR. KUNSTLER: I didn't hear that, Mr. Justice.

QUESTION: How many judges refused to set this

aside after this post-trial hearing?

MR. KUNSTLER: Well, interestingly enough, the appellate division affirmed without opinion.

QUESTION: But the judge who held the hearing --

MR. KUNSTLER: Judge Birns was one. The appellate judge --

QUESTION: So he would be one out of your 1,000.

(General laughter.)

MR. KUNSTLER: Well, I am not so sure that he didn't say -- Yes, he would be one out of my 10,000. I agree with that. I wouldn't ask him.

(General laughter.)

QUESTION: And the appellate division?

MR. KUNSTLER: We had five there.

QUESTION: And they didn't --

MR. KUNSTLER: They did, too, but they are not in the same position, Justice White, because they are seeking to avoid the enormous expense in setting aside of a jury verdict, which is very hard. The ordinary person in the street on the appearance of justice standard is not a judge and is not sitting on this kind of a situation. So I wouldn't have gone to them in the first place.

CHIEF JUSTICE BURGER: All right. Thank you.

MR. KUNSTLER: Thank you. Thank you very much.

CHIEF JUSTICE BURGER: Do you have anything

further, Mr. Pitler? You have two minutes remaining.

ORAL ARGUMENT OF ROBERT M. PITLER, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. PITLER: Well, listening to Mr. Kunstler describe the case, it has nothing to do with the relationship to reality or the record. I mean, the suggestion that the prosecutors deliberately met and chose not to disclose this to the court is just not true. What happened is that Mr. Litman was standing outside Mr. Keenan's office to talk to him about another matter, and Ms. Sudolnik came up to tell him this. He was in the middle of cross examination. He said, oh, my God, that is all I have to hear now, just don't tell anybody, just don't contact him at all, have everyone have no contact, and that was the extent of the decision in this case.

For Mr. Kunstler to suggest to this Court that the juror then made his move, as soon as he was selected for the jury, I recommend a reading, Mr. Kunstler, and to the Court, the record in the case.

QUESTION: What about the other juror? They did tell the judge about the other juror.

MR. PITLER: Because that was -- what happened was, that had been going on for a while, beginning on the voir dire minutes, and they knew about that for a while, and they finally disclosed that.

QUESTION: Don't you think the possibility of talking to the judge occurred to them when they met outside there?

MR. PITLER: Judge, I really do not think so, and I think that the trial judge was correct to credit the prosecutor's testimony in that regard. But let me talk about the juror as well. Mr. Kunstler would make it seem that as soon as upon being sworn he actively ran out for a job. That is not true. At Pages -- the record makes clear throughout that he applied for that job on the 16th of October. That was three weeks after he had been sitting about -- and that is when he first found out about it. So, to try to create this impression of prosecutors running around and conspiring and the juror running around and actively seeking is just not true. It has no -- if you read our brief and if you read the record, you will see what happened here. You had an innocent, naive juror who was actually impartial.

The Constitution requires no more. The state courts require no more, and a federal court sitting in habeas corpus review of the conviction certainly should require no more. The judgment should be reversed. Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:04 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

HAROLD J. SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY v. WILLIAM R. PHILLIPS NO. 80-1082

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Ryan Connelly