

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1334

TITLE ANDREW J. WINSTON, SHERIFF AND AUBREY M. DAVIS, JR.,
Petitioners v. RUDOLPH LEE, JR.

PLACE Washington, D. C.

DATE October 31, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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ANDREW J. WINSTON, SHERIFF AND :
AUBREY M. DAVIS, JR., :
Petitioners, :
v. : No. 83-1334
RUDOLPH LEE, JR. :

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Washington, D.C.
Wednesday, October 31, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:
STACY F. GARRETT, III, ESQ., Deputy Commonwealth's Attorney, Richmond, Virginia; on behalf of the petitioners.

JOSEPH RYLAND WINSTON, ESQ., Richmond, Virginia; on behalf of the respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Winston against Lee.

4 Mr. Garrett, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT OF STACY F. GARRETT, III, ESQ.,

7 ON BEHALF OF THE PETITIONERS

8 MR. GARRETT: Mr. Chief Justice, and may it
9 please the Court, in 1982, Rudolph Lee attempted to rob
10 a supermarket, and for his efforts received a bullet in
11 his shoulder. The only witness to that shooting was the
12 victim, who returned fire and put the bullet in Mr.
13 Lee's shoulder.

14 The Commonwealth of Virginia is seeking to
15 recover that bullet from Mr. Lee's shoulder as
16 corroborative evidence in his prosecution for attempted
17 robbery and for the shooting of the store owner who shot
18 Mr. Lee.

19 In my petition for certiorari, I asked the
20 Court to establish for the first time a standard by
21 which all courts, particularly our Court, can have to
22 determine when and when not surgery can be mandated upon
23 a defendant in a criminal case to recover from his body
24 evidence that would be used in the prosecution of that
25 person for a crime which it is alleged that he

1 committed.

2 QUESTION: Do you feel that you needed that
3 evidence in this case?

4 MR. GARRETT: Yes, sir, I do. Historically in
5 Virginia, in Richmond in particular, one on one
6 situations where the only eye witness is the victim,
7 juries have been very, very reluctant to convict if it
8 only gets one man's word against the other.

9 In this case it is more complicated because
10 Lee claims that shortly after or at the same time the
11 alleged robbery took place, he himself was the victim of
12 a robbery some eight to ten blocks away, and claims that
13 is how he received the bullet wound when the people
14 robbed him.

15 QUESTION: You say this is particularly
16 difficult in Richmond?

17 MR. GARRETT: Pardon me?

18 QUESTION: You say this is particularly
19 difficult in Richmond.

20 MR. GARRETT: Yes, sir. I recently had a case
21 where there were three witnesses in a situation like
22 that, and the jury came back and found the defendant not
23 guilty, claiming that particular reason.

24 QUESTION: While you are on that point, do you
25 understand that if you do go to trial without the

1 bullet, you would be able to put into evidence the
2 refusal of the defendant to submit to this operation?

3 MR. GARRETT: Yes, sir. But it is still --

4 QUESTION: That would be a rather persuasive
5 bit of evidence in itself, wouldn't it?

6 MR. GARRETT: Yes, sir, it would, but it also
7 is clouded by the fact that he says, sure, I have a
8 bullet in me, but I didn't get it from attempting to rob
9 the supermarket. I got it when somebody tried to rob me
10 and shot me.

11 QUESTION: Then you ask him, why didn't you
12 have this operation? What is he going to say?

13 MR. GARRETT: I hold my body inviolate. I
14 don't want anybody to go into it for any reason, I would
15 assume would be his argument.

16 This Court has never had the opportunity to --

17 QUESTION: Mr. Garrett, on the same point, do
18 you think that as the intrusion in the body becomes
19 greater to recover the bullet, that the corresponding
20 need of the state for the evidence should be greater in
21 order to justify taking it?

22 MR. GARRETT: If I understand you, ma'am, the
23 deeper the bullet, or the more complicated it is to get
24 it?

25 QUESTION: Do you think the state's need for

1 the evidence should be greater to justify taking it out
2 as it gets more difficult to remove?

3 MR. GARRETT: Somewhat. Yes, ma'am. If the
4 bullet were located next to his heart, or in some cases
5 if it were in his spine or in a joint where the removal
6 would cause a possibility for that joint not to be used
7 any more, or could cause some real serious harm to the
8 defendant, I don't think the state should be entitled to
9 have the bullet.

10 But when you have the situation here, the
11 bullet is right under his collarbone, and his doctor,
12 Dr. Mendez-Picon, and the anesthesiologist, Dr. Boyan,
13 have both palpated the bullet, and can feel it right
14 from the surface.

15 There has been a hangup in some of the cases
16 between major surgery and minor surgery. I think it can
17 be simplified. In the words of Dr. Mendez-Picon, this
18 is a simple operation.

19 QUESTION: Haven't people died during simple
20 operations?

21 MR. GARRETT: I am sure they have somewhere.
22 Yes, sir.

23 QUESTION: Like tonsillitis. They have died,
24 some people have.

25 MR. GARRETT: I am sure -- yes, sir, they have

1 died.

2 QUESTION: Don't you agree that any operation
3 is serious if you cut somebody?

4 MR. GARRETT: No, sir, I don't believe all
5 operations are serious.

6 QUESTION: But what if it is a general
7 anesthetic? There are a lot of people that -- it is
8 just a shock to the body.

9 MR. GARRETT: The anesthesiologist in this
10 particular case has performed over 150,000, and he has
11 yet to lose the very first one. He has performed many
12 of these, and his hospital has never lost -- where this
13 is going to go, has never lost a single patient for this
14 type of surgery.

15 Minor surgery done with general anesthesia is
16 now the common trend. It is done because it is quicker,
17 it is easier for the surgeon, it is less painful for the
18 person undergoing the surgery. As Dr. Boyan says, they
19 go in at 10:00 o'clock in the morning, and they are out
20 by 3:00. They walk out of the hospital.

21 QUESTION: Anyway, the court below didn't turn
22 on that at all, did it, on whether it was a general
23 anesthetic?

24 MR. GARRETT: They ruled -- yes, sir, that was
25 their reason, because it was a general anesthesia.

1 QUESTION: So you think that is not a very
2 good line?

3 MR. GARRETT: I don't think so. No, sir. I
4 wouldn't be here if I did.

5 QUESTION: Didn't one physician say that it
6 could be done with a local anesthetic in about 20
7 minutes?

8 MR. GARRETT: The anesthesiologist said it
9 could be, but in this case it was the particular surgeon
10 who said, I want to use a general anesthesia. It is the
11 surgeon who decides whether local or general could be
12 used. It could be taken out with a very light
13 anesthesia. The doctor said that by the time he is
14 asleep, the procedure will be all over.

15 It is a very, a very simple, a very
16 straightforward -- they don't have a lot of exploratory
17 to do. They know exactly where the bullet is. They can
18 feel it, and go right to it.

19 QUESTION: Mr. Garrett, do you propose, then,
20 that the standard of reasonableness is whether it is
21 minor surgery or not?

22 MR. GARRETT: I think that should be one of
23 the tests. I think the test should include an analysis
24 of the --

25 QUESTION: That isn't your test then, whether

1 it is minor surgery?

2 MR. GARRETT: You can get into debate as to
3 what is minor and what is major.

4 QUESTION: Yes, I was going to get to that. I
5 am just wondering what your test is.

6 MR. GARRETT: I think any test, whatever it
7 be, has to include the amount of risk to the victim, or
8 to the person undergoing the surgery. One doctor, Dr.
9 Williams, who, by the way, never examined Mr. Lee --

10 QUESTION: So you don't propose that minor
11 surgery be the standard?

12 MR. GARRETT: That is an artful term, ma'am,
13 and it is hard to say. What one person says is minor --
14 I think if the medical people say it is minor. To a
15 school teacher, going in and having your oil changed
16 might be a major operation, but for a mechanic it is
17 simple. It is a very minor thing, but for her it is
18 not, or him, if the school teacher is a man. It makes
19 no difference.

20 QUESTION: You are talking about an
21 automobile, not a person, I take it.

22 MR. GARRETT: Yes, sir.

23 QUESTION: But any operation that had any
24 substantial risk of a permanent disability or of death
25 you wouldn't classify as minor.

1 MR. GARRETT: Yes, sir. Yes, sir. If there
2 is a substantial chance of a person dying, or a
3 substantial risk of having a limb being affected, or not
4 being able to use, I don't think that the state should
5 have the right to have that bullet.

6 QUESTION: That is your test then?

7 MR. GARRETT: That is the way I define it.

8 QUESTION: Yes.

9 MR. GARRETT: I mean, I don't -- what is minor
10 or major. There is a balance that has to be struck, I
11 feel, in this case, the right of Mr. Lee to say, look,
12 I've got a bullet in me. I claim I came from an
13 attempted robbery.

14 The Commonwealth claims that he came from --
15 or I tried to rob somebody else. Does he get to keep
16 that at no risk to himself because the doctors say that
17 keeping the bullet in him right now will have no effect
18 on him, you know, life-threatening one way or the
19 other.

20 On the other hand, the balance must be
21 considered what right do the citizens of the country
22 have, or Richmond, to have evidence to be used in a
23 criminal trial? Are we to allow a criminal or a person
24 who is alleged to have committed a crime to perhaps go
25 free because of this bullet that is in him that with

1 very little risk to him, a very small risk to him --

2 QUESTION: Mr. Garrett, is there any evidence
3 in the record as to the utility of ballistic test
4 examinations? In other words, how frequently are they
5 probative evidence?

6 MR. GARRETT: I am not sure the record
7 contains much. I think it is my experience as a
8 prosecutor that it is very probative. Here we have, in
9 this case the lab has bullets taken from Mr. Watkinson's
10 gun that can be compared against the bullet. I have
11 checked with the ballisticsian about it, and they are
12 ready, if the bullet is taken out from Mr. Lee, to
13 compare it.

14 It is something -- it is more important for
15 the jury to put their hands on. Instead of saying on
16 the one hand, here is Mr. Watkinson, this man tried to
17 rob me, and over here we have Mr. Lee, who says, I
18 didn't try to rob you, or if he stands mute, one man's
19 word against another, we have something the jury can put
20 their hands on.

21 It is like a fingerprint. We can show, yes,
22 this is the man who robbed you. Or, most importantly,
23 perhaps, perhaps that bullet didn't come from Rudolph
24 Lee's gun -- or Mr. Watkinson's gun, and if that is the
25 case, then for two years now a robber, somebody who did

1 shoot him, has been running around free, because we have
2 been trying to get the wrong person.

3 QUESTION: Is it possible that the bullet
4 itself, if it were extracted, would not be in perfect
5 condition for a comparison?

6 MR. GARRETT: I don't think it would probably
7 be in perfect condition. They tell us that when a
8 bullet comes into the body like that, like sand into an
9 oyster shell, it forms a protective coating around it,
10 and the ex-rays show that the bullet, which is not
11 fragmented, has got dents slightly in the nose of it,
12 but otherwise it is intact.

13 The bullet has not disintegrated. And I
14 believe that from talking to everybody and the reading I
15 have done, we can be able to compare that bullet with
16 the one that we have on file from Mr. Watkinson's gun.

17 QUESTION: The court below proceeded on the
18 basis that even if it is very probative and would be
19 necessary, you nevertheless couldn't get it.

20 MR. GARRETT: Yes, sir.

21 QUESTION: So we should judge the case on the
22 assumption that the bullet -- that the state really has
23 an interest in getting the bullet.

24 MR. GARRETT: They minimized that interest by
25 saying that the risk to Mr. Lee was too great.

1 QUESTION: I know, but the reason they ruled
2 against you was that the risk was too great?

3 MR. GARRETT: Yes, sir.

4 QUESTION: Not that you didn't need the
5 bullet.

6 MR. GARRETT: Yes, sir.

7 QUESTION: Mr. Garrett, Judge Widener in his
8 dissent in the Fourth Circuit felt that the cases of
9 Younger and Harris and Perez against LaDezma should have
10 prevented the federal courts from ever getting into this
11 case before it had run its process in the state, but he
12 criticized the majority for not discussing it.

13 Did the state ever raise those points?

14 MR. GARRETT: Initially when we went into
15 federal court, they were raised.

16 QUESTION: You didn't raise them in the Fourth
17 Circuit?

18 MR. GARRETT: No, sir, it was not raised in
19 the Fourth Circuit at all.

20 QUESTION: From your earlier response to one
21 of the questions, you said that if the bullet were
22 extracted on the ballistic tests, or you intimated if
23 you didn't say it, that the ballistic tests showed that
24 it had not come from the gun of this man that had been
25 found.

1 Are we to take it that you would probably
2 dismiss?

3 MR. GARRETT: Absolutely.

4 QUESTION: The state would probably dismiss?

5 MR. GARRETT: Just dismiss the charge.
6 Absolutely.

7 QUESTION: So the search, the examination of
8 the bullet is in your view as much to produce his
9 innocence as his guilt?

10 MR. GARRETT: Yes, sir.

11 QUESTION: Well, what would you have done if
12 the finding, if they get the bullet out and then
13 couldn't say that it was fired from the victim's gun?

14 MR. GARRETT: I would have to go to trial with
15 that knowledge.

16 QUESTION: You would go to trial?

17 MR. GARRETT: Yes, sir, because Mr. Watkinson
18 is -

19 QUESTION: But the surgery would have been for
20 nothing. What is the prospect that if they took the
21 bullet out it would be discovered that they couldn't say
22 whether it did or didn't come from the victim's gun?

23 MR. GARRETT: I cannot answer that 100
24 percent, sir, because we don't know until we actually
25 see the bullet, but from all indication, they will be

1 able to tell, because --

2 QUESTION: I understood that sometimes you
3 can't. You can get the bullet out, but you can't say
4 whether it did or didn't come from the victim's gun.

5 MR. GARRETT: Yes, sir. That is normally
6 because it has hit a hard object, such as a bone, or has
7 hit a metal object, or a piece of stone, like the pillow
8 behind you.

9 QUESTION: Only in those circumstances?

10 MR. GARRETT: Most of the time. Yes, sir. Or
11 the gun itself, the barrel and the lens and grooves have
12 so corroded themselves that you can't get a good
13 pattern. We know that is not true, because in this case
14 the laboratory now has sample bullets of the same taken
15 from Mr. Watkinson's gun, and they are clean, and they
16 are readily identifiable, the lens and the grooves, and
17 the individual characteristics of that particular
18 bullet.

19 QUESTION: Where was this gun located?

20 MR. GARRETT: Where was the gun located, sir?

21 QUESTION: Yes. Precisely when did the
22 police first come into possession of his gun?

23 MR. GARRETT: Moments after the shooting. Mr.
24 Watkinson was trying to lock to close his store up, and
25 he had the money bag in one hand and his gun, and the

1 key. He locked it up, and he turned and fired the shot,
2 and he was shot, and the police were called, and they
3 arrived at the scene and took possession of his weapon.

4 QUESTION: There is no doubt about whose gun?

5 MR. GARRETT: No, sir, none at all. None in
6 the record.

7 QUESTION: I notice in respondent's brief the
8 statement that the firearms identification expert didn't
9 know whether or not a microscopic examination of the
10 bullet itself would show that it was fired from that,
11 and then he goes on to say, "There is a statistical
12 probability of 20 percent that Watkinson's gun will not
13 be capable to replicate firing." Was there that kind of
14 evidence?

15 MR. GARRETT: No, sir. We have fired Mr.
16 Watkinson's gun, and we have the bullets that were taken
17 from it, and the lens and grooves are very clear on it,
18 and they can be readily discernible by the ballistics
19 expert to compare against the bullet should this Court
20 allow me to take it from Mr. Lee's shoulder.

21 QUESTION: Here they were talking about the
22 expert's testimony. Was that contradicted by you?

23 MR. GARRETT: The tests were run after that
24 hearing was held.

25 QUESTION: Did you contradict the expert's

1 testimony?

2 MR. GARRETT: Did I contradict it? No, sir.
3 I am talking about the same person. The same person who
4 testified, Mr. Moorhead, was the same person who talked
5 to me later. He said, after the tests were run, and an
6 examination of the bullets from Mr. Watkinson's gun --

7 QUESTION: I mean, that's in the record?

8 MR. GARRETT: No, sir, because it happened
9 afterwards.

10 QUESTION: It is not in the record?

11 MR. GARRETT: No, sir. No, sir, it is not.

12 QUESTION: Does the record tell us why your
13 adversary doesn't consent to the operation?

14 MR. GARRETT: No, sir. He just says, I don't
15 want the surgery to be done. I have asked him many
16 times if he will stipulate that he was the person shot.
17 Then we won't have to go through it. He refused to do
18 that also.

19 QUESTION: And he does not place on the record
20 any reason for not having the operation?

21 MR. GARRETT: No, sir. He has never
22 testified, and his counsel has never said, my client
23 doesn't want the surgery because, for whatever reason.

24 The Crowder case is the only one that has
25 reached the Circuit Court level other than this case,

1 and in that case, which this Court refused to grant
2 certiorari in, said that the extent of the surgical
3 intrusion and the extent of the risk to defendant is the
4 extent of reasonableness that we have to decide.

5 Intrusion in this case is approximately one
6 inch below the surface in an operation that is
7 characterized by the doctor as simple. The
8 anesthesiologist said, as soon as he is asleep and
9 under, the operation would be over with, and he will be
10 ready to go back to his jail cell or wherever they are
11 keeping him.

12 QUESTION: Why shouldn't the state be put, in
13 a situation like this, be put to saying to the court,
14 well, without this bullet we will just have to dismiss?
15 You now tell us that even if it turns out that the
16 bullet is not the bullet, or you can't tell whether it
17 is or not, you would still go forward with the
18 prosecution?

19 MR. GARRETT: I have to go forward, sir.

20 QUESTION: So the most you can say is that it
21 would help you case.

22 MR. GARRETT: Help it considerably.

23 QUESTION: Well, I know, but without it -- you
24 wouldn't dismiss it, though, without the bullet.

25 MR. GARRETT: No, sir.

1 QUESTION: You would still go through this.
2 All it means is, it changes the odds of conviction.

3 MR. GARRETT: Considerably. I am now at a
4 distinct disadvantage, and at least with the bullet I
5 will have a 50-50 chance.

6 QUESTION: That is just based on your
7 experience with juries in Richmond?

8 MR. GARRETT: Yes, sir.

9 QUESTION: Well, but you have an eye --

10 QUESTION: In the Schmerber case, wasn't the
11 blood in a position analogous to the bullet here? That
12 is, there was other evidence in Schmerber of
13 intoxication.

14 MR. GARRETT: Yes, sir.

15 QUESTION: But the blood test would tie it
16 up. Is that so?

17 MR. GARRETT: Yes, sir.

18 QUESTION: So that your bullet is just like
19 the blood.

20 MR. GARRETT: Yes, sir, in that regard. It
21 gives the jury something to hang their hat on and to put
22 their hands on, something tangible as opposed to a
23 victim on one side testifying, that's the man that shot
24 me, as opposed to the defendant sitting here either moot
25 or even taking the stand and saying, look, I was robbed

1 somewhere else and shot. It gives them something they
2 can put their hands on, and --

3 QUESTION: Yes, but that's not all the
4 evidence you've got. You've got the fact you made a
5 rather detailed investigation to corroborate his story
6 and there is no other bloody person hanging around
7 Richmond within that eight-block area. Isn't that
8 true?

9 MR. GARRETT: That's correct, sir.

10 QUESTION: I mean, the probabilities are
11 fairly remote, it seems to me, that this denial will
12 have any credibility. I just -- I don't think this is
13 quite right like the normal case of a one on one
14 situation, because this fellow's got a bullet in him,
15 and nobody else was found with a bullet, if I understand
16 the facts correctly.

17 MR. GARRETT: That's correct.

18 QUESTION: I mean, I don't -- really, I just
19 don't think this is a typical one on one confrontation
20 between a defendant and the victim.

21 MR. GARRETT: It is typical in that it is as
22 typical as you can have when you have the alleged
23 perpetrator being shot by his victim.

24 QUESTION: Well, except that you've got the
25 alleged perpetrator here who admittedly has a bullet in

1 him, and he is not willing to explain where it came --
2 we've got a theory about where it came from which is
3 highly implausible.

4 MR. GARRETT: At trial --

5 QUESTION: There is no corroboration. You
6 don't have dead bodies sitting around in Richmond, I
7 don't suppose, that you don't -- that the police can't
8 find.

9 MR. GARRETT: I have no idea how the trial
10 court would rule, but if the police officer would
11 testify when asked the question, what did Lee tell you
12 how he got that bullet, objection, hearsay, would you
13 advise Mr. Lee of his rights, obviously, you suspect him
14 of being the victim -- or the perpetrator of this
15 particular crime. He was not advised prior to that
16 time.

17 QUESTION: Yes, but you can surely put into
18 evidence the fact that he would not consent to the
19 operation.

20 MR. GARRETT: Certainly.

21 QUESTION: At least I would think so. Maybe I
22 missed some rule or Virginia evidence law.

23 MR. GARRETT: That could come in.

24 QUESTION: Well, anyway, I shouldn't -- I am
25 getting off on a collateral point, I guess.

1 QUESTION: You would have an easier case if
2 you had a confession, too, wouldn't you?

3 MR. GARRETT: Of course.

4 QUESTION: But that doesn't give you a right
5 to take one, does it?

6 MR. GARRETT: No, sir. Not unless you do it
7 within the guidelines of the law.

8 QUESTION: I mean, all I am saying is, the
9 fact that it makes it easier for the prosecutor isn't a
10 right of the prosecutor.

11 MR. GARRETT: But I think I have a right to
12 use evidence that is available.

13 QUESTION: That is not what I said.

14 MR. GARRETT: I agree, sir.

15 QUESTION: It makes it easier.

16 MR. GARRETT: It definitely makes it easier.

17 QUESTION: You are not alleging that at all.

18 MR. GARRETT: Pardon me, sir?

19 QUESTION: You are not urging that on us at
20 all?

21 MR. GARRETT: No, sir.

22 QUESTION: Did the record show what happened
23 to the storekeeper's gun or the victim's gun? No,
24 excuse me, the robber's gun, Lee's gun.

25 MR. GARRETT: No gun was ever found.

1 CHIEF JUSTICE BURGER: Mr. Winston?

2 CRAL ARGUMENT OF JOSEPH RYLAND WINSTON, ESQ.,

3 ON BEHALF OF THE RESPONDENT

4 MR. WINSTON: Mr. Chief Justice, and may it
5 please the Court, I noted Justice White had asked the
6 question, what if there is a general anesthesia to be
7 used in this case. That is, of course, a matter that
8 there is no question about because we have a stipulation
9 on that.

10 QUESTION: I knew that that is what was
11 proposed, a general anesthetic.

12 MR. WINSTON: Yes, Your Honor. I just didn't
13 want there to be any question about that.

14 In regard to the risks, Mr. Garrett has
15 suggested this morning that the Medical College of
16 Virginia has never lost a patient in a minor procedure
17 of this sort. I don't believe that that assertion is
18 supported by the record.

19 If my recollection is correct, there are some
20 mortality statistics quoted on a study done at the
21 Medical College of Virginia, and the mortality statistic
22 was greater than zero, and that means that somebody has
23 died. So I don't believe that that assertion would be
24 supported by the record.

25 I believe that the test that is being urged on

1 the Court by the petitioners is simply a major-minor
2 surgery distinction. I think at Page 12 of the
3 petitioners' brief petitioners flat out state, if the
4 medical personnel characterize the surgery as minor, no
5 constitutional violation; if the medical personnel
6 characterize the surgery as major, then constitutional
7 violation.

8 And even if the reasonableness test as opposed
9 to the per se test is the proper test for the Court to
10 adopt, I don't think the Court can adopt that position
11 of having the Court simply delegate to a witness the
12 ultimate question before it, and particularly a question
13 of constitutional magnitude.

14 Any reasonableness test, I think, is a
15 balance. I think that there has first got to be a need,
16 and secondly, the inquiry has to go to the invasion of
17 the privacy or the affront to the dignity of the
18 individual and the risk.

19 QUESTION: Well, Mr. Winston, now, in
20 Schmerber, when the blood test was authorized, there is
21 no suggestion that the extent that the state needed the
22 evidence was a factor, is there?

23 MR. WINSTON: Well, I believe that --

24 QUESTION: It just said, if the evidence is
25 relevant, it can be obtained by means of the blood

1 test. There wasn't really a consideration of need.
2 When does the state's need for the evidence become a
3 factor then?

4 MR. WINSTON: I think it becomes the initial
5 inquiry, and I believe that the need factor -- perhaps
6 if I could borrow from the --

7 QUESTION: Well, why wasn't it a factor in
8 Schmerber, which also involved some degree of pain and
9 discomfort, I assume.

10 MR. WINSTON: Perhaps I am in error, but my
11 recollection of Schmerber is that need in the general
12 sense was a very great factor influencing the Court's
13 decision, the national problem of drunken driving and
14 the need for an effective test to determine who is drunk
15 and who is not as a means of detecting, both detecting
16 that behavior and deterring it in the future.

17 And so I think need was important to the Court
18 in Schmerber.

19 QUESTION: Well, if it was, it wasn't
20 articulated, was it?

21 MR. WINSTON: I may be incorrect, but I
22 believe that it was.

23 QUESTION: Well, at least --

24 MR. WINSTON: And I believe in Breithaupt as
25 well.

1 QUESTION: -- there was no indication in
2 Schmerber that the prosecution would not have gone
3 forward without the blood test.

4 MR. WINSTON: No, I believe they would have
5 gone forward in that case as well.

6 QUESTION: Yes, so it is just a question of
7 having more evidence than you had before.

8 MR. WINSTON: I think that's correct.

9 QUESTION: Or just maybe it would be relevant
10 evidence, and any relevant evidence supposedly would
11 make the case better for the prosecution.

12 MR. WINSTON: If it is beyond merely being
13 cumulative, I think.

14 QUESTION: Over and above that, isn't there an
15 obligation on the prosecution to come forward with
16 evidence that is exculpatory as well as inculpatory, and
17 that if the ballistics test didn't bear out, or if they
18 showed that it was not the same gun, your man would walk
19 out, wouldn't he?

20 MR. WINSTON: I think that's correct, but I
21 think that is, since we have a defendant in this case
22 rather than -- I think this case is about people's
23 rights, and not defendants' rights, but since we have a
24 defendant in this case, I think that that is correct,
25 but I think it is, and it is the defendant's choice.

1 The defendant is advised of those matters, and is -- and
2 with advice of counsel has still chosen to say, I want
3 to -- I want my body to be held inviolate.

4 QUESTION: Are you suggesting that if he
5 thought it would help him, he might have the operation?

6 MR. WINSTON: That's not the way it's been
7 expressed to me. The way it's been expressed to me is,
8 I don't want anybody cutting me.

9 QUESTION: Mr. Winston, at the time of the
10 first series of hearings in this case, it was thought
11 that the bullet was only a half a centimeter below the
12 skin. You took the same position at those hearings that
13 you are taking today and that you took in the second
14 hearing, are you not?

15 MR. WINSTON: I don't believe I have ever
16 changed my position, but I am not sure in regard to
17 what, Your Honor.

18 QUESTION: Well, you have always taken the
19 position, as I understood it, that there could be no
20 cutting without the permission of the defendant.

21 MR. WINSTON: Well, what Your Honor has styled
22 as --

23 QUESTION: Is that correct or not? Did your
24 defendant agree to the first --

25 MR. WINSTON: No, I would say that my position

1 has modified somewhat. What Your Honor has styled as
2 the first set of hearings -- it was actually the second
3 hearing. Mendez-Picon was given three opinions.

4 QUESTION: Oh, there are three hearings?

5 MR. WINSTON: He has given three separate
6 opinions at different points in time as to the location
7 of the bullet.

8 QUESTION: Yes.

9 MR. WINSTON: Originally he thought it was
10 much deeper and would take about a 45-minute procedure
11 to operate, but then he did come back, as Your Honor
12 quite correctly points out, and says that it was just
13 beneath the skin, in the fatty tissue. Incision of one
14 centimeter --

15 QUESTION: Would require only local
16 anesthesia?

17 MR. WINSTON: Local infiltration anesthesia, a
18 solution of 1 percent Xylocaine. Now, in that case,
19 that is about the most minimal form of surgery there is,
20 and I had to under that factual situation, I just had to
21 advocate a per se rule. No choice.

22 QUESTION: So there would be no balancing
23 under any circumstances if any cutting were required?

24 MR. WINSTON: That's correct, Your Honor.
25 That was the --

1 QUESTION: Regardless of how much the state
2 may need the particular bullet?

3 MR. WINSTON: I beg your pardon?

4 QUESTION: Regardless of the state interest in
5 obtaining the bullet?

6 MR. WINSTON: Well, I am assuming that they
7 have an interest, because I think if they don't have an
8 interest, we don't even get to looking at how serious
9 the procedure is.

10 QUESTION: But that interest may vary.
11 Suppose there were four or five other witnesses in this
12 case to the shooting.

13 MR. WINSTON: Oh, the need would be much more
14 minimal.

15 QUESTION: The state interest would be
16 minimal. On the other hand, if there were no witnesses,
17 no other evidence whatever, the state interest in
18 obtaining the bullet might be very great. But your
19 position, which is what I am interested in -- would
20 there ever be a balancing if the defendant took the
21 position this defendant has taken, that as counsel you
22 probably raised if he wished you to, that there could be
23 no cutting to obtain any evidence?

24 MR. WINSTON: I have not abandoned that
25 position, but I have modified it to some degree, because

1 under the facts as they presently exist, I don't believe
2 that I need a per se rule.

3 I believe if the rule is a reasonableness
4 rule, the balancing of the need against the affront to
5 dignity and the invasion of privacy and the risks, I
6 believe that on these facts the balance falls in favor
7 of Mr. Lee.

8 But there may very well be reasons why there
9 should be a per se rule prohibiting all surgery.

10 QUESTION: Well, Mr. Winston, if we reverse,
11 how much balancing may judges do in circumstances like
12 this?

13 MR. WINSTON: How much balancing?

14 QUESTION: If we reverse, and say that the
15 intrusion to this extent, at least, is permissible
16 without violating any of the principles of Schmerber.

17 MR. WINSTON: I think that would create a
18 great deal of confusion, because what we have here, the
19 petitioners are using this major-minor surgery
20 distinction on the Court, but in this case it is not so
21 clear, major-minor surgery.

22 There is a difference of medical opinion. Dr.
23 Mendez-Picon has come up with this kind of an
24 intermediate category which is called minor surgery but
25 under a general anesthetic. I think in just looking at

1 my attorney's textbook or attorney's dictionary, medical
2 dictionary, I think under the definition of minor --
3 major surgery -- excuse me -- one of the factors that
4 they -- one of the indicia that they point to in
5 determining whether it is major or minor or how to
6 characterize it is the presence of inhalation
7 anesthesia, which will, of course, be present should the
8 procedure go forward in this case.

9 QUESTION: It is also true that major surgery
10 is sometimes performed with a local anesthetic, is it
11 not?

12 MR. WINSTON: Oh, I think that is absolutely
13 correct, Your Honor, because some local anesthetics are
14 extremely dangerous. I mean, a spinal anesthetic is a
15 local anesthetic, or an epidural anesthetic is a local
16 anesthetic.

17 QUESTION: Does the ex-ray dispose the caliber
18 of the bullet?

19 MR. WINSTON: I don't believe that it does.
20 The ex-ray --

21 QUESTION: But you know -- you have the gun.
22 What is it?

23 MR. WINSTON: The firearms identification
24 expert testified that it was a .32 caliber revolver.

25 QUESTION: And you say the record does not

1 show as of now what is the caliber of the bullet that is
2 under his collarbone or near his collarbone?

3 MR. WINSTON: No, that is not in the record,
4 Your Honor.

5 QUESTION: Is it ascertainable, if you know?

6 MR. WINSTON: I asked the firearms
7 identification expert about that on cross examination at
8 the hearing, and he said he could not make that
9 determination from an ex-ray.

10 QUESTION: Well, he couldn't say it wasn't a
11 .45, or it wasn't a .22?

12 MR. WINSTON: Well, perhaps I should have had
13 a more lengthy cross examination. In this case they are
14 admitting that this evidence is only corroborative.

15 QUESTION: Don't you agree that -- as I
16 understand the state's position is that it wouldn't be
17 any balancing in the state's position as long as the
18 evidence is relevant and would improve their case, and
19 that is not a question of balancing, then they are
20 entitled to it unless there is a substantial risk of
21 death or disfigurement or some other kind of permanent
22 injury.

23 MR. WINSTON: That's my understanding of the
24 argument.

25 QUESTION: Yes, and that isn't a balancing

1 test at all, is it? Once you decide it is relevant
2 evidence, you get it, unless.

3 MR. WINSTON: Unless there is the -- unless
4 the doctor comes in and says it is major surgery

5 QUESTION: Yes, well, that isn't a balancing
6 test of need from case to case. It hasn't anything to
7 do with the need of the state except for just
8 relevance.

9 MR. WINSTON: I think that's correct.

10 QUESTION: May I ask you if you think the test
11 would vary at all depending on if the bullet were not in
12 the accused person, but rather were in a third party, a
13 witness's body? Would either have a stronger right to
14 object than the other? Do you know?

15 MR. WINSTON: I don't see how the fact that
16 the man was accused of a crime changes his Fourth
17 Amendment rights at all. If anything, once he has been
18 accused, he is cloaked with the presumption of
19 innocence.

20 QUESTION: So you would say it is the same
21 case. I would be curious to know whether the state
22 takes the same view. It is the same case as if just a
23 witness --

24 MR. WINSTON: That has, of course, come up
25 twice in the past.

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QUESTION: Yes.

MR. WINSTON: The Supreme Court of Georgia says that -- appears to say that defendants have fewer Fourth Amendment rights than witnesses do. But the California Appellate Court has held that -- they denied surgery.

The defendant's attempt to get into the complaining witness body to recover the bullets, they denied, but in so doing they held that the Fourth Amendment rights of witnesses and the Fourth Amendment rights of defendants were the same.

QUESTION: So not only would you say that it is not different whether it is a witness or a defendant, but it also should be the same test if the defendant wanted the evidence as if the state wanted it.

MR. WINSTON: I don't see any reason for any difference.

QUESTION: I suppose the danger to the state's case is a matter of identification, whether the jury believes the victim.

MR. WINSTON: I think that's essentially correct. That is what he is representing that he is worried about.

QUESTION: And was there ever a line-up in this case? The identification as far as the opinions

1 go, they just say he identified him in the hospital.

2 MR. WINSTON: That's all that's in the
3 record.

4 QUESTION: And I don't know whether he was
5 then in bad shape or not, the victim. He had been shot,
6 hadn't he?

7 MR. WINSTON: Yes.

8 QUESTION: Was he in bad shape?

9 MR. WINSTON: He was --

10 QUESTION: Well, anyway, is that the only
11 pretrial identification there was?

12 MR. WINSTON: The confrontation in the
13 emergency room, that's the only one that's reflected in
14 this record.

15 QUESTION: There never was a line-up?

16 MR. WINSTON: There was not a line-up. I don't
17 know whether there was a photographic spread or not. I
18 can't recall. I would think it would be unusual. If
19 they have a good identification, why do anything to mess
20 it up?

21 QUESTION: Well, it depends, I suppose, on how
22 good a witness they think he is, or maybe --

23 MR. WINSTON: Well, I cross examined him at
24 the preliminary hearing, and I couldn't shake him.

25 QUESTION: But I suppose if you were on the

1 other side, you would like to have the bullet.

2 MR. WINSTON: I don't know that that is so,
3 Your Honor. I know at least two of Mr. Garrett's former
4 colleagues whose opinion is that this case is a waste of
5 time, that they would have tried this man and gotten a
6 conviction two and a half years ago.

7 QUESTION: Whatever happened to the state's
8 position, if it ever expressed it, that habeas corpus is
9 a -- or this kind of an intervention by a federal court
10 before there has ever been a criminal trial is wholly
11 contrary to sound judicial practice? It is really --

12 MR. WINSTON: The Younger abstention
13 request.

14 QUESTION: It really isn't a Younger against
15 Harris case, is it? I mean, that isn't --

16 MR. WINSTON: Well, the first thing is,
17 whatever happened to it, it is gone now. I mean, the
18 petitioners are the ones now who have invoked the
19 jurisdiction of this Court.

20 QUESTION: Do you think it is a semi -- it may
21 be, but isn't it a semi-jurisdictional thing?

22 MR. WINSTON: It affects the jurisdictional,
23 but --

24 QUESTION: In the federal courts? I don't
25 know why, if we don't think the federal courts should

1 get in this kind of a position, the state can't --

2 MR. WINSTON: Well, I think we had a nearly
3 identical, very similar factual situation.

4 QUESTION: Maybe we can waive Younger against
5 Harris, but I don't know.

6 MR. WINSTON: Ohio Bureau of Employment
7 Services against Fidori, that was a case involving a
8 state agency action. The state agency was the defendant
9 in a class action suit in the District Court. They
10 raised Younger abstention, even though it was a state
11 agency case and not a criminal case.

12 The District judge decided against them. The
13 case was appealed to this Court. They invoked the
14 jurisdiction of this Court and did not raise the Younger
15 question, and the holding here, which I believe was
16 unanimous, was that the rationale of comity does not
17 apply when they have submitted themselves to the
18 jurisdiction of the Court.

19 They had the chance to challenge the order,
20 and did not challenge it.

21 QUESTION: But all you are saying is that the
22 state has asked that the Fourth Circuit's holding be
23 reviewed, not that they submitted themselves to the
24 jurisdiction of the District Court in the first
25 instance.

1 MR. WINSTON: Oh, no, I had them brought into
2 the District Court.

3 QUESTION: Yes, and my understanding from what
4 your opponent said was that they raised this point in
5 the District Court, and the District Court ruled against
6 them on this point.

7 MR. WINSTON: It is difficult to tell whether
8 they raised the question or not, because they never
9 filed any pleadings. But there were two other
10 defendants who were dismissed at the District Court
11 level. They raised Younger. And it is my recollection
12 that they did join in that.

13 QUESTION: And the District Court ruled
14 against them on that?

15 MR. WINSTON: Ruled against them on the
16 Younger question. Then they took it to the Fourth
17 Circuit, did not present Younger, and then they brought
18 it here and have not presented Younger.

19 But in addition there are other reasons why
20 Younger I don't believe is applicable, why I think the
21 District Court was correct in its ruling.

22 Now, I have heard something here this morning
23 for the first time, and that is that they have made the
24 replicate firings from Mr. Watkinson's gun, in other
25 words, they have shot it and locked at it, and now they

1 know that it has grooves on it that can be compared.

2 All I can say is that there is nothing in the
3 record to that effect. They had the firearms
4 identification expert testify in the state court. No
5 evidence to that effect was brought forward at that
6 time, and this is the first I have heard of it.

7 QUESTION: Wouldn't that be a routine police
8 practice in any such case as this?

9 MR. WINSTON: To go ahead and fire the
10 weapon?

11 QUESTION: Yes. Yes.

12 MR. WINSTON: I would think so.

13 QUESTION: Yes. So that whether it is in the
14 record or not, we could judicially notice that that is
15 standard police procedure.

16 MR. WINSTON: To fire it to see if it does
17 have grooves on it, but then the question is whether it
18 has grooves on it, and there is no evidence to that
19 effect, but only what I have heard for the first time
20 this morning.

21 QUESTION: And the record of other cases will
22 show that sometimes you can't find any grooves.

23 MR. WINSTON: Oh, I think the --

24 QUESTION: The barrel of the gun is so
25 corroded, it will not show at all.

1 QUESTION: Well, that's in the evidence in
2 this case. I asked the firearms identification expert,
3 can you tell right now whether it is identifiable or
4 not? No. And then whether you have the bullet to make
5 the comparison with, the replicate firing from Mr.
6 Watkinson's gun, that is only half the story, because
7 then you go back to the questioned specimen.

8 Now, that questioned specimen could have been
9 damaged on its entry into the body, and in fact Dr.
10 Mendez-Picon did testify, printed at Page 34 of the
11 Joint Appendix, that it was damaged in hitting the
12 collarbone. It retained its cylindrical state, but it
13 was damaged somewhat. It was bent.

14 So, there has been some damage to the bullet
15 that we know about in its entry. And then the firearms
16 identification expert testified that the length, the
17 deterioration to the bullet from the bodily fluids is
18 positively correlated with the passage of time.

19 He could not testify as to any particular rate
20 at which that deterioration would occur, but there is a
21 positive correlation, and furthermore, since he knew the
22 gun was a .32 caliber revolver, he says, well, that
23 pretty much limits you to a lead bullet, and that is
24 apparently the softest substance out of which bullets
25 are made, and I think his wording was that they

1 deteriorate much faster.

2 And so, I think it is entirely speculative as
3 to whether or not there is going to be any possibility
4 to identify that bullet after two and a half years, and
5 if the bullet comes out and it is not identifiable, they
6 have nothing more than what they have now, and they can
7 show -- they bring in the doctor and show that he was
8 treated for a gunshot wound, and bring in the doctor and
9 say, here's the ex-ray, this little white spot is the
10 bullet, and do that whether or not they are allowed to
11 comment upon the refusal to allow the surgery.

12 QUESTION: Mr. Winston, do you agree that the
13 record does not show the reason for the refusal?

14 MR. WINSTON: I believe that the record shows
15 it through counsel. In other words, Mr. --

16 QUESTION: And what is the reason?

17 MR. WINSTON: He does not want to be cut open.

18 QUESTION: But that doesn't tell us why he
19 doesn't want to be cut open.

20 MR. WINSTON: He believes that it is up to him
21 --

22 QUESTION: Is this in the record -- now, I am
23 just asking -- or are you now telling me what you
24 think?

25 MR. WINSTON: I believe that my position and

1 Mr. Lee's position through me has been consistent and
2 the same at all times in that regard, that it is his and
3 his doctor's decision to make whether or not he goes
4 under the knife.

5 QUESTION: And there is no explanation of why
6 he might not want to have the benefit of exculpatory
7 evidence available?

8 MR. WINSTON: No, Your Honor.

9 QUESTION: Was there any cross examination
10 about what his medical history on surgery had been up to
11 that time?

12 MR. WINSTON: The only thing in the record, I
13 believe, is that for reasons I don't know he has had two
14 previous anesthetics without untoward consequences. But
15 again, moving over from the need aspect to the invasion
16 of the privacy, the affront to dignity, and the risks
17 involved --

18 QUESTION: Do you think the invasion of
19 privacy is fundamentally different from what it was in
20 Schmerber, extracting blood?

21 MR. WINSTON: It is the same in kind, but much
22 greater in magnitude. I mean, in Schmerber, we are
23 talking about a penetration that is something along the
24 order of the tip of this pen, and now we are talking
25 about, if Dr. Mendez-Picon's opinion is correct, we are

1 talking about an incision five centimeters long and
2 three centimeters deep, a many, many, many times greater
3 intrusion.

4 And, of course, I don't think any
5 physician-patient relationship is ordinarily necessary
6 in the withdrawal of blood. In other words, I think for
7 Schmerber, one thing Schmerber required in the blood
8 case was appropriate personnel. I think appropriate
9 personnel in blood withdrawal is a technician or a
10 nurse.

11 For the type of surgery that was originally
12 contemplated in this case, that is, when it was part of
13 that class of cases that I have styled the "just beneath
14 the skin cases," where it is in the fatty tissue, and
15 they make a small incision under local anesthesia and
16 just basically pop it out, for that kind of -- I think
17 the reading of the cases shows that for that kind of
18 operation, you don't even need -- you don't need to go
19 to the hospital. You just go to the doctor's office,
20 and the doctor doesn't even have to be a surgeon.

21 But in this case, not only does he have to go
22 to the hospital, he has to have a surgeon, and not only
23 does he have to have a surgeon, but he has to have the
24 separate doctor who is the anesthesiologist. And I
25 think that the invasion of privacy and affront to

1 dignity, I don't see how it could be any greater than
2 when the doctor is actually going to be breathing for
3 the man.

4 At 135 in the appendix, Dr. Poyan says, "If
5 you get to be anesthetized, then you don't breath so
6 deep. You see, in order to bring you to normal
7 breathing, I will just squeeze the bag a little bit.
8 That expands your chest.

9 "Otherwise, if I am not there, you know, you
10 give anesthesia, you just walk off, you know, then the
11 doctor has to be there to take care of the patient when
12 he is under anesthesia."

13 Question: "What would happen if he weren't
14 exchanging with sufficient frequency and there is nobody
15 there?"

16 "Well, then, eventually he will die."

17 QUESTION: Mr. Winston, you concede, do you,
18 that the evidence of your client's refusal to allow the
19 bullet to be retrieved can come into evidence against
20 him?

21 MR. WINSTON: Well, I wouldn't make that
22 concession at all. If I were going to be the one that
23 was going to be trying these indictments, and I will not
24 be trial counsel in this case, I believe I would object
25 to that. I think he is just exercising his Fourth

1 Amendment rights.

2 QUESTION: You would not equate it, then, with
3 admission into evidence of a refusal to have a blood
4 alcohol test?

5 MR. WINSTON: Well, of course, that is a
6 question with which I am not very familiar, because in
7 our state that is prohibited by statute. That evidence
8 is not admissible in a Virginia DWI prosecution.

9 QUESTION: Mr. Winston, may I ask, you didn't
10 get -- or rather, what relief you did get on habeas in
11 the District Court was reversed by the Court of Appeals,
12 wasn't it?

13 MR. WINSTON: They vacated on the ground that
14 there had to be, that the two remedies were so
15 inconsistent that when the plaintiff petitioner
16 prosecuted them both to the judgment stage, the Court
17 was required to make an election.

18 QUESTION: But you brought both the habeas and
19 a 1983 action.

20 MR. WINSTON: Yes, Your Honor, one paper.

21 QUESTION: And the relief you got was in the
22 1983 suit?

23 MR. WINSTON: We got a permanent injunction
24 and a writ of habeas corpus.

25 QUESTION: And you got habeas, too, did you?

1 MR. WINSTON: From Judge Merritt. Yes, Your
2 Honor.

3 QUESTION: I didn't understand what it meant
4 that the Court of Appeals said it wasn't cognizable on
5 habeas because it related only to conditions of
6 confinement.

7 MR. WINSTON: I have a very difficult time
8 understanding that rationale, but that's what they
9 said.

10 QUESTION: Well, really, what I am getting at
11 is, do we still have the habeas here, or do we have only
12 the 1983 --

13 MR. WINSTON: No, Your Honor, I
14 cross-petitioned on the vacating of the habeas corpus,
15 and it was denied.

16 QUESTION: So the habeas is not here.

17 MR. WINSTON: No, Your Honor.

18 QUESTION: It is only the 1983 suit.

19 MR. WINSTON: Yes, Your Honor. Strictly a
20 civil rights case.

21 QUESTION: All right.

22 QUESTION: You could have attempted to come
23 here from the Virginia Supreme Court's refusal to take
24 your appeal? I guess it wouldn't have been a final
25 judgment, would it?

1 MR. WINSTON: Well, the ruling of the Circuit
2 Court of the City of Richmond is not a final judgment.
3 I mean, it is an interlocutory order in the case.

4 QUESTION: Didn't you go up to the Virginia
5 Supreme Court?

6 MR. WINSTON: On appeal and habeas corpus and
7 prohibition. It was all denied.

8 QUESTION: They turned you down.

9 MR. WINSTON: And I suppose that I could have
10 tried to --

11 QUESTION: Would that have been -- could you
12 have brought that here?

13 MR. WINSTON: I suppose that I could have
14 tried, but I --

15 QUESTION: I know you could have tried, but I
16 just -- would it have been a final judgment?

17 MR. WINSTON: Possibly on the prohibition
18 aspect of the case. But this case proceeded at a very
19 quick pace at that point in time. All the activity was
20 between July and October, and most of it was in late
21 October, and the United States Courthouse in Richmond
22 was much more accessible.

23 QUESTION: Was the defendant in jail or on
24 bail?

25 MR. WINSTON: He was in jail in lieu of

1 \$30,000 bond. I filed a supplemental brief Monday to
2 inform the Court that his incarceration status had
3 changed. He had a previously suspended imposition of
4 sentence on another felony charge from 1977 or '79, and
5 the Circuit Court of the City of Richmond issued an
6 order to show cause why that suspension should not be
7 revoked, alleging as the sole ground the offenses for
8 which he is awaiting trial and to which the surgery in
9 this case relates, and they had the hearing. Mr.
10 Watkinson testified. Sentence was -- suspension was
11 revoked, and now he is doing a ten-year term in the
12 Virginia Penitentiary.

13 Thank you.

14 CHIEF JUSTICE BURGER: Do you have anything
15 further, Mr. Garrett?

16 CRAL ARGUMENT OF STACY F. GARRETT, III, ESQ.,

17 ON BEHALF OF THE PETITIONERS - REBUTTAL

18 MR. GARRETT: Just briefly, Your Honor.

19 I want to make sure that everyone understands
20 that the Commonwealth's position is not that the bullet
21 is strictly cumulative. It is the most reliable
22 evidence that we have. We have -- an argument can be
23 made by Mr. Lee that the identification at the time
24 after the shooting in the emergency room was of a man
25 who had just been shot, and can we rely on that? But if

1 we have the bullet, that is the most reliable evidence
2 that exists that is going to show whether or not Mr. Lee
3 is guilty of the crime with which he is charged.

4 QUESTION: Does the record show why the
5 surgeons in the emergency room didn't remove that bullet
6 at the time?

7 MR. GARRETT: Yes, sir, it was not
8 life-threatening. It was not life-threatening. That is
9 the only criteria they use to remove it, if it is
10 life-threatening or not.

11 QUESTION: General Garrett, can I ask you if
12 you would apply the same standard that you seek to apply
13 in this case if the bullet were lodged in a witness
14 rather than a potential defendant?

15 MR. GARRETT: I was afraid you were going to
16 ask that. I am not really sure, sir, but I think it
17 probably would be the same standard.

18 QUESTION: Because you have to -- even though
19 you have a lot of evidence, we have to treat him as
20 presumptively innocent.

21 MR. GARRETT: Yes, sir. We probably end up
22 with the same standard.

23 QUESTION: And I gather it would have to be
24 the same standard if the defendant were seeking the
25 evidence.

1 MR. GARRETT: Yes, sir. I can't see any
2 reason to have a disparity in that at all.

3 QUESTION: Do you think I correctly described
4 your position in speaking with your opponent that as
5 long as it is relevant evidence, you can get it unless
6 there is a substantial threat of disfigurement or death
7 or something like that?

8 MR. GARRETT: Yes, sir. Justice Marshall
9 indicated sometimes that you can't tell from the bullet
10 whether or not the lens and grooves are there until after
11 you get it. It is the same situation in Schmerber.
12 They take the vial of blood, and it is broken before it
13 gets to the laboratory. The argument can be made that
14 that is a waste. It is not the same. The Fourth
15 Amendment --

16 QUESTION: I don't know. In Schmerber you
17 could go back and get another one.

18 MR. GARRETT: I don't think you could, sir,
19 because the time, the passage of time, the evidence of
20 intoxication was dissipated, and the alcohol wouldn't be
21 in the blood, especially if it were a day or so
22 afterwards.

23 The Fourth Amendment doesn't preclude all
24 searches, only those that are unreasonable. I think the
25 Commonwealth has shown through the evidence that it is

1 reasonable in this case to subject Mr. Lee to the
2 surgery, and I would ask this Court to allow me to do
3 that.

4 Thank you.

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

7 (Whereupon, at 10:53 a.m., the case in the
8 above-entitled matter was submitted.)
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CERTIFICATION

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

#83-1334 - ANDREW J. WINSTON, SHERIFF AND AUBREY M. DAVIS, JR., Petitioners

vs. RUDOLPH LEE, JR.

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

BY Paul A. Richardson

(REPORTER)

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