OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-95

TITLE ERNEST S. PATTON, SUPERINTENDENT, SCI - CAMP HILL AND HARVEY BARTLE, III, ATTORNEY GENERAL OF PENNSYLVANIA, Petitioners v. JON E. YOUNT

PLACE **Washington, D. C.**

DATE February 28, 1984

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IN THE SUPREME COUPT OF THE UNITED STATES

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ERNEST S. PATTON, SUPERINTENDENT, :
SCI - CAMP HILL AND HARVEY :
BARTLE, III, ATTORNEY GENERAL :
OF PENNSYLVANIA, :
Petitioners, :
v. : No. 83-95
JON E. YOUNT :

- -x

Washington, D.C.

Tuesday, February 28, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:51 o'clock p.m.

APPEARANCES:

F. CORTEZ BELL, III, ESQ., Assistant District Attorney, Clearfield, Pennsylvania; on behalf of the Petitioners.

GEORGE E. SCHUMACHER, ESQ., Federal Public Defender, Pittsburgh, Pennsylvania (appointed by this Court); on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Bell, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF F. CORTEZ BELL, III, ESQ.

ON BEHALF OF THE PETITIONERS

MR. BELL: Thank you.

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

The instant matter before the Court this afternoon, Paton v. Yount, presents this Court a broad, general question dealing with the impact of pretrial publicity upon the ability to select and empanel a fair and impartial jury, as well as a question dealing with what if any standard is to be provided to the federal courts for purposes of reviewing a state court conviction. However, contained within that broad and general question is a much narrower, much smaller question. However, that question is very important, and that being what standard is to be applied by a federal court to a state court determination of the impartiality of not only just one juror but of a jury panel as a whole.

Now, the basic factual history setting forth these particular issues have previously been exhaustively covered both in the record and in the brief of counsel.

With regard to the 2254 analysis, the respondents in their brief rather summarily dismiss this particular issue. However, it is the petitioners' assertion that this issue is very important not only to this particular case but also to the federal circuits and the federal district courts. The courts since the inception of federal habeas corpus review have constantly struggled with the question as to how much deference should be given to a state court determination, and of course, as part of that struggle, that has led to a conflict between the state and the federal court systems.

With the amendment in 1966 of Section 2254 by adding a provision 2254(d), Congress initially made an attempt to attempt to alleviate some of this particular conflict. However, it seems that due to the recent influx of cases that have been decided on the basis of 2254, that particular provision has led to more litigation rather than ceasing the litigation in the various federal courts.

It wasn't until this Court's decision in Sumner v. Mata in 1981 that this court orally addressed in that particular opinion what standard of review, what should the federal courts do with regard to state court determinations.

QUESTION: Of what?

MR. BELL: State court determinations basically as to factual matters.

QUESTION: Fact, yes.

MR. BELL: Yes, not the mixed questions of fact and law.

With regard to that particular decision, it set forth that the federal courts must not only note the provisions of 2254, but that they must go one step further and indicate the basis of their analysis so the reviewing court could review their determination, on what basis did they decide that the state court determination as to a factual matter would not be accorded the presumption of correctness?

Now, in essence, what we have in the present case before the court today, we have a state trial court and Pennsylvania State Supreme Court determination as to the issue of juror impartiality. So the first question that must be addressed is is this a factual determination, or is this a determination of a mixed question of fact and law?

QUESTION: This was at the second state trial, was it not, Mr. Bell?

MR. BELL: Yes, this was at the second state trial in 1970.

QUESTION: Fourteen years ago?

MR. BELL: Fourteen years ago, yes.

QUESTION: Is it correct that this, the act charged in the indictment occurred in 1966?

MR. BELL: Yes. The actual occurrence in this particular case was April 28 of 1966. The first trial was held with a decision being reached by the jury October 7 of 1966, and then the second trial occurred in November 20th of '70, 1970.

With regard to the issue as to whether this is a factual determination, I would submit to the court that what we have in essence here is a determination of a credibility issue by the trial court judge, in this particular case, Judge Charry, and hearing the indications from the person on the voir dire, that person indicating as to whether they had an opinion, did not have an opinion, whether it was fixed or unfixed, or ever where they could set that opinion aside, what the trial court judge was doing in that case was determining the credibility of that particular person, was what they were saying is believable based upon their demeanor, their tone, the inflection in their voice.

Now, this particular issue as to credibility is a very difficult issue to determine on the basis of appellate review. As this Court has indicated that

based upon a record before the appellate courts and any appellate court this applies to, even within the States, it is very difficult to have a flavor of what went on actually during the course of the trial, during the course of the voir dire examination. So what we have here is a determination by the trial judge as to these individual jurors and as to the panel as a whole, the 12 individuals that were selected, that they were impartial.

Now, based upon this Court's decision in Marshall v. Longberger, which indicated that a credibility determination of a witness is such that it should, or great deference should be given to the trial judge, in this particular case, the trial judge in Clearfield County. I submit to the Court that what we are dealing with here is an issue as to fact, not a mixed question as to the law in fact. The law in this particular case, Irvin v. Dowd, which the Federal Court of Appeal in the Third Circuit applied to this particular case, I submit to the Court was misapplied. What the Court of Appeals did in essence was determine the statistical analysis based on the individuals as a whole who were not selected for the panel for various reasons, and used that in order to overturn the sworn testimony of the individuals on their voir dire

indicating that either yes or no, they had opinions, and yes or no, that they would set them aside.

In essence, we also have a decision not only as to this credibility, but also as indicated before this particular Court, in various other cases of the court. Prior to the beginnings of 2254(d), which was in 1966 -- and I just note in passing that Irvin v. Dowd predated that in 1961 -- the various decisions of this Court mention this issue as to juror impartiality and the struggle that was working with regard to it. Clear back in 1878 in Reynolds v. United States, they talk about publicity at that early date, and they indicated the struggle that once again occurred with challenges for cause as to publicity, as to prejudice, as to the jurors to be selected, and also in the Holt v. United States in 1910. At that particular time with regard to those cases, the Court did not deal with a 2254 analysis but simply indicated that a state court determination with regard to those particular issues, which it did indicate at that time was a mixed question of fact and law, should be dealt with by the Court by granting great deference to the trial court decision.

Even in Irvin v. Dowd there is a citation to the Reynolds case and to Holt indicating once again that unless the error is manifest as shown by the record

before this particular Court, that the court should defer to that particular case.

As I mentioned, since the 2254 came into effect, this Court has on several occasions dealt with this particular issue once again, initially in Sumner v. Mata, which was once again a mixed question as to fact and law dealing with a photographic display to various witnesses. There were several questions addressed at that particular time, in particular dealing with the circumstances surrounding the identification as to whether the victim had sufficient time in order to accurately see what occurred and who her assailants were, or the assailants were, whether the witness failed to give an adequate description to the authorities, and thirdly, whether there was any pressure placed upon the individual by prison officials in order to get him to identify this particular individual.

Now, this Court has on two occasions with regard to Sumner v. Mata addressed this particular issue. Initially in 1981 the Court vacated the decision, remanded it back to the Court of Appeals for purposes of applying a 2254 analysis to these particular matters. The Court of Appeals retained jurisdiction, rendered its decision. the issue came back up before this particular Court once again in Sumner v. Mata in

1982, I believe, and it was once again vacated and remanded by this Court on the basis that the Court of Appeals had improperly applied 2254 to this factual determination.

In Marshall v. Longberger, as I have mentioned to the court this morning or this afternoon, that was a case dealing with a murder prosecution where the State or the Commonwealth attempted to use a prior conviction of the individual in order to fit it into its aggravated circumstances range such that they could gain the death penalty. With regard to that particular case, the Court has held that a federal court has no license to redetermine the credibility of the witnesses. In that case, the Court of Appeals, what they have done there was they attempted to redetermine whether this individual's plea of guilt in another state which was used for purposes of attempting to gain this conviction, whether that was voluntarily entered. They went into great depth dealing with the guilty plea colloquy, etc. And this Court indicated that the federal courts shouldn't redetermine that issue as to credibility, they should allow it to stand and accord it the deference of 2254(d).

And most recently, in the case of Pusham v. Spain in this Court in 1983, December of 1983, in this

particular case, a juror who was on a case subsequently realized during the course of the testimony that she had some knowledge at to the victim involved in another homicide which indirectly related to this particular case through one of the witnesses. She had some ex parte discussions with the court with regard to that, and the record indicates that more or less he indicated as long as it is not brought up again, I don't think you have a problem.

However, defense counsel after the conviction discovered that this occurred. Obvicusly he filed a petition before the court, a hearing was held, and the court at that particular time -- this is the lower court, the trial court -- made a determination with regard to that particular juror that her -- she was not biased, she was not prejudiced as a result of that. This Court, upon reviewing that, held in essence that this was a determination of fact because it dealt with impartiality, it dealt with the credibility to be accorded that particular witness.

So the petitioners before this Court at this particular time would assert to this Court that what we have in this particular case is a question as to this credibility, and who better to make a determination as to --

QUESTION: May I interrupt you with a question, Mr. Bell?

MR. BELL: Certainly.

QUESTION: Judge Garth in his concurrence concentrated on the one juror, I think his name was Brin or some such name.

MR. BELL: Yes.

QUESTION: And as to him, he said there was no fact problem because the district, or the state judge didn't make any finding concerning him.

How does your argument -- does your argument respond to Judge Garth's concern?

MR. BELL: Yes. In essence with regard to Mr. Brin, who is the major problem for the prosecution in this particular case, his voir dire examination, the trial court did not specifically refer to his testimony in any of its opinions. It indicated I believe once as the respondents have brought up, as the trial court said at one point that most if not all of the individuals seated had a -- did not have a fixed opinion. The Pennsylvania Supreme Court, which under Sumner v. Mata is a state court determination, their review on appeal, did specifically state that with regard to Mr. Brin and the other individuals -- they did not mention Mr. Brin's name in essence, but they did state that upon their

independent review as to Mr. Hrin and all the others, they could find no problems not only with regard to whether a change of venue could be required, or as to the issue as to whether challenges for cause were improperly resolved by the court.

QUESTION: Yes, but Justice Roberts didn't mention the problem that Juror Hrin had a predisposition to find the man guilty and put the burden on the defendant to explain why he was innocent.

MR. BELL: Your Honor --

QUESTION: Justice Roberts didn't mention that problem, did he?

MR. BELL: No, he did not specifically address that. The petitioner's position with regard to that particular matter, and in specific, with regard to Mr. Hrin, we did not feel that he entered the jury box with an opinion. The testimony at the voir dire obviously is ambiguous. At one point he said I can enter with an open mind. In the next sentence, practically, he says that he would require some evidence before he would change his opinion. It certainly is ambiguous.

What we would submit to the Court are two things with regard to that. First of all, as to his testimony that he would require some evidence, he has never indicated that he would require some evidence by

either the prosecution or the defense to change that. He simply says that he would enter the box with an open mind. At one point he does indicate in the voir dire examination that he would listen to the evidence presented and decide the case solely on the evidence and the facts presented to the court.

We would submit that he did not enter with an opinion. He entered to the extent where he said, hey, I have heard this publicity to some extent. My opinion that I had was based upon what I have read in the paper, et cetera. And as a result of that, I do have an opinion. I cannot go in there and totally cleanse myself of any thought of it. It is still there regardless. However, he indicated that once evidence has started to be presented, we submit once the prosecution started to present evidence, he will begin to develop with his open mind an analysis as to that, he would look at it as to an open mind.

Judge Charry in his denial of the challenge for cause in essence based it upon the fact that he said that he could go in with an open mind. However, even after that challenge for cause, what occurred was that defense counsel continue to question Mr. Hrin when on questioning him after that point, and on page 89a of the record before this particular Court, he questioned with

Mr. Hrin with a, in essence a double question. He asked him whether he could set aside his opinion, whether it was solid, unsolid, or however you wish to describe it, or whether he could enter the jury box and would need some evidence before he could change his mind, and he asked him to think about it beforehand.

In response to that, he said I have to. Defense counsel said is that a yes or a no, or could I please have a yes or no, and he said I think I could enter it with a very open mind. And then he related it to some of the requirements of his day-to-day use, he being a chemist. He indicated that oftentimes, whenever you go into a procedure believing or even thinking that a certain outcome was going to come, even time tested tests that he has run before, during the course of that test circumstances change, things are shown to him through those tests which make him change his mind as to what the proper analysis would be.

With regard to Mr. Hrin's specific, we would indicate to the Court that although the defense did challenge him for cause, as I have indicated, and it was denied, they continued to question him, and at that time we would submit he did give a proper response.

QUESTION: Mr. Bell, did the respondent appeal the trial court's denial of the challenge for cause to

Juror Brin to the Pennsylvnia Supreme Court?

MR. BELL: Yes, they did, but they did not mention this very specifically.

QUESTION: They didn't mention him specifically?

MR. BELL: No, they do not.

QUESTION: How about on habeas to the United States District Court?

MR. BELL: Okay.

QUESTION: Was Juror Brin mentioned specifically?

MR. BELL: On habeas in the United States District Court, even in the initial pro se petition filed by Mr. Yount in this case, he was mentioned specifically. The District Court opinion addresses not only Mr. Brin but all the jurors individually and sets forth within his opinion various points of their voir dire examination that he feels are appropriate to establish whether they do or do not have an opinion.

QUESTION: The District Court also denied a motion to amend the habeas petition for failure to exhaust claims.

Did any of those unexhausted claims relate to Juror Brin in any way?

MR. BELL: In essence, the unexhausted claims

basically dealt with his counsel and the fact that he had ineffective assistance of counsel.

You are correct under Rose v. Lundy, the District Court gave him the option as to whether he wished to either amend his petition at that time or withdraw it and proceed to exhaust his state court remedies.

I do not recall as to whether he specifically addressed that his counsel was ineffective due to a failure to either further challenge Mr. Hrin after these statements or not.

In essence, with regard to Mr. Hrin, however, after that initial challenge for cause was denied and he was questioned and gave a proper response, what occurred was the defense counsel subsequently accepted him as a juror even though they did have peremptory challenges still remaining to them at that particular time.

What I think is important in this case, however, and we shouldn't lose sight of it, is nine of the jurors were accepted by the defense without challenges of any kind, either challenges for cause or peremptorily. With regard to those particular challenges, it's important to note that one of the challenges was used as to Mr. Hrin, the challenge for cause. The other two came with regard to the last two

actual jurors who were selected. Those particular individuals had even indicated on their voir dire that they had no particular opinion as to the guilt or innocence of this individual. However, the defense, since they were out of peremptories, did challenge them for cause, and those were denied.

Those are the three challenges for cause by the defense with regard to this particular jury.

QUESTION: You say at the close of the jury selection the defense had still available to it unexhausted peremptory challenges?

MR. BELL: At the close of the jury selection of the actual jury itself, not dealing with the alternates, but the actual jury itself, no, they did not have peremptories left. They had used them all. The last two individuals who were placed on the jury were placed there after they had exhausted, and the defense merely challenged for cause on whatever basis, I'm not sure, in essence, that they had an opinion.

QUESTION: But at the time Mr. Hrin was placed on the jury, at that time they did have a peremptory challenge.

MR. BELL: Yes, they had more than one. They had quite a few left to them at that particular time.

In essence, Your Honors, once a determination

is made with regard to the issue as to what deference or what is begun with the state court determination as to juror impartiality, at that point then we must apply the test as to pretrial publicity, etc., to determine what if anything had occurred in this particular case.

Now, the Court of Appeals decision, in essence they indicate they apply an Irvin analysis. However, I would submit to the court that that is more or less misconstrued here. The Court of Appeals placed great reliance upon the number of individuals that were excluded, upon the overall picture, the overall publicity, the number of individuals that were challenged for cause, and the percentage. I believe they indicated it was something like 77 percent.

However, this case can be distinguished from Irvin v. Dowd. First of all, this case is a case that falls under 2254(d), and dependent upon this Court's decision as to whether this is a question of fact or a mixed question, we get into the area as to what is to happen after 2254(d) with regard to cases such as Irvin v. Dowd. The instant case involves a situation where the actual counsel conducted the voir dire examination. In Irvin v. Dowd the judge himself conducted voir dire examination. In Irvin v. Dowd, we have to look at the scope of the voir dire allowed. Obviously in this case

we did nct have voir dire as lcng as was exhibited in Irvin v. Dcwd. However, in essence, what cccurred was since counsel was themselves conducting it, there were many leading questicns, there was great leniency given to both counsel with regard to their ccnduct of voir dire. I think even the Court cf Appeals dces indicate that great leniency was given.

That is what led, I would submit to the Ccurt, tc the lengthy vcir dire, this constant bickering. If you look at the total voir dire, there is ccnstant bickering back and forth between counsel and the ccurt as to what the extent cf the vcir dire should be, hcw far it should go, whether questions have been asked and answered, ccnstantly, cver and cver again.

So the scope of the voir dire is different, and alsc we have a difference in the degree of publcity. In Irvin v. Dowd, the very day before he went to trial, there was a newspaper article published that indicated he had ccnfessed tc the crime invclved ir that particular case.

In the Ycunt case, basically the press that occurred just prior to trial, yes, it did indicate that this was a retrial that was coming cnce again before the Ccurt cf Common Pleas cf Clearfield Ccunty, but in essence, what it did at that particular time was

basically factual indications. There is a great dispute even with the basic factual determinations to which we are certain 2254 apply. The Court of Appeals says that there were 66 newspaper article in between the end of the second trial and the beginning of the -- excuse me, between the end of the first trial and the beginning of the second trial. In our brief we submit to the Court that there were 15.

What has occurred here is, and in Judge Charry's opinions he also, I believe he says 17, what has occurred here is that we are trying to compare apples with oranges more or less. The Court of Appeals is looking from the end of the first trial to the commencement of testimony in the second trial. Judge Charry in his opinions which they hold are erroneous because he does not come up with the same 66, he is indicating from the end of the first trial to the beginning of jury selection.

Granted, there were a lot of articles published during the course of the voir dire. Several panels were exhausted during the course of the voir dire examination.

QUESTION: How long was it between the first and the second, or the commission of the crime and the second trial?

MR. BELL: Okay. The commission of the crime occurred April of 1966. The second trial went to trial with the jury verdict being returned November 20 of 1970. In essence we have four years.

QUESTION: Four years, four years.

MR. BELL: Yes.

QUESTION: May I ask on the voir dire, the jury was sequestered during the trial, wasn't it?

MR. BELL: Yes, it was.

QUESTION: But not during -- the people who were on the venire were not sequestered until after they were chosen? Is that how it was done?

MR. BELL: That is correct, Justice Stevens. As an individual was selected for voir dire, he was sequestered.

QUESTION: But then that would mean that all the stories -- and the voir dire lasted for how long?

MR. BELL: The voir dire lasted, and once again, that is subject to question by various people -- the voir dire lasted, the petitioners would assert, seven and a half days. I believe the decision of the Court of Appeals may make reference to the fact that it lasted eleven or twelve days.

QUESTION: Well, say it was seven days for the purpose of my question.

MR. BELL: Yes.

QUESTION: But the jurors who were not selected until the end of the seven days would have read the stories presumably during the first five or six days.

MR. BELL: That is correct.

QUESTION: Yes.

MR. BELL: What we have to look at, though, is at the beginning, the very beginning of voir dire, the court --

QUESTION: Mr. Bell, where did you learn to pronounce voir dire the way you pronounce it?

MR. BELL: I believe it is Pennsylvania, Your Honor.

QUESTION: Oh.

MR. BELL: With regard to the jury selection,. in essence, what occurred there was -- and there is great dispute --

QUESTION: Do you think it's right?

MR. BELL: Your Honor, I would not hedge to make a guess at that.

With regard to the selection, as I indicated, and with regard to this, the Court at the very beginning of the selection process instructed the persons on the first panel that they should not read any press with

regard to the case. It is correct that some of the very last jurors were selected from subsequent panels who would have had a chance to review it not knowing that they were even involved in the particular proceeding.

I believe the testimony, however, given at the time indicated that their knowledge as to the case recently was basically that it was coming up, that the jury selection was going on with regard to the particular case, not in essence as to the first trial or otherwise.

I believe the total concept of the testimony given with regard to the selection of jurors indicates that in essence they were aware of the case from the prior publicity that was given to it more than the most recent publicity that it was coming once again to a new trial.

Returning back to the publicity issue, there are basically two manners in which this Court has indicated publicity is reviewed, an utterly corrupt the trial standard, which is Estes v. Texas, Sheppard case, etc., and all the courts have agreed there was not this type of publicity with regard to this case, or of an actual prejudice claim. That is where the Court of Appeals bases their particular decision that the publicity was so extensive, that it so inflamed the

members of the jury with regard to this and the whole community as a whole that as a result of that and looking at the individuals and the sheer number of individuals that either indicated they knew about the case, had some opinion about the case, that the sworn testimony of the individuals as a result of their process of selection of the jury, should be disregarded or should be more or less looked at in a different light, I guess the Court would say.

With regard to that actual prejudice claim, then, the petitioners would assert to this court that the Court of Appeals did not actually apply Irvin v. Dowd. They looked at Irvin v. Dowd, they placed their decision upon Irvin v. Dowd, but due to the differences between Irvin v. Dowd and this case, and the impact of 2254(d) on the deference to be given to a state court determination, they did no in essence apply a full analysis with regard to this case.

Your Honors, in conclusion at this particular point, the petitioners would respectfully request that this particular Court find that a state court determination as to juror impartiality is a factual determination. It is a determination based by the trial court upon the credibility of those particular individuals, and that based upon that particular finding

of this court, that 2254(d) does apply, we would ask this Court to reverse the decision of the Court of Appeals due to them not properly applying 2254(d). They do technically make reference to it in Footnote 20, I believe. They go on in Footnotes 21 and 22 to talk about their application of it to this particular case, so technically they have complied, they have gone a little bit further and attempted to indicate their analysis.

However, with regard to those items that they address and the items that they seem to indicate that they found error in the factual determination of the Court, it is items as to the number of newspaper articles involved; it is items as to whether there were spectators in the courtroom or not. All these things go into their analysis as to the publicity issue. But they do not specifically deal in the majority opinion of the court of appeals with this issue as to the individuals selected for the jury and whether their examination shows that they were biased or unbiased.

Mr. Chief Justice, at this time I would like to wish to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Schumacher?

ORAL ARGUMENT OF GEORGE E. SCHUMACHER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The issues in this case have been clearly defined, particularly that of the issue of whether or not pretrial publicity infringed on the ability of my client, Mr. Yount, to select a fair and impartial jury in Clearfield County, Pennsylvania, during his second trial in 1970. However, at least some reference to the sensational nature of the first murder -- of the murder in this case that was tried originally in 1966 is appropriate because it was a sensational murder by a high school teacher of his student that was closely covered by the media. Each detail of his voluntary surrender, of his confessions to the police, of the pretrial procedures, of the trial in which he maintained an insanity defense, were closely followed by the news media.

QUESTION: In what year, 1966?

MR. SCHUMACHER: Yes, sir.

QUESTION: And now you're trying the case four years later.

MR. SCHUMACHER: Four years later these jurors now that are called before the same judge, the same

courtroom, following the reversal of the conviction by the Pennsylvania Supreme Court for Miranda violations, and who testify that a very high percentage of them, something like 98 percent, recall the facts of this case, have read about it, are familiar with it --

QUESTION: When you say they recall the facts of the case, they recall that there was such a case is what you mean, isn't it?

MR. SCHUMACHER: Correct, yes, sir.

QUESTION: Not all the facts.

MR. SCHUMACHER: No, there's no way of knowing because that was never in the voir dire. All I can set forth in the appendix are the newspaper articles that were available and they could have become familiar with.

What can be gathered from the facts of the voir dire, however, are the many statements made by people questioned that he admitted he did it before, he confessed before, statements I think that are very accurately revealed in the testimony of Vera Krapf, one of the jurors who was a minister's wife and who when questioned indicated that the people from the congregation came to her and stated to her that it was time, that she had been selected to appear before this court, possibly to be selected as a juror, for her to

come forth and be counted, and she testified that these people that came to her felt that he had received a fair trial and is lucky he didn't get the death penalty.

And this was the atmosphere in the community from which this jury was selected and from which some 72 percent of the jurors admitted that they had an opinion of guilt and were successfully challenged for cause, and a higher number of jurors admitted opinions, the question becoming primarily, as previously indicated, whether particularly one of them, Juror Hrin, was so prejudiced and partial that he should not have been permitted to sit as a juror on this case.

So his testimony has already been mentioned in the first argument, indicating that he admitted that he had a fixed opinion and that he would require testimony to be presented before he could change that opinion.

QUESTION: Mr. Schumacher, I think one of your opponent's positions is that if one takes Juror Hrin's various answers, as the first questioned by the defense, then by the prosecution, one gets several different versions of an answer to that question, that admittedly that answer was given, but also something that could be called contradictory to it.

Why isn't that an ambiguity in his overall testimony that is best resolved by the trial judge?

MR. SCHUMACHER: This, Your Honor, we would submit is a mixed question of law and fact which, under Irvin, indicates the nature and strength of a venireman's opinion, is a mixed question of law and fact.

QUESTION: I don't see how that could possibly be under -- after our decision in Sumner v. Mata and after Congress changed the statute in 1966. If ever there's a question of fact, it seems to me, it is whether a particular juryman had a fixed opinion about a particular set of circumstances.

MR. SCHUMACHER: The difficulty, Your Honor, in establishing that as clearly indicating an issue of credibility is how that issue of credibility was resolved adversely to Mr. Yount by the trial judge whereas the Circuit Court of Appeals, examining exactly the same record, came to the conclusion that it indicated that he was not an impartial juror.

QUESTION: But, you're an experience trial lawyer, Mr. Schumacher. If you had your choice between taking the resolution of a controversy like that from someone who sat right there and heard the venireman answer questions, saw the demeanor, and had -- or the choice of taking the resolution of it by another experienced judge sitting in Philadelphia and reading a

record, which one would you take, assuming they were both equally competent?

MR. SCHUMACHER: Well, Your Honor, that is a very difficult question to require me, representing Mr. Yount to answer. Obviously the trial judge can see the person, can hear the testimony, and can reflect on the way it's given. However, it's the words here that are spoken that are so important, not necessarily how they're spoken, and the words nevertheless are in the record that he would require evidence to put aside his opinion, and that it is a fixed opinion even though at some future time he says it isn't as fixed as it was before. When the trial judge resolved that issue, he said, he stated it was fixed, next he stated it isn't as fixed as it previously was; therefore, it isn't a fixed opinion, which I consider to be totally illogical, and I would not accept that resolution of that issue whether or not the man were before me or not.

QUESTION: But if a juryman says the defense is going to have to shake me before I'll find him innocent, wouldn't he be challengeable for cause?

MR. SCHUMACHER: Yes, sir.

QUESTION: Isn't that what this --

MR. SCHUMACHER: And was so.

QUESTION: Isn't that what this man said?

MR. SCHUMACHER: Yes.

QUESTION: And you got rid of a great many of them that way.

MR. SCHUMACHER: Right, with similar type -- not I, but my client did so, 72 percent of the jurors on this case, and as Irvin teaches, or at least there's some doubt raised when a situation exists in a community of this nature when 80 percent of the individuals that participate in the voir dire have opinions, as to their veracity in answering this questions of this nature.

QUESTION: Well, is the test we employ one of whether the trial judge committed manifest error when he determined that the jurors were impartial? Is that our test?

MR. SCHUMACHER: Well, as I read Section 2254(d)(8), the determination must be made by the federal habeas corpus case -- court as to whether or not the determination is fairly supported by the record. Now, the circuit court, when considering that issue here, held that the ruling of the trial judge was clearly erroneous.

QUESTION: Well, as to Juror Hrin, you had him answering a question, for instance, by saying I would enter it, meaning the jury box, with an open mind. There was a lengthy colloquy in the questions and

answers, and he gave answers which on balance perhaps could lead the judge to find did not demonstrate any kind of bias.

How, how can we justify overturning the trial court's determination on habeas?

MR. SCHUMACHER: When he answered that he had an opinion, that he had a fixed opinion, and he indicated that he would definitely require evidence before he could change that opinion and wouldn't change his mind until facts were presented, those are sufficient answers to alert this Court that the circuit court was correct in its determination that he could not sit as an impartial juror.

QUESTION: Did the district court on habeas specifically address the cause challenge to Juror Brin?

MR. SCHUMACHER: I don't believe so.

QUESTION: Why not?

MR. SCHUMACHER: There were --

QUESTION: Was it, was it specifically raised in the petition for habeas?

MR. SCHUMACHER: Yes.

QUESTION: As to Brin?

MR. SCHUMACHER: Yes.

QUESTION: Where in the record does it show that?

MR. SCHUMACHER: The habeas corpus petition is in the record, and I cannot give you a page reference.

QUESTION: If you have a chance before you are through, I would appreciate the page reference.

MR. SCHUMACHER: But as I recall, that was an issue early in the case, and the district court neither addressed specific matters pertaining to the -- it did not address specific matters pertaining to the publicity, but it did specifically address the testimony of Juror Hrin in Judge Ziegler's opinion. The problem with Judge Ziegler's opinion was that he stopped at the crucial points where the questions that I'm indicating would indicate juror bias and stressed some of the points that Your Honor previously mentioned.

QUESTION: Well, but don't you think in all fairness we have to look at the entire exchange on voir dire relating to Juror Hrin, at all points where that juror was questioned?

MR. SCHUMACHER: Yes, I do. I think that's only fair. And I would also submit that the Commonwealth arguing that the -- we were attempting to mix apples and oranges is as similar as their attempting to mix Longberger and Busham with Irvin and Murphy because there are totally different concepts involved there with post-trial hearings in which credibility was

adjudicated in a completely separate and distinct fashion than was accomplished in this case, and unless this Court now is facing the prospect of reversing Irvin v. Dowd, we would still rely on the position that the nature and strength of the venireman's opinion is a mixed question of law and fact, and as such, each of the habeas corpus courts must independently review the record before them, and there is far more support for the analysis of the record by the circuit court in its footnotes to its opinion than was done by the state county court or the Pennsylvania Supreme Court.

QUESTION: If this challenge -- was this challenge made in the Supreme Court of Pennsylvania?

MR. SCHUMACHER: Yes. The Pennsylvania Supreme -- was this challenge --

QUESTION: Was the argument which prevailed with the Court of Appeals for the Third Circuit that Juror Hrin's testimony on voir dire should have disqualified -- was that challenge made in the Supreme Court of Pennsylvania?

MR. SCHUMACHER: I don't know. I didn't represent him then, and there is nothing in the record from which --

QUESTION: If it wasn't made there, why wasn't it waived under Wainwright v. Sykes?

MR. SCHUMACHER: But the general issue of jury impartiality was raised as to all the jurors. The entire transcript was presented to the Pennsylvania Supreme Court, and the Pennsylvania Supreme Court affirmed saying these findings are fairly supported by the record, in other words, when the district trial court held that it was not unfair and that there was -- and that there was no public interest in the case and practically no persons present in the court, and that the jurors decided that the case on the law and the evidence.

QUESTION: But none of those sound like the same issue -- those sound like kind of a bath of publicity over the community as a whole rather than focusing on one particular juror and saying from his transcript of voir dire we can tell he shouldn't have been seated.

Was the latter point argued in the Supreme Court of Pennsylvania?

MR. SCHUMACHER: Well, I don't want to beg your question; I want to answer it as directly as possible. I didn't represent him then. I wasn't there. I don't know for sure. There is nothing in the record from which I can say it was and decided one way or the other.

QUESTION: In other words, you have examined the record and it doesn't tell us the answer to that question.

MR. SCHUMACHER: That is correct.

QUESTION: And you will let me know if you find where Juror Hrin was -- that issue was raised before the district court, right?

MR. SCHUMACHER: I will.

I know that the Court of Appeals was very specific in its treatment of 2254 and its analysis indicating that this was a mixed question of law and fact, and that it had independently analyzed the voir dire testimony as well as the pretrial publicity, and of course, we have never maintained that the publicity was of such a nature as to utterly corrupt the trial as in the Sheppard case, and have consistently maintained the burden of requiring -- of prejudice in this case in order to come forward and satisfy the test that he was denied a fair trial.

But the Third Circuit in its opinion very clearly pointed out that it felt this was a mixed question of law and fact and that the determinations of the state courts and the District Court for the Western District of Pennsylvania were clearly erroneous. It did so in several regards, in regard to the publicity, in

regard to the interest in the community, and another factor involved is that apparently the trial court took into consideration not merely the publicity which it said had died down over a four year period of time, but ignored the fact that the voir dire itself reflected the interest of the community and the knowledge of the community on what had taken place before.

Mr. Yount was retried in the same community, in the same courtroom where he had been tried in 1966. He was again retried in 1970. A completely different case was presented, both by the prosecution and by the defense. There was no rape charged in the second trial. It was a murder case. Much of the confession, the oral statements, had been suppressed. The weapon that was alleged to be the murder weapon was suppressed. The bloody clothing was suppressed. And yet all of these items were in the publicity that this jury had previously been exposed to.

Mr. Yount testified in the first trial; he did not in the second. A defense of temporary insanity was presented in the first trial. In the second trial character evidence was presented on his background, the fact that he was a college graduate, a husband, a father, had no prior criminal record, was a school teacher in the community, in order to show that the

requisite intent for first degree murder was not present, in an effort to reduce the degree of guilt. And in this situation, jurors that were exposed to the publicity of the first trial, jurors who had read and heard, jurors who had fixed opinions of guilt, first of all established through the voir dire and secondly -- I must apologize to the Court. That is the correct pronunciation in Pennsylvania, and I have difficulty after 27 years of getting away from it.

QUESTION: That's the way we pronounce it out in Minnesota, too, so you're all right.

QUESTION: I think it's the way we pronounce it here even.

MR. SCHUMACHER: -- of obtaining a fair trial by impartial jurors, and obviously the most direct example of that, we submit, is Juror Hrin's testimony, and would stand on it, taking it as a whole, indicating that he testified that he had a fixed opinion that could not be set aside unless evidence was presented that would convince him to change his mind.

And the concurring opinion of the Third Circuit of Judge Garth is most -- clearly analyzes this specific aspect of the case.

The name of Mr. Hrin, Your Honor, is not specifically referred to in the habeas corpus petition.

He at page 302a of the transcript refers in percentage figures to the number of jurors who held opinions, but his name is not specifically mentioned in the habeas corpus petition.

QUESTION: Well, look at the paragraph following it at 302a. Despite the fact that all indicated they would judge the case on the evidence, two stated that they would require petitioner to prove his innocence. Does that refer to him?

MR. SCHUMACHER: Of the twelve seated jurors, nine stated they had read about the case.

QUESTION: It's the next sentence.

MR. SCHUMACHER: Yes.

QUESTION: Wouldn't that reference more fairly be read as challenging Jurors No. 2 and 10 who expressed confusion over whether the defendant had to prove his innocence?

MR. SCHUMACHER: May I have a moment, please?

When it says two stated that they would require petitioner to prove his innocence, I --

QUESTION: Wouldn't that refer, then, to Jurors 2 and 10 and not to Hrin, who was No. 6?

MR. SCHUMACHER: Excuse me.

QUESTION: Did you have briefs, did you have briefs at the habeas corpus?

Did you have any written arguments?

MR. SCHUMACHER: We filed briefs and had two hearings on the habeas --

QUESTION: Did you mention this specific juror?

MR. SCHUMACHER: Oh, I did, yes, sir. And Judge --

QUESTION: Regardless of what your petition said.

MR. SCHUMACHER: Yes, and Judge Ziegler then, in response to our briefs, specifically referred --

QUESTION: How about the arguments in the state courts?

MR. SCHUMACHER: I did not represent Mr. Yount before the state courts.

QUESTION: Were there briefs?

MR. SCHUMACHER: There were briefs filed.

QUESTION: Did they ever mention this particular juror by name in the briefs?

MR. SCHUMACHER: My best recollection is that they did.

QUESTION: Mm-hmm.

MR. SCHUMACHER: When I was appointed to represent him some three years ago, those briefs were made available to me and I read them, and I am going by

my memory of reading them.

QUESTION: They aren't in the record here, I take it.

MR. SCHUMACHER: I -- I can't answer that question. I don't know if they are.

QUESTION: Well, we could call for them, I suppose.

QUESTION: Did your opponent contend that you didn't exhaust your state remedies?

MR. SCHUMACHER: No. The only reference, Your Honor, to the exhaustion of state remedies was that I amended the habeas corpus petition to include an incompetency of counsel claim, and then Rose v. Lundy, and obviously I very hastily deleted.

QUESTION: If you prevail here, the case will go back and possibly a new trial, what, in 1984, and then an appeal from that if there's a similar verdict? That would be 1985 in the Supreme Court of Pennsylvania, and 1986 or 1987 back up here perhaps. Quite a long time for a criminal case to be in the courts, isn't it?

MR. SCHUMACHER: Yes, sir.

QUESTION: Mr. Schumacher, where has this man been all this time?

MR. SCHUMACHER: He's in Camp Hill, Pennsylvania.

QUESTION: He has been incarcerated since 19-- when?

MR. SCHUMACHER: Yes, sir, and that's the reason my answer would be --

QUESTION: So the delay really hasn't done him very much good, I guess.

MR. SCHUMACHER: He's been in jail for 17 years without a fair trial is my position.

QUESTION: So you think the longer the time, the greater the injustice?

MR. SCHUMACHER: Well, I think so, and the Commonwealth has indicates its willingness and ability to retry him and has never indicated there was any prejudice from the passage of time.

It was seven years between the denial of the -- by the Supreme Court of the appeal and the application for write of habeas corpus.

The position, I believe, has been clearly briefed and set forth, Your Honors, unless there are any additional questions.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Bell?

MR. BELL: Not unless the Court has any specific questions, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:43 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:

#83-95-ERNEST S. PATTON, SUPERINTENDENT, SCI - CAMP HILL AND HARVEY BARTLE, III ATTORNEY GENERAL OF PENNSYLVANIA, Petitioners v. JON E. YOUNT

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

BY _____

(REPORTER)