ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-321 & 83-322

TITLE GUY WALKER, Petitioner v. GEORGIA; and
CLARENCE COLE, ET AL., Petitioners v GEORGIA

PLACE Washington, D. C.

DATE March 27, 1984

PAGES 1 thru 50

IN THE SUPREME COURT OF THE UNITED STATES

- x

GUY WALLER, :

Petitioner :

v. : No. 83-321

GEORGIA :

- x

CLARENCE COLE, ET AL., :

Petitioners :

v. : No. 83-322

GEORGIA :

- x

Washington, D.C.

Tuesday, March 27, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:29 a.m.

APPEARANCES:

HERBERT SHAFER, ESQ., Atlanta, Ga.;

on behalf of Petitioners.

MARY BETH WESTMORELAND, ESQ., Atlanta, Ga.;

on behalf of Respondent.

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Waller v. Georgia.

Mr. Shafer, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF HERBERT SHAFER, ESQ.,

ON BEHALF OF PETITIONERS

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

We are here for three reasons. The first relates to the closure of a suppression hearing over a defendant's objections. The second relates to the statute which authorizes warrantless seizure of "property subject to forfeiture," and it was upheld by the court below. And the third relates to the proper remedy when police treat an otherwise valid warrant as a license to conduct a totally indiscriminate search and a warrantless seizure. I will address these issues each in turn.

First the closure. We respectfully submit that the Constitution guarantees open suppression hearings, that suppression hearings may only be closed upon a demonstration of compelling justification, and then only if no means short of closure will achieve the compelling state purpose.

QUESTION: Does your argument extend to the suppression hearings conducted previous to the impaneling of the jury, as well as to a suppression hearing conducted after the jury was impaneled?

MR. SHAFER: Justice Rehnquist, we would not rest on so technical a ground. Philosophically, the societal and defendant's interests are in this context so broad that we would not urge that the mere impaneling of a jury is the predicate for the position we urge.

We say that, irrespective of whether a jury has or has not been impaneled, that the interests are so broad and so compelling that closure, particularly over a defendant's objections, as in this case, cannot be squared with the Sixth Amendment's commands. Nor, bearing mind society's interests and the interests of the criminal justice system --

QUESTION: Mr. Shafer, supposing that you had a suppression motion well in advance of trial, but it's closed by the court. The court refuses to suppress the evidence, it is then admitted at the trial, which is perfectly open.

Under your theory, the closure of the motion hearing would have violated the defendant's right to a public trial. What would be the remedy for that violation?

MR. SHAFER: The remedy for that violation, because it is such an egregious affront to the Sixth Amendment right to open proceedings during the entire course of criminal proceedings, and to the First Amendment, that there can be only one remedy without trivializing the significance of both of these amendments, and that would be to send it back for a new trial in its entirety.

QUESTION: Nothing short of that?

MR. SHAFER: Nothing short of that, no, sir.

QUESTION: Are you positive about that?

MR. SHAFER: To treat it as a mere procedural quirk, without cloaking it with all the grandeur of these two amendments, is to demean it. It's too grave an affront to both of these amendments to treat it as anything other than --

QUESTION: Well, I took the Justice's hypothetical to say there was nothing wrong with the trial, the trial was open all the way. Why wouldn't you have a suppression hearing repeated, and wouldn't that be enough by way of remedy?

MR. SHAFER: I'm sorry, I don't understand.

QUESTION: I understood that the hypothetical given by Justice Rehnquist was to the effect that the trial was perfectly open, the trial itself. And why do

you have to have a new trial then? Wouldn't a new suppression hearing, so to speak, be a sufficient remedy?

MR. SHAFER: Justice Blackmun, we respectfully suggest not. As in the case of a grand jury not being properly constituted, this Court has not sent cases touching upon that infirmity back for the impaneling of a new grand jury, but has vacated the conviction and sent it back for a trial de novo.

We believe that openness is of equal significance and that it requires a new trial rather than sending it back for a suppression hearing. There's a more practical, there's a pragmatic reason why this case should not be sent back.

QUESTION: Mr. Shafer, may I throw this out at you on that very point. Supposing they suppress the evidence at the suppression hearing that was closed. Would you still think you're entitled to a new trial? You get all the relief you asked for in the suppression hearing except having it open.

MR. SHAFER: I don't think you can escape the fundamental affront for the closure.

QUESTION: In other words, your answer is you'd say the same result?

MR. SHAFER: I would say irrespective of what

the result is. I think that this Court cannot countenance closed hearings. It's too important from the standpoint of society, from the standpoint of the criminal justice system, and from the standpoint of the defendant. It's something he's entitled to and ought to have.

QUESTION: If you carry your argument to its logical conclusion based on the affront to the system, then even if your client were acquitted you must be pressing for a new trial to vindicate the affront tc the system.

MR. SHAFER: The problem is I couldn't get here if he were acquired, Justice Burger.

QUESTION: You might if he waived the double jeopardy, you might.

MR. SHAFER: Conceivably I might, but realistically, Mr. Chief Justice, it seems --

QUESTION: Well, realistically you wouldn't want a new trial then, would you?

MR. SHAFER: If he were acquitted? I would still feel some discomfiture, though, nevertheless, that over a defendant's protests a courtroom in this republic was closed.

QUESTION: Will you please tell me what provision of the Constitution gives you remedies fcr

your discomfiture?

MR. SHAFER: I know of none, Your Honor. But I was trying to answer Justice Burger's questions and I knew of no other way to do it. I withdraw it.

No, the Constitution does not protect my discomfiture. It does protect the discomfiture of the public, and that is one of the underlying reasons why we have open hearings. And to that extent, an affront to the public if there is an acquittal cannot be cured, and for that reason there should never be any countenancing of closed courtrooms under our scheme of criminal justice.

There was no justification for closure in this case. The state asked for closure on the basis of a state law that the state claimed would disable it from future use of wiretap evidence. Whether or not this is so is something that the Georgia Supreme Court did not decide.

And even if the statute were held to require closure in this case while the state played its tapes, the statute could not conceivably authorize closure for the rest of the seven-day hearing, and the tapes took two and a half hours to play.

Nothing in the record justified closure. The Georgia Supreme Court said that the trial court

legitimately balanced. It balanced nothing. There was nothing in the record to balance.

The Georgia Supreme Court's ipse dixit cannot substitute for a trial court record that simply does not exist, and the trial court made no specific findings and closure was improper.

And of course, the court perceives, quite rightly, the question of remedy here, and I trust that I need not allude to that further.

Moving to the second issue, if the Court please, and that deals with the facial validity of Section 16-14-7(f) of the Georgia Code. We submit that we're dealing with a very special and a very dangerous type of statute.

The statute purports to afford basic Fourth Amendment protections in authorizing the warrantless seizure of property subject to forfeiture. It permits a state officer to seize such property without a warrant only if he has probable cause to believe that such property is subject to forfeiture, and then only if he has probable cause to believe that the property will be lost or destroyed if not seized. And the Georgia Supreme Court has construed the statute to permit warrantless seizure only if it is incident to a lawful search, arrest, or inspection.

That's pretty awesome stuff, and it seems to comport facially with the Fourth Amendment. Yet we nevertheless suggest to the Court that it is facially invalid. It is our position that the statute constitutes an open invitation to lawless police action so long as property subject to forfeiture is so broadly defined and so long as the judgment required to determine whether such property is associated with a pattern of racketeering activity --

QUESTION: Mr. Shafer, I'm not sure that the question on the statute is properly here. As I understand it, all the property seized which was not covered by warrants was suppressed. So we don't have any of that property in this case, do we?

MR. SHAFER: We did everything in our power to raise this question --

QUESTION: Now, yes or no? Wasn't the property suppressed, the evidence was suppressed as to all property seized except that covered by the warrant?

MR. SHAFER: We're unable to say, Justice O'Connor, what was suppressed and what wasn't suppressed and whether it was within the four corners of the warrant. And the reason that we're not able to say that, Justice O'Connor, is because the trial court resisted each and every attempt we made to present

evidence on that question, whether in fact what was seized was the result of a pretextual warrant in the nature of a hoax perpetrated on an issuing judge and subverted, corrupted into a general seizure; whether, had the deponents disclosed to the issuing judge what their intent was, whether he would then have authorized or not authorized them to conduct the sort of search that they did.

QUESTION: Well, don't we know what property was suppressed and what wasn't?

MR. SHAFER: But we don't know whether it was authorized to be seized. We don't know -- excuse me. We do know what was suppressed, but what we don't know was what was left, whether that was legitimately permitted to come in.

That's the problem. We don't know that anything should have come in and we don't know whether the judge, had he permitted the officers to obtain the warrant and who were animated and guided by the authorization in the warrant -- whether they did what they were supposed to do, and if they didn't whether they converted this otherwise facially valid warrant into a general search.

QUESTION: Well, that's your last argument, but I'm trying to see whether this statutory question is

even properly here.

MR. SHAFER: Well, Justice O'Connor, all I can say in response to that is this. We may have a problem with that, and if so it would be appropriate to remand it. But I remind the Court that the failure to make a clearer record was not due to any conduct on our part. We did everything we could.

We tried to get the police officers to come in to testify. The court said it wasn't interested in it. We ain't going to try no search warrant, if I recall, was the response of the court. The district attorney acknowledged that the validity of the search warrant was in issue, at the suppression transcript page 3, 10 and 11.

The record is permeated with allusions to the RICO statute and to the fact that the searches were conducted under the authority of the statute. Some of the agents so testified, some of the searching officers so testified.

QUESTION: What county in Georgia was this tried?

MR. SHAFER: Fulton County.

QUESTION: Right in Atlanta.

MR. SHAFER: Sir?

QUESTION: Right in Atlanta, then?

MR. SHAFER: Right in Atlanta.

The searches and seizures were virtually, I believe, in 11 or 12 counties, at 160, 170 homes, 287 individuals named in the warrant to be searched, and they didn't stop there. They had a picnic. They just went on and on.

But be that as it may, minimally, if the Court has some discomfiture, if I may use that bad phrase, with whether the statute is fully before the Court, minimally there ought to be a remand so that we can argue that question.

QUESTION: Well, if it's not properly before the Court then it simply means that you haven't preserved it to bring it to our attention. We wouldn't do anything with it if it weren't properly before the Court. We wouldn't remand.

MR. SHAFER: Well, Justice Rehnquist, this issue has troubled me a great deal, but I have given the Court the very best answer that I can and I have to live and die with it.

The mischief with this statute, if I may discuss that briefly. This statute authorizes police officers to do anything they want to do. It's an invitation to anarchy in the context of search and seizure.

In spite of the noble purposes set out in the statute and in spite of the gloss put on those purposes by the Supreme Court of Georgia, in actuality to expect a police officer conducting a search and seizure to determine whether he has probable cause to believe that all the property of an individual's home is subject to forfeiture or is part of a continuing criminal enterprise or is subject under RICO to forfeiture is like placing a 10b-5 statement before him and having him determine whether it complies with the securities laws.

In practical effect, such a statute would either never be applied because it is manifestly unreasonable to expect an officer to make such a probable cause determination, or the statute would be applied despite its purported probable cause requirement.

In short, the statute would stand as an invitation to lawless police action, which is precisely, precisely, what happened here. The fact of the matter is the statute is, as Justice Jackson said on another occasion, a teasing illusion. It is like a munificent bequest in a pauper's will. It promises everything and can deliver virtually nothing.

I turn now, if the Court please, to the suppression issue, and it is a melancholy issue in this

case. What happened here simply does not make a very pretty picture. The unconstitutional orgy of the way in which this search was executed and the way in which these seizures were made is of mind-boggling proportion. We're not --

QUESTION: Well, do you think there's something inherently wrong with trying to search and seize in 200 or 500 or 1,000 places at once if they have the information? Is that what makes it an orgy, the numbers?

MR. SHAFER: No, sir, no. If I've intimated that, that is not the question. The question is what they did here and the manner they did it, not the numbers. I can conceivably see where thousands are involved in a criminal enterprise and, if probable cause exists and if the executing officers are governed by the authority set out in the warrant, by all means.

But what we're dealing here with is, as the trial judge observed, they simply came in and took everything that they could carry out. There was no effort made --

QUESTION: But some of it was suppressed, was it not?

MR. SHAFER: Yes, it was suppressed because it was irrelevant. They seized love letters which were

irrelevant, they seized report cards of children which were irrelevant, they seized bounced checks which were irrelevant, they seized credit applications which were irrelevant.

It was suppressed because it was irrelevant. It was not suppressed because of the heinousness, the revulsion that the trial court felt, that it should have felt, for what they did and how they did it. We're not talking in this case about the constable that blundered. We're talking about constables who knew very well what they were doing and who embarked on a prearranged design and plan to do precisely what they did here.

They testified that it was their objective to seize evidence of assets so that forfeiture proceedings could be brought. There was nothing in the four corners of the warrant to authorize them to do that. So indifferent were they to the ambit of the warrant that they seized lock boxes where they didn't even bother to distinguish what was or what was not seizable.

Now, may it please the Court, it does not good to excite passions, but it's hard not to be offended by what was done here. So long as there is a Fourth Amendment and a Fifth Amendment, there must be a point at which this Court will say enough is enough.

May I respectfully reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Ms. Westmoreland.

ORAL ARGUMENT OF MARY BETH WESTMORELAND, ESQ.,

ON BEHALF OF RESPONDENT

MS. WESTMOREIAND: Mr. Chief Justice, may it please the Court:

As counsel for the Petitioners has pointed out, there are two separate issues presented to the Court, and I will address them in the crder that the Petitioner, Mr. Shafer, has presented them to the Court this morning.

I would first like to address the issue of the closure of the hearing on the motion to suppress and the circumstances surrcunding that closure and the state's justification for the closure of that hearing. The state sought to close the hearing on the motion to suppress pursuant to a Georgia statute requiring that there be no unnecessary publication of electronic surveillance evidence, similar to such concerns that had been expressed under Title 3 of the Omnibus Crime Control and Safe Streets Act. So that the purpose of the closure was the protection of the privacy of other individuals.

At the time the motion was made at the hearing on the motion to suppress, a colloquy took place between the court and counsel for all of the Petitioners present. Counsel for Mr. Cole, who is one of the Petitioners present in this case, concurred with the request and agreed to the closure of the hearing on the motion to suppress. As such, we would submit he simply has no cause to challenge the issue before this Court.

Mr. Shafer objected on behalf of his clients and urged that his clients did have a right to a public trial. Once the court determined that closure would be effected, Mr. Shafer then requested that certain specified individuals be allowed to remain in the courtroom.

At the insistence of counsel for Petitioner Cole, all of the individuals were excluded from the courtroom except for necessary court personnel, counsel, and the respective Petitioners in the case.

QUESTION: Ms. Westmoreland, would you refresh my recollection. How long was the trial -- was the suppression hearing closed?

MS. WESTMORELAND: The suppression hearing was closed for the entire hearing, Your Honor.

QUESTION: How long was that?

MS. WESTMORELAND: About seven days, Your

Honcr.

QUESTION: Seven days. Does the record show how much of the suppression hearing actually related to the confidential information that prompted the closing?

MS. WESTMORELAND: Your Honor, what the record reflects -- and I don't believe it's broken down precisely in time increments. We have a portion of the record, which admittedly is not in relation to the entire length of the suppressicn hearing, a portion of the reccrd which is devoted to the playing of certain specific tapes of wiretaps which had been made. And I don't know that the reccrd actually reflects precisely how long that is. I believe it is less than a full day period.

Certain cther parts --

QUESTION: Would it be hours or days?

MS. WESTMORELAND: It would be hours, Your Honor.

QUESTION: Hours?

MS. WESTMORELAND: Yes, Your Honor. I don't know precisely how long. I believe Petitioners have asserted two and a half.

QUESTION: Does the state contend it should have remained closed during periods when that type of evidence was not being intrcduced?

MS. WESTMORELAND: Your Honor, what we submit is that the initial basis for the request for the motion was justified based on the fact that not only were the tapes being played, but other evidence was being presented throughout the entire hearing.

The main thrust of the hearing on the motion to suppress was electronic surveillance. That was -- the majority of the motion to suppress was devoted to the electronic surveillance, the manner in which it was conducted, the persons who were surveilled, and various other things of this aspect.

During the motion to suppress hearing there were references to individuals' phone numbers, other individuals who may have had their telephones tapped during this proceeding. At the beginning of the motion to suppress, I don't know that the trial court knew precisely to what limits the evidence would go during the hearing on the motion to suppress, but we would submit that there was a justification at the outset of that hearing for closing the entire hearing.

And we would also note that there is no attempt made at a later portion to request that the hearing be made open at any part, even after the tapes were played.

QUESTION: There was no renewal of the

request?

MS. WESTMORELAND: Not that I recall on the record, Your Honor.

QUESTION: At the end of the seven days, the judge did release some of it, didn't he?

MS. WESTMORELAND: Your Honor, there was a discussion conducted as to the transcript at that point I believe it was made available to counsel, and I think the transcript has been made available at this time. It was public once it was submitted to the Georgia Supreme Court.

QUESTION: By the time it reached the Georgia Supreme Court it was public?

MS. WESTMORELAND: Yes, Your Honor. I know it was open in the Supreme Court of Georgia. I don't know the status, at what point in time.

QUESTION: Open for the court or for the public generally?

MS. WESTMORELAND: For the public, Your Honor, to my knowledge.

QUESTION: Well, the tapes were played at the trial, weren't they?

MS. WESTMORELAND: Yes, Your Honor, the tapes were played at the trial.

QUESTION: So it's all going to be made public

there, regardless of their impact on other people.

MS. WESTMORELAND: That's correct, Your Honor. And this is where we would submit that the trial court did conduct a balancing of the interests. Petitioners have asserted that the trial court balanced nothing. A reading of the transcript, of the particular portion on the motion to suppress dealing with this issue, shows that the trial court recognized the fact that if this motion were made in relation to the trial itself, then the public trial right would have to supersede any concerns of privacy or other individuals in regard to --

QUESTION: Well, the state's interest in closing it, it sounds to me like it would only be to protect privacy in the event you lost your motion. If the motion to suppress were granted, you would have lost and what would have been your interest then? Certainly if you win and you plan to introduce the tapes at the trial --

MS. WESTMORELAND: Yes, sir.

QUESTION: -- so you don't plan to protect anybody's privacy.

MS. WESTMORELAND: Your Honor, I think the state's interest --

QUESTION: Well, what's the state's interest

in closing the suppression hearing?

MS. WESTMORELAND: The state's interest focuses on not only the fact -- there are persons who were not being tried at that point, who were not indicted, who subsequently I think were tried or were considered for trial, and the state was seeking to protect their rights, at least to the fullest extent possible, recognizing they could not --

CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock.

(Whereupon, at 12:00 noon, the argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: Ms. Westmoreland, you may continue.

ORAL ARGUMENT OF MARY BETH WESTMORELAND, ESQ.

ON BEHALF OF RESPONDENT - RESUMED

MS. WESTMORELAND: Mr. Chief Justice, may it please the Court:

The argument that I was making before we adjourned for lunch was dealing with closure of the trial. At this point I would like to move into some of the factors that were considered by the trial court and what was the basis for the closure.

The trial court, as I have noted previously, did balance interests prior to the closure. He recognized that there was a public trial right and specifically acknowledged that that right would have to take precedence if this were addressed to the trial itself rather than the hearing on the motion to suppress.

The trial court was also aware of the fact that there were other persons potentially involved. Shortly prior to this hearing, continuances had been granted for any number of defendants, and the trial court was aware of the fact that these defendants were

also involved and could have been involved in some of the evidence that was to be presented at the hearing.

QUESTION: Is it your position that if anyone else is involved or affected, that that is sufficient in itself to close the hearing?

MS. WESTMORELAND: Yes, Your Honor, we would submit that -- not just necessarily one individual, but in this circumstance we have the potential of so many individuals being affected and so many individuals' privacy rights being affected by the very nature of the crime that was involved, by the very scope of the gambling operation that took place, and I think that was one of the factors that was --

QUESTION: So it isn't enough if just one person's rights are affected?

MS. WESTMORELAND: That could be enough in a given case, Your Honor. And we would submit that what has to be considered in evaluating the public trial guarantee is the totality of the circumstances in any given case, to determine whether that public trial right must take precedence over other privacy rights of individuals in the case.

QUESTION: Well, Ms. Westmoreland, was there any reason that the proceeding could not have been open after the tapes were played?

MS. WESTMORELAND: Your Honor, the obvious response is that there was still the potential for other evidence coming out, as I have noted previously.

QUESTION: What kind of evidence?

MS. WESTMORELAND: For instance, other individuals' telephone numbers, names, and that type of information, which, while not necessarily within the restrictions of the statute providing for the publication, referring to the publication of wiretap evidence, still affects privacy rights of these individuals.

QUESTION: Was any suggestion made during the proceeding that it should be opened at some later stage?

MS. WESTMORELAND: Not to my recollect, Your Honor. There was no suggestion made by any counsel at a later stage that the proceedings at that time be opened. The suggestions were all made at the beginning of the hearing and I don't recall seeing one at any stage later in the proceedings.

QUESTION: Well, isn't this mostly speculation, though, about what invasions of privacy might occur? Were there any findings by the trial judge?

MS. WESTMORELAND: There were no factual

findings made on the record at the time of the closure.

QUESTION: Well, or off the record, based on an off the record hearing?

MS. WESTMORELAND: No, Your Honor, although I think there was the opportunity there for a hearing should anyone wished to present any additional evidence. The court was, as I noted, faced with a situation in which obviously a great number of people were involved.

QUESTION: Well, I take it part of your submission, then, is that these kinds of findings are not essential to close?

MS. WESTMORELAND: A specific factual finding on the record we would submit is not essential to the closure of the hearing under the circumstances in this case, when it is important -- when it is obvious from the record that the trial court did balance the rights.

QUESTION: Well, what would you say if at any suppression hearing the prosecution just got up and said, Your Honor, we'd like to close this hearing, and he said fine?

MS. WESTMORELAND: I would submit that in that circumstance the prosecution would have to go further than just merely requesting closure.

QUESTION: Well, why? What right is

involved?

MS. WESTMORELAND: In the instance that Your Honor suggests, the court has no way of knowing what right is available which should take precedence.

QUESTION: Well, I know, but you mean there would be some federal constitutional obligation to keep the hearing open?

MS. WESTMORELAND: Your Honor, well, it would depend on what type of proceeding we're referring to.

QUESTION: Well, this is just a suppression hearing, and the prosecution says: Your Honor, we think it'd be better to close this hearing.

MS. WESTMORELAND: Your Honor, under those circumstances that --

QUESTION: That infringes the defendant's right to a public trial, doesn't it?

MS. WESTMORELAND: That's not necessarily the circumstance in which we would --

QUESTION: Well, I know, but would that violate the defendant's rights, without some kind of findings?

MS. WESTMORELAND: We would submit that a suppression hearing is not such a proceeding to which a public trial guarantee necessarily attaches.

QUESTION: Well, why don't you just take that

position, then, and forget this privacy business?

MS. WESTMORELAND: That is one of the positions that we would take in this Court, Your Honor, and also obviously noting that the privacy right is --

QUESTION: Well, suppose you lost on that, though. Suppose the issue was, suppose it was clear that in my example the defendant's right to a public trial would be infringed absent -- without more. How much more would there have to be? Just some inference of third party interests, or wouldn't he have to make some findings?

MS. WESTMORELAND: Your Honor --

QUESTION: Wouldn't the prosecution have to -- perhaps you could have an in camera hearing and the judge could be told what was really involved in this suppression hearing.

MS. WESTMORELAND: There's a possibility --

QUESTION: You didn't have that here, did you?

MS. WESTMORELAND: No, Your Honor, there was no such hearing conducted. But we would submit that the assertions that were made on the record in this case were sufficient to allow the judge to conclude that there was a privacy right at stake and to allow the judge to balance that privacy right.

QUESTION: Although you don't think even that kind of a consideration was necessary?

MS. WESTMORELAND: No, Your Honor, we do not. We simply do not think that the public trial right need attach to a suppression hearing, particularly not under the facts of the instant case. We submit that under the circumstances of this case the Sixth Amendment right to a public trial did not attach and was simply not violated.

The fact that it was a suppression hearing is a fact that should be considered by the Court in making its determination as to whether a public trial right was violated.

QUESTION: Of course, here the jury had been impaneled and perhaps it was a part of the trial.

MS. WESTMORELAND: The jury had been impaneled, Your Honor, but we would submit that that is simply a procedural technicality that had taken place and does not necessarily make the suppression hearing any more a part of the trial than it would have if the suppression hearing had taken place two months prior to the actual trial itself.

It was a procedural matter and nothing more, and under those circumstances we would submit that to apply a public trial guarantee to a suppression hearing

would in a sense defeat the entire purpose behind the suppression hearing and the exclusionary rule itself.

QUESTION: Does that follow? Supposing you did what I think perhaps was behind some of Justice Powell's questioning this morning, supposing you closed everything except the -- I mean, suppose you did not permit the wiretaps themselves to become public, but just all the evidence about how they were taken and all the rest of it.

Why wouldn't that be adequate for the state's interest?

MS. WESTMORELAND: Your Honor, as noted previously, under some circumstances that could be sufficient, it might be. In this case we would submit that at the time this decision was made that was not -- that was something that would have been purely speculative on the part of the trial judge.

QUESTION: Is the transcript available of what actually happened at this hearing? Do we have it in the papers before us?

MS. WESTMORELAND: Yes, Your Honor, there is a transcript of the motion to suppress hearing and what took place regarding the closure is transcribed.

QUESTION: The entire transcript of the suppression hearing is before us?

MS. WESTMORELAND: Yes, Your Honor, it is.

QUESTION: How soon after the close of the suppression hearing was that transcript available to the public, to the press, for example?

MS. WESTMORELAND: Your Honor, I am not certain as to how scon afterwards it was actually made available to the public. I simply don't know that.

QUESTION: It became available at some pcint, did it not?

MS. WESTMORELAND: Yes, Your Honor, I believe it did. I just simply --

QUESTION: Well, why did it ever become available before you actually put the evidence, played the tapes at the trial? Did the prosecution just revoke its objections to making this matter public?

MS. WESTMORELAND: No, Your Honor. I think if my recollection is correct, the transcript I believe was initially sealed in the Superior Court of Fulton County.

QUESTION: Well, who opened it?

MS. WESTMORELAND: And I don't know at what stage it became opened. Like I said, I do know that it was opened in the Supreme Court of Georgia on direct appeal, and at that time the evidence had already been played during the trial of the case. So it was opened.

QUESTION: Well, ycu mean -- I thcught it was opened before trial, wasn't it? It wasn't?

MS. WESTMORELAND: It was made available tc counsel, I believe, at some point, Your Honor. I am simply not certain as to exactly at what stage.

QUESTION: But you don't think it was made public before the actual playing of the tapes at trial?

MS. WESTMORELAND: Your Honor, I simply don't know. I would doubt it, because the trial did begin almost immediately after the suppression hearing was concluded.

QUESTION: Once the tapes were available and played in the courtrcom, there'd be certainly no reason to withhold the transcript, would there?

MS. WESTMCREIAND: I can perceive none, Your Honor. The evidence was available.

QUESTION: The cat was out of the bag by that time.

MS. WESTMORELAND: Whether through the suppression hearing transcripts or through the trial itself, the evidence was available, yes, Your Honor.

QUESTION: Well, if the jury had been impaneled and this trial was going to go on just instantaneously after the suppression hearing, and you knew you were going to play the tapes, I don't know what

interest the prosecution really had in closing the hearing. The cat's going to be out of the bag in a few days anyway.

MS. WESTMORELAND: Assuming that the prosecution prevailed at the hearing on the motion to suppress, that's a definite consideration. The consideration is always present in a hearing on a motion to suppress that you may not prevail, and in order to protect privacy rights of individuals at that point that consideration has to come into play, that this evidence may be suppressed.

And once again, we come to one of the underlying purposes of the exclusionary rule itself. We would submit that this simply furthers that purpose.

QUESTION: Suppose you lose on this argument. What's the remedy in your view?

MS. WESTMORELAND: Your Honor --

QUESTION: Can we just have -- can the state just conduct a new suppression hearing and open it up?

MS. WESTMORELAND: Your Honor, we would submit that the only remedy that would be appropriate or necessary assuming that we were to lose on this argument would be a new suppression hearing. That would be sufficient at least until such time as that suppression hearing was conducted.

QUESTION: But that's really ludicrous in a way, to say that you conduct a new suppression hearing where there's no suggestion that the absence of the public influenced a decision, which is purely a question of law, as to whether evidence should be suppressed cr not.

I realize it's not you that say that there has to be some remedy, but to have a new suppression hearing just seems like giving someone a wooden arm when they don't need it.

MS. WESTMORELAND: Well, Your Honor, that would be true and would fall in line with our argument that there is simply no need for any such remedy in this case. But we would submit that that is the most that is required in the fashion of a remedy at this stage.

To require an entire new trial --

QUESTION: Well, would we have to determine what the remedy is? Isn't that a matter for the Gecrgia courts if you should nct prevail here?

MS. WESTMORELAND: Your Honor, we would submit that perhaps the Court would probably give directicn to the Georgia court as to what their remedy would be in this case.

QUESTION: I'm still a little troubled. I take it your basic argument is that the theoretical

privacy rights of third parties prevail over a constitutional right of a defendant who is accused and being tried to a public trial?

MS. WESTMORELAND: That they can prevail under certain circumstances. That is the main thrust of our argument, Your Honor, aside from also the point that the Sixth Amendment public trial guarantee should not be held to apply to a motion to suppress, at least under the circumstances of this case.

QUESTION: Well, I thought one of the interests you were asserting was the interest of the state, wholly aside from third parties, to protect your law enforcement function, other prosecutions and things like that, isn't it?

MS. WESTMORELAND: That's correct, Your Honor. And in conjunction with protecting the prosecutions, you once again necessarily bring in the privacy rights, because that is the fundamental purpose behind the statute prohibiting publication.

QUESTION: You might want to protect some informers who might be revealed or surfaced in these things.

MS. WESTMORELAND: That is also a compelling interest the state may have.

QUESTION: In which event I doubt that you

would play the tapes at the trial.

MS. WESTMORELAND: That's probably correct, Your Honor.

QUESTION: But I still don't understand how you have a hearing, a suppression hearing, and reveal what has already been revealed. I assume you put in the same testimony that is not only in the record, but it's all the way up here now. So it's rather public.

MS. WESTMORELAND: Yes, Your Honor, at this point it is. At the time of the suppression hearing it was not.

QUESTION: But I still, like Justice Rehnquist, I don't see actually what anybody gets out of this.

MS. WESTMORELAND: Your Honor, that would be our submission as well, is that either a new suppression hearing would serve no purpose and a new trial is simply not warranted under the facts of the case. There is simply no showing that an open suppression hearing would have affected the trial one way or the other.

We have the record, we have the evidence presented at the trial. Virtually all of the witnesses who testified at the suppression hearing, with the exception of perhaps --

QUESTION: Well, what effect does that -- was

it Jackson or something against New York, where this Court said you should hold a confession hearing, Jackson against Denno?

QUESTION: Yes.

QUESTION: Does that have any effect on this?

MS. WESTMORELAND: Your Honor, I'm not sure I understand the question.

QUESTION: Jackson and Denno says, where there was a charge that the confession was illegally admitted into evidence -- despite the conviction, this Court sent it back to have a hearing on it --

MS. WESTMORELAND: Yes, Your Honor.

QUESTION: -- as to whether the confession was admissible or not.

MS. WESTMORELAND: Yes, Your Honor.

QUESTION: Well, on the basis of that could you send this case back for a hearing as to whether the suppressed evidence should not have been suppressed?

MS. WESTMORELAND: A new suppression hearing could be a potential remedy, and we would again submit that it's simply not a necessity, but that would be the most extreme remedy that would be warranted under the facts of this case.

QUESTION: Of course, there's a lot of thought behind the public trial. I'm sure that it may actually

have some impact on the outcome. Witnesses sometimes testify differently in a closed hearing than they would in public. As a matter of fact, some of them may not testify at all if it's an open hearing.

So it may be that the result would be different in an open hearing.

MS. WESTMORELAND: Your Honor, there is a speculation that it might very well be true. In the instant case, however, we have an open trial in which virtually all witnesses did testify before the trial court at that time. They testified in public, with the exception of, I believe I noted, I think four or five witnesses who did not, but who could readily have been called to testify at the trial and present their testimony in public.

QUESTION: Public trials, also sometimes people read about them, see about them; all of a sudden somebody shows up, I'm the unknown, as a witness, that completely refutes the state's case.

MS. WESTMORELAND: That's correct, Your Honor. We would submit that, once again, the fact that the trial itself was open serves that purpose of a public trial guarantee.

QUESTION: Ms. Westmoreland, I gather that before the closure was ordered there was no proceeding

to identify any state interest, compelling or otherwise, and any weighing proceeding of any kind by the judge. He just ordered the closure, didn't he?

MS. WESTMORELAND: There was a -- if you wish to categorize it, it was not really a hearing. There was a discussion that took place between the trial court and defense counsel and the district attorney prior to the closure. There was no actual evidence taken.

QUESTION: Is that consistent with what we said, at least in the context of that case, in Globe Newspaper about the necessity before closure of a proceeding of this kind, in which the state interest is identified and the judge can weigh it and all that?

MS. WESTMORELAND: It seems to me that this circumstance is somewhat different from that.

QUESTION: Because it's a pre-trial question or what? No, this was suppression during the trial, wasn't it?

MS. WESTMORELAND: Your Honor, we would submit that it is actually, although the jury was impaneled, it still is actually a pre-trial type of proceeding. The mere fact that the jury may or may not have been selected prior to the suppression hearing is not sufficient to actually incorporate it into the trial.

QUESTION: I know this is primarily a Sixth

Amendment case.

MS. WESTMORELAND: Yes, Your Honor.

QUESTION: But there's also a First Amendment argument here, I think, isn't it?

MS. WESTMORELAND: There is a First Amendment argument, I think, that has been somewhat asserted by the Petitioners. But we would submit the First Amendment question is simply not brought before this Court in this case, that the issue presented to this Court is a Sixth Amendment public trial question, and that the First Amendment --

QUESTION: Well, if it had been phrased, framed as a First Amendment issue, would you have a different position than the one you are advocating today?

MS. WESTMORELAND: No, Your Honor, we would not.

QUESTION: That's my point. And Globe was a First Amendment case.

MS. WESTMORELAND: Yes, Your Honor.

QUESTION: A true First Amendment case.

MS. WESTMORELAND: Yes, Your Honor, it was.

QUESTION: And why shouldn't what we said there apply equally here?

MS. WESTMORELAND: I think the circumstances

are somewhat different, Your Honor, in the instant case.

QUESTION: Well, they are different in the sense that this is a motion to suppress and that was the testimony of the witness.

MS. WESTMORELAND: Yes, Your Honor. That is one of the fundamental differences that we have between two two cases.

QUESTION: But the underlying reasons for requiring access and open trials, don't they apply to both, both to the context of the witness that we had in Globe and the suppression hearing? What's the difference?

MS. WESTMORELAND: They apply, but not to the same extent, Your Honor, in this case. We would submit that the public trial right would not apply to this type of hearing in the same light the same type of restrictions might be placed upon a First Amendment type of right.

In the time that I have remaining, I would like to move on to the search and seizure issue that has been presented to the Court. In beginning, I would note that, as pointed out previously by Justice O'Connor, the issue of the validity of the statute is simply not a question that is properly presented to the Court. There

has been no showing that any evidence that was admitted at the trial was not seized pursuant to the search warrants themselves.

Evidence was suppressed which was allegedly seized outside the scope of the search warrant. The Petitioners have pointed to no evidence that was presented at trial which was seized outside of the scope of those warrants. So we would urge the Court to simply decline to reach the challenge to the facial validity of the RICO forfeiture statute.

If the Court were to reach the facial validity of that statute, we would submit that it is clearly valid on its face. It sets forth specific requirements which clearly comply with the Fourth Amendment. It specifically codifies various provisions of the Fourth Amendment requiring that the law enforcement officers be authorized to enforce the laws of the state, that they make a seizure pursuant to a lawful arrest, a search or inspection, that they have probable cause to believe the property is subject to forfeiture, and that they have probable cause to believe that the property will be lost or destroyed if not seized.

These four requirement clearly fall within the purview of the Fourth Amendment and, as a matter of fact, essentially codify Fourth Amendment principles in

themselves. The statute does not give officers authority to extend the bounds of the search itself. The officers must be conducting a lawful search. It merely authorizes warrantless seizures under certain specified, precise conditions.

We submit that this is no different from a plain view type of seizure, which has been allowed on prior occasions. In the same context, the plain view seizure does not enlarge on the right to actually search the area, but simply recognizes the fact that once an officer is in a position to observe the evidence, to observe documents, then to require that he obtain a warrant at that point could in some circumstances endanger the public, endanger the police, or could simply result in the evidence being destroyed or lost before a warrant could be obtained, and to require a warrant under those circumstances would be an inconvenience that is simply not required under Fourth Amemdment principles.

Petitioners have also made a comment concerning a lack of notice and hearing provided in the statute, and we would submit that the statute itself, while not providing for prior notice and hearing, that under the circumstances that a seizure would be taking place that such notice and hearing prior to seizure is

simply not required.

This is similar to the circumstances found in the Calero-Toledo versus Pearson Yacht Leasing Company case, in which the circumstances in the case justified the seizure of property without prior notice and hearing. The state's interest in obtaining in rem jurisdiction over the property and in enforcing criminal sanctions and preventing the loss or destruction of property, which quite obviously would be destroyed under those circumstances, justifies the statutory provisions which do not provide for the notice and hearing.

The statute does provide for a hearing within a very short time period thereafter, and we would submit that that is clearly sufficient to meet the Fourth Amendment requirements.

Finally, Petitioners assert that the search in question was a general search and that all evidence seized should have been excluded. We would submit that there is no justification presented in this record for extending the exclusionary rule to such unreasonable bounds as to exclude every piece of evidence seized in this case.

The evidence would not support a conclusion that the officers acted in flagrant disregard of the search warrant. The warrants were valid on the face of

those warrants, and there is no reason existing on this record to exclude evidence which was clearly lawfully seized pursuant to the warrant.

To do so would be to defeat the entire purpose behind the exclusionary rule and would serve no deterrent effect on the actions of police officers. Therefore, we would submit that the Court should not find a general search under the facts of this case, as they simply do not warrant such a conclusion.

In conclusion, Your Honors, we would simply urge that the Court conclude that there was no public trial right that attached, and even if the public trial right did attach at a suppression hearing it was not violated under the facts of the instant case.

We would also urge the Court to conclude that the statute providing for the RICO forfeitures was not presented to this Court, as all evidence submitted at trial was seized pursuant to a valid search warrant. Even so, the statute is clearly valid on its face and the facts of this case do not justify a finding that there was a general search.

Thank you, Your Honors.

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

REBUTTAL ARGUMENT OF HERBERT SHAFER, ESQ.,

ON BEHALF OF PETITIONERS

MR. SHAFER: If the Court please.

First of all, I want to clear up one problem. I didn't mean to intimate to the Court that remand for a fresh suppression hearing would be unacceptable. On the contrary. It isn't an all or nothing proposition for Guy Waller and the codefendants. We'd rather have an incomplete remedy than no remedy at all, obviously.

QUESTION: What would you do after your new hearing on suppression? Go to another trial then?

MR. SHAFER: We would hope to. But realistically speaking, Mr. Chief Justice, the trial judge hearing the motion to suppress would be hard put to change his mind, and that is why we're asking this Court and the Constitution to make up his mind for him by ordering a new trial.

QUESTION: Well, it might be the hearing might be before another judge.

MR. SHAFER: That is not before another jury, though, which would be insulated as --

QUESTION: Well, the suppression hearing isn't going to be before a jury. It's going to be before a judge.

MR. SHAFER: But the analogy I'm trying to draw, Justice White, is Jackson v. Denno was sent back

for a new hearing on the question of the voluntariness of the confession, but that was a jury that was completely insulated from the events that had happened previously.

That would not be the case with a new judge.

QUESTION: In Jackson against Denno the hearing that was going to take place on remand wasn't before a jury. It was before a judge. It had nothing to do with a jury.

QUESTION: The only question on that remand was whether it would ever get to the jury.

QUESTION: And if it was found to be voluntary, it was properly put before the jury.

MR. SHAFER: I'm confused on that.

Justice O'Connor suggested that the statute could not be properly addressed because everything that was illegally seized was suppressed. Well, we really don't know what was suppressed, and we really -- or rather, we really don't know that what was suppressed was all that should have been suppressed, because the trial court studiously refused to consider the validity of the warrant, and refused to consider the manner in which the warrant was executed.

The trial court simply said, I ain't going to sit here for no nine hours and listen to a bunch of

police officers come in and say how they executed the warrant. So whether they in fact executed a general warrant, which would require suppression of everything, we don't know.

We do know this, though: Some of the police officers who testified acknowledged that they conducted the searches and seizures under the authority of the warrant. We do know that the Supreme Court of Georgia said that it was properly before the court. And we did everything in our power to make an evidentiary showing -- we were frustrated by the trial court -- in order to expand the record.

So minimally, if the Court has some doubts on the subject, we respectfully suggest that we ought to have a new hearing on remand on that question.

Finally, the suppression order entered by the court, the trial court, was not sufficient because this kind of indiscriminate search and seizure, a general search and seizure, requires suppression of everything. The failure to suppress everything, but allowing them to return those things that they have no use for, is an insufficient remedy under the circumstances.

And finally, if the Court please, Calero-Toledo had exigent circumstances. We don't have any exigent circumstances here.

Thank you.

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

(Whereupon, at 1:28 p.m., argument 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:

#83-321-GUY WALKER, Petitioner v. GEORGIA; and

#83-322-CLARENCE COLE, ET AL., Petitioners v. GEORGIA

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

BY Pirie Hammond

(REPORTER)