OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-6646

TITLE WILLIAM LLOYD TURNER, Petitioner V. ALLYN R. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

PLACE Washington, D. C.

DATE December 12, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIE LLOYD TURNER, :

Petitioner, :

V. : No. 84-6646

ALLYN R. SIELAFF, DIRECTOR, :

VIRGINIA DEPARTMENT OF :

CORRECTIONS :

- -x

Washington, D.C.

Thursday, December 12, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:03 o'clock p.m.

APPEARANCES:

J. LLOYD SNOOK, III, ESQ., Charlottesville, Virginia; appointed by this Court, on behalf of the petitioner.

JAMES E. KULP, ESQ., Senior Assitant Attorney General of Virginia, Richmond, Virginia; 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: We will hear arguments next in Turner against the Director of the Virginia Department of Corrections.

Mr. Snook, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF J. LLOYD SNOOK, III, ESQ.,
APPPINTED BY THIS COURT, ON BEHALF OF THE PETITIONER

MR. SNOOK: Mr. Chief Justice, and may it please the Court, this case presents the question of whether Willie Turner was denied his right to be tried by an impartial jury in his capital murder case where the trial judge refused to allow voir dire about whether the fact that Turner is black and his victim was white would cause prospective jurors to be prejudiced against him.

In this case, Turner's trial counsel asked the judge at trial, before trial to tell the jury that Turner was black, that his victim was white, and to ask them whether these facts would prejudice you against Willie Lloyd Turner.

The trial court refused, saying simply Question 10, which is the question that we are talking about here, has been ruled on by the Supreme Court. I am not going to ask that.

Now, it is important to note that counsel had just immediately before this discussion of voir dire finished discussing with the court the claim that the death penalty was discriminatorily applied against blacks, and particularly against blacks who have killed whites. The court had refused any evidence or any hearing, but evidence had been proffered to that effect, and I think it is safe to say that the court had that evidence and that contention firmly in mind at the time.

This Court has held in Ristaino versus Ross that these kinds of claims are to be adjudicated essentially on a case by case analysis in which the question is whether there are special circumstances about the crime that cause one to believe that there is a need for such voir dire.

One of our points is that the special circumstances need not be the facts of the case, the facts of the crime or the murder as much as they may also include the facts surrounding the prosecutions, such as in this case, since the facts of the capital murder statute, the nature of the statute under which the prosecution is being conducted, and therefore we have argued that capital murder, the fact of a capital murder prosecution itself is one of those special

circumstances that this Court ought to find requires such voir dire.

We have addressed all of these issues fully in our briefs, which we incorporate into this argument by reference, but I would like to address one thing in particular in this argument that we have not really focused on before. That is exactly the scope of a rule that we would suggest that this Court could or should make in such a case.

Now, there is in this Court's jurisprudence on voir dire issues a tension between the virtue of clarity on the one hand that comes with per se rules and on the other hand the flexibility that comes with the discretionary approach or leaving it all to the discretion of the trial court.

This Court need not decide whether a state must apply a bright line rule in such a case. Some states have. Georgia has, for example, in capital murder cases. Rhode Island, Massachusetts, Pennsylvania have in other kinds of cases.

You could continue to rely on Ristaino versus Ross's discretion-based analysis provided that you make clear that the discretion must be exercised in a capital case with due regard for the special circumstances of a capital case.

For example, due regard for the greater discretion that the jury is given in a capital case than was given in Ristaino versus Ross or Rosales-Lopez versus United States or the other cases in which this Court has considered this issue. The discretion given to a jury in Virginia to impose the death sentence is basically unlimited once an aggravating circumstance has been found. The Virginia statute is essentially identical to the Georgia statue in this regard, so that the degree of discretion that you found and noted in Zant versus Stevens applies absolutely in this case as well.

And the second thing that is important about capital cases is the possibility that racial prejudice will manifest itself in the death and life decision, and for that we have suggested that the history of racial discrimination and the history of the discriminatory application in this country is evidence if not necessarily evidence high enough to allow us to argue to you that the entire statutory scheme should be invalidated, at least high enough to suggest that in the words of Justice White in Rosales-Lopez, that there is a substantial -- a more substantial indication of a likelihood of racial prejudice in this kind of case.

QUESTION: Suppose the defendant, Mr. Snook,

is Puerto Rican.

MR. SNOOK: Well, Your Honor, I --

QUESTION: You would ask the same question then?

MR. SNOOK: Your Honor, I would argue in this particular case all that we are presenting you with is the black on white situation, and we have --

QUESTION: I am asking you a hypothetical question.

MR. SNOOK: I understanding.

QUESTION: Because the question you are putting may answer the other question.

MR. SNOOK: I understand. My position is that you could draw a very narrow rule recognizing the problem of black and white relationships in this country.

QUESTION: How about Hispanics then? And, of course, Puerto Rican may be categorized as Hispanic under some circumstances.

MR. SNOOK: Well, I think that there you could again fall back on the case by case sort of analysis, and I don't think it is necessarily wrong to say that in a case where -- for example, let us suppose that we are in a place in Texas in which there is a greater history of discrimination against people with Spanish surnames.

If we are in a place like that, where there is some history of discrimination, that may be more of a problem. I tend to look at it from the Virginia perspective, where at least in Charlottesville there are very few indeed Hispanics, and so we don't perceive there being a problem of discrimination against Hispanics.

In a different community, in a different fact situation, there may well be enough of a problem so that this Court and lower courts would have to find that such voir dire would be appropriate.

QUESTION: Mr. Snook, in your submission a moment ago you said that in your view the Court could retain, I thought you said, the basic outline of Ristaino against Ross, which leaves it largely to the discretion of the trial court informed by the facts of the particular case. But you are not suggesting under your rule that a trial judge in Virginia in this case could have exercised his discretion as this particular trial judge did, could you?

MR. SNOOK: Your Honor, if you choose to apply that, the narrowest possible ground on which we have urged relief in this particular case with simply the decision that the trial judge must consider, at the very least, must consider the unique characteristics of the

death penalty statute and the unique characteristics of the death penalty decision, and you add in this particular case the fact that not just the trial and the jury was being move to a different location, but the judge who was conducting the voir dire and counsel also were going to a jurisdiction with which they were not familiar in this instance. One of the reasons this Court has traditionally given that degree of discretion to the trial judge is that that discretion is informed by familiarity with the local ethos, the local citizenry, which in this case the trial judge did not have.

QUESTION: Where was this case tried, what county?

MR. SNOOK: This case was tried in Northhampton County, which is on the eastern shore of Virginia, and Southampton County was where the crime occurred, and is the area from which the judge comes and where the judge sits. In Virginia the judges sit in narrowly circumscribed circuits, and it would be an extraordinary instance in which they would go elsewhere.

QUESTION: Southampton County is a good ways from Northampton County?

MR. SNOOK: Yes, they are not contiguous. You

go from Northampton County south through the cities of Virginia Beach and Norfolk and Suffolk, and then over to Southampton County, and I believe the respondent has said it is about 80 miles. I believe that is essentially accurate. Certainly there is a significant differences, and the judges of one area do not sit in the other area.

QUESTION: And what was the reason for the change?

MR. SNOOK: The change of venue was basically because of pretrial publicity. Now, we are not arguing --

QUESTION: On the motion of the defense?

MR. SNOOK: Yes. Now, we are not arguing that there was any abuse in the discretion to have moved it to Northampton County. In fact, as respondents have noted, one of the things that was perhaps good about this particular move was that both Southampton and Northampton County had essentially the same racial mix, 46.4 percent black in both counties.

QUESTION: So your submission is on your narrowest ground that although the judge had resided in Northampton County, he could have declined to voir dire; since he came from another county, he couldn't have.

MR. SNOOK: At least in a case in which the

judge sits there and actively thinks about the unique aspects of the capital statute. It is important to remember that in this case we do not have the instance of the judge sitting there and saying, well, I am going to weigh the following factors pro and the following factors con and say no. All he said was, that case has already -- that question has already been decided by the Supreme Court. I am not going to ask that question.

In other words, if he is going to exercise discretion, it has to be a discretion that at least contemplates the possibility that there would be some cases that would allow for such a question.

QUESTION: Yes, but you wouldn't be satisfied if we just said that. You want us to say that the discretion could not have been exercised in these circumstances to refuse the question.

MR. SNOOK: In this particular case, Your Honor --

QUESTION: Yes.

MR. SNOOK: -- I am obviously here asking you to hold that in this case the judge abused his discretion.

QUESTION: What would you do? Would you insist that the jurors be individually questioned, or just a general question?

MR. SNOOK: Your Honor, I don't suggest that the Constitution requires in this case or as a general matter individual voir dire, or that any particular form of voir dire --

QUESTION: So what would you expect? Would this be -- this would be to the entire panel?

MR. SNOOK: At the very least, yes.

QUESTION: Well, at the very least. Would that satisfy you?

MR. SNOOK: I think that that is the minimum that the Constitution requires, yes.

QUESTION: So the answer is yes?

MR. SNOOK: Yes. As a constitutional basis, yes.

QUESTION: And you would expect that that really would do some good, that some people would raise their hand and say, yes, I am racially prejudiced?

MR. SNOOK: Well, I am prepared to assume, as this Court has in the past, that jurors will answer truthfully.

QUESTION: And you think that the -- you must think that the chance of there being racial prejudice among the jurors is sufficient to try to weed these people out.

MR. SNOOK: That's right.

QUESTION: Let me get back to the geography. You said there were about 80 miles between Northampton and Southampton Counties.

MR. SNOOK: Yes sir.

QUESTION: How many counties are in between?

MR. SNOOK: It is complicated a little bit by the fact that there are cities in between, and in Virginia cities and counties are separate jurisdictions, but I think --

QUESTION: How many counties in between?

QUESTION: In fact the Chesapeake Bay is in between.

MR. SNOOK: That's right, the Chesapeake Bay is the bigger problem, because we are -- you have to go across the Chesapeake Bay, I think it is really safe to say that the eastern shore is considerably isolated from the rest of the state, and Justice Powell, I am sure, is familiar with the geographical problems that we have in this state in integrating the eastern shore into the rest of the state. While it has some --

QUESTION: Or vice versa.

MR. SNOOK: Or vice versa. That's correct.

QUESTION: Then your 80 miles is as the crow flies.

MR. SNOOK: That may well be.

QUESTION: Don't you know?

MR. SNOOK: I don't know offhand how the crow flies, because you are going at sort of an angle.

QUESTION: Well, you are from Virginina. I would think you would know your geography.

MR. SNOOK: Your Honor, I know that it is about 20 miles or 30 miles from the county seat of Northampton County down to Norfolk, at which point one heads west about 50 miles. I think that is the basis for the 80-mile submission. Exactly how the crow flies in this instance I coulin't tell you, but I suppose if one figured out the hypotenuse it might give you the answer.

QUESTION: The crow likes to follow the shoreline.

MR. SNOOK: If you follow the shoreline, you are in real trouble. So, in this case all that we are saying is that there may be a continuum, a spectrum, if you will, of justifiable and supportable constitutional rules going from the -- still adhering to the case by case analysis in Ristaino versus Ross all the way over to a bright line rule that says in every single capital case in every state in the union there must be such voir dire.

Now, I don't think you have to decide where on

that spectrum necessarily to fall. What you coul do is to say all that is necessary is that one way or another, either the state courts adopt a per se rule or they adopt a discretionary rule that takes these other factors into consideration, but the problem is that at no time in this case did we ever get up to that level, because the court never considered any circumstances surrounding the proper voir dire in this case.

Now, as I said, you could adopt a number of different per se rules. One would be every capital case. A second might be -- a more limited one would be to say every capital case in which the jury does the sentencing, and of course there are about seven states in which the death sentence is imposed where it is really a judge sentencing state, Alabama being one, Florida being another, Arizona. Those are states in which this same rule might not apply.

Or down to the case of every capital case in a state where the jury has essentially unfettered discretion, as in Georgia, as in Virginia. You can also consider simply the fact of every jury sentencing case, which would be a broader rule that would apply obviously not only to capital cases, but would apply to non-capital cases in those seven states that still have jury sentencing.

But again, you don't have to adopt any one of those per se rules. What you might well do is simply decide that the states must as a matter of constitutional law either adopt a per se rule that considers these facts or must adopt a discretion based rule that considers these facts, but that in either event you must consider the unique characteristics of the capital sentence.

QUESTION: What are the guidelines for the exercise of that discretion?

MR. SNOOK: The exercise of the judge's discretion is what -- well, Your Honor --

QUESTION: Must he take a look at the ethnic and racial composition of the particular jurisdiction, that is to say that it is one-third Hispanic or one-third something else or --

MR. SNOOK: I would think so, yes.

QUESTION: -- one-third Austrians?

MR. SNOOK: I would think so, and in fact that would be part of the local knowledge that a local judge would have that would make that decision and that exercise of discretion better informed. There are a number of factors like that which -- obviously, in Ham versus South Carolina this Court recognized that a familiarity with the local ethos there, familiarity with

the racial prejudice that was a problem in that case was one of the reasons -- was one of the factors to take into account, and therefore that the judge, having failed to take those factors into account, abused his discetion in not having asked those questions.

But all we are saying is that at a bare minimum, the bare mandatory minimum that this Court should require is that the trial judge consider the unique needs of a capital case.

QUESTION: Well, would you require him to put something on the record reciting that he had considered them?

MR. SNOOK: I think that would certainly be helpful in this particular case --

QUESTION: Would you require it as a matter of federal constitutional law?

MR. SNOOK: I think that if it is to be considered as an exercise of discretion, that yes, it would have to be -- either he would have to say, yes, I have considered these factors, or would have to give some othe indication some place that he is not simply ruling out of his hip pocket.

QUESTION: What part of the constitution would he be relying on?

MR. SNOOK: Only the part of the constitution

-- Your Honor, this is still a Sixth Amendment claim, and while the Sixth Amendment may not spell out specifically that he has to put in writing every reason for what he is doing, and I understand of course in Witt versus Wainwright that this Court held that a judge does not have to give written findings of fact every time he decides that somebody should not sit as a juror, but that is not what we are talking about. All we are talking about here is that there be some evidence from the record, howeve he wants to put that evidence into the record, that those factors were considered.

It doesn't have to be in writing, it doesn't have to follow any particular form, but the record must show in some way that this issue has been considered and the unique aspects of the case have been considered.

QUESTION: Mr. Snook, your argument strikes me, frankly, as asking for almost a cosmetic change which would have the effect of overturning a conviction for failure to meet it. The judge did ask of the panel if there was any reason whatever why the jurors could not serve properly in this case, and presumably the panel didn't indicate or no one indicated they could not, and you would be satisfied with a single additional question posed to the entire panel, are any of you racially biased?

MR. SNOOK: As a bare minimum, yes.

QUESTION: Well, I mean, when you look at it from that standpoint, how much do we gain by that kind of a limited inquiry? That is what troubles me, I think, about your argument.

MR. SNOOK: Okay. What we gain, first of all, is the fact that at the very least if there are honest jurors on the panel, as we assume that there are, that those jurors will say yes.

QUESTION: If there are honest jurors on the panel who felt they were racially biased, they should have said yes in response to the more general question, shouldn't they?

MR. SNOOK: I don't think so, Your Honor, because the more general question does not call their attention to the fact that the victim was white. Now, we all know that as a practical matter, what often happens in capital cases is that the jury considers in some way or another the relative worth of the life of the defendant against the relative worth of the life of the man he killed, and it is unfortunately the case that all too often people, blacks, when the blakcs are the victims, for whatever reason, the death penalty does not get applied. I have to assume on the basis of all the research that has been done that that is based in large

part on the notion that the jurors do take that into account.

Now, I have to assume again that asking the question would have some utility, first of all, because I assume that they are honest jurors, second, because at the very least they would begin to think about the possibility of their own prejudice. If they did not even know that the race of the victim -- that the victim was white, there is no way that they can answer a question that has not been asked, and I don't think it is reasonable to expect as the respondent would have us do that someone hearing the question, do you know of any reason why you could not be fair in this case, would say, if it turns out that the victim is white, I am going to vote to execute him. And that is basically what they are suggesting.

Now, I have asked to be allowed to reserve some time for rebuttal here, and I would simply like to note that as this Court has noted in Gardner and in Beck, that it is important in this case, as in all capital cases, both -- it is important both to the defendant and to the community that any decision to impose the death sentence be and appear to be based on reason rather than emotion.

All that we are asking in this case is that

black capital defendants have the right to be sure that inadmissible influences such as race not be allowed to decide who lives and who dies.

QUESTION: What about a white capital defendant in a community that may be predominantly Negro?

MR. SNOOK: If you had the same history of racial discrimination in that community, I think that would be a valid concern. I think the Court ought to require voir dire in that case.

QUESTION: How does the history -- how do you measure that history? Who decides what that history is?

MR. SNOOK: Obviously, Your Honor, that is a discretionary matter. I recognize that my model of judicial decision-making still retains a great deal of discretion for the trial court as to those other additional factors. I have suggested a couple of ways that that discretion might be guided, a couple of per se rules that this Court may follow.

As to the additional cases, the cases not presented on the basis of this factual record or on the basis of the issues presented here, all I can say is that I would hope that this Court would give the judges some guidance in those decisions they would have to make

in the future.

QUESTION: What if the judge then says, well, I have been sitting in this jurisdiction for 20 years, and I reject the idea, the notion that there has been any discriminatory administration of justice, and I would regard the question that you propose as an offensive question to be put to an American citizen? Is he going to be reversed for abuse of discretion, or where do we go from there?

MR. SNOOK: At least in that instance the judge would have considered those things. He would have said that I am familiar with the local citizenry, and he would have made these specific statements, and we would know that he had in fact carried out his duty. We don't know that in this case. Whether he would be reversed on that factual record, I suppose the Court would again have to fall back to the abuse of discretion standard. Has he abused his discretion? We couldn't really tell until we saw the facts of that case.

I would like to reserve the balance of my time for rebuttal. Thank you.

CHIEF JUSTICE BURGER: Very well, Mr. Snook.

Mr. Kulp.

ORAL ARGUMENT OF JAMES E. KULP, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KULP: Mr. Chief Justice, members of the Supreme Court, may it please the Court, one of the questions that was asked earlier about the difference between Southampton County, the place in which this crime occurred, and Northampton County, the place in which the trial occurred, in his opening statement to the jury counsel for petitioner, in speaking to the jurors in Northampton County, indicated that the area and the people were basically the same. You find this on the transcript of trial, December the 4th, Page 116.

I think that the question that counsel for petitioner is asking is, since the judge was not from this county, therefore he had a special duty to determine whether racial prejudice existed in this particular instance. This Court has said on many occasions that the trial judge has great discretion, broad discretion to determine the voir dire in a case, and it seems that this Court has indicated that in order for the judge to exercise his discretion, that counsel need to inform him or bring to his attention those matters in which they believe that, particularly in this instance, where they are requesting a specific question, the matters which they think they should call to the judge's attention to require such a question.

Now, the situation in this case is that prior

to trial over in Northampton County the petitioner's attorneys did make a motion to strike the indictment because of the fact under their position that the statutes in Virginia were unconstitutional. They did mention to the judge at that time a study from Northeastern University, but the record makes clear they did not introduce the study at that time. The study was not actually introduced into the record until the post-sentencing hearing several months after the conviction and sentencing by the jury in this case.

Several things occurred in between the time that the mention of this study and the question about voir dire occurred. Prior to trial, the judge had requested counsel to supply him with questions which they would ask that he ask the jury. They did so. One of the questions was, as Mr. Snook has indicated, a question specifically related to a question towards possible racial bias.

During the trial, when the judge was taking up the questions, the prosecutor brought to the judge's attention, said that this was not a racial case, it did not involve any racial issues, and that the only thing you had here was a crime where the victim was white and the defendant was black.

At that time the petitioner's attorney made no

proffer to the court of any reasons why the question should be asked.

They did not again bring to the judge's attention the Northeastern study or their basis that the question should be asked because in their view the study shows that white victims -- defendants who kill white victims are more frequently subject to the death penalty.

They didn't tell him anything about, Judge, you are not familiar with this county so therefore you need to give specific attention to whether you know anything about the county. They didn't bring to his attention the things that they had mentioned in their brief. They set forth a number of factors.

QUESTION: Mr. Kulp, the Supreme Court of Virginia's opinion when it is dealing with the question of whether or not the trial judge should have asked this question does have a footnote, as I recall, saying that the defendant had introduced into evidence this study. It doesn't say when it was introduced.

MR. KULP: Yes, sir, Justice Rehnquist, they do, and it seems that the Supreme Court of Virginia has given credit that the study was introduced on this particular point.

I suggest to the Court, however, that a

careful reading of the record would indicate that it was not, and then if the Court would look at the post-sentencing hearing when the study actually was introduced into evidence in February of 1980, at that point the attorneys for the defendant again said, we want to now make a part of the record the study from Northeastern as it pertains to our claim of discrimination application of the statute.

They didn't really say again that it was for this point, but even if you give credit, as the Supreme Court of Virginia has apparently done, to the defendant for introducing this study on the basis of showing that white victims, defendants who kill white victims are more frequently executed, we submit that the study is insufficient.

First of all, the Bowers and Pierce study that was introduced at trial bore no relationship to how the death penalty is being imposed in the state of Virginia. It was based on some statistics in five other states. Now, we submit that at the time this Court decided Furman, all states were basically operating the same.

But since this Court handed down the decisions in Gregg, Jurek, and Proffitt, states do not have the same type of statutes any longer, and Virginia, we

submit, has one of the more stringent statutes in the country, because not only has Virginia seen fit to narrow the categories of crimes for which a death penalty may be imposed, and it is related to all of the capital murder crimes, had to be wilfull, premeditated, and deliberate murders.

In Virginia, unlike Texas and Florida and Georgia, Virginia cannot use a felony murder rule in capital cases. In addition to having to show the premeditation and wilfull, deliberate murder, it has to be in connection with some other aggravating circumstance such as during the commission of rape or in this case during the commission of armed robbery.

But not only does the Commonwealth bear the burden of showing those stringent circumstances. A person is not eligible to be subject to the death penalty in the Commonwealth of Virginia unless the Commonwealth proved beyond a reasonable doubt one of two additional aggravating circumstances.

So, we submit that the statute in Virginia is much more stringent than the statutes in other states, and that Virginia should be viewed upon how it is imposing capital murder, not perhaps what they are doing in Georgia or some other place.

The studies, as we have indicated in our

brief, are clearly fundamentally flawed. Each of the studies, the Bowers and Pierce study, which was introduced at the time of trial, and the study by Gross and Morrow which was introduced, I think, during the Federal District Court proceeding on a motion to alter or amend, those studies take all homicides committed in a state and try to compare those with cases in which the death sentence was actually imposed.

Under Virginia law, for example, they are comparing or would try to be comparing in Gross and Morrow's study, they would be trying to compare capital murder cases with manslaughter cases, with second degree murder cases, with first degree murder cases, all of those of which the defendant is never subject to capital punishment.

QUESTION: Let me ask you for a minute, Mr. Kulp, is the first study you referred to the Northeastern study?

MR. KULP: Yes, sir; that is Bowers and Pierce.

QUESTION: Bowers and Pierce. That was offered in the trial court.

MR. KULP: Yes, sir.

QUESTION: Were Bowers and Pierce, either of them present?

MR. KULP: No, sir.

QUESTION: Did the state object to the admission?

MR. KULP: No, sir, the commonwealth's attorney did not object.

QUESTION: And the trial judge received it?

MR. KULP: Yes, sir. I wanted to point out that they mentioned the study to the judge at that time. They did not in fact introduce the study until after the trial in the post-sentencing conviction or proceeding.

QUESTION: Post-sentencing proceeding?

MR. KULP: Proceeding.

QUESTION: And then how about the Morrow study? You say that was introduced for the first time in the federal habeas proceeding?

MR. KULP: Yes, sir.

QUESTION: And what was the state's position when that was offered?

MR. KULP: I think the position, and I didn't try the case, but I believe the position was that it does not accurately reflect how capital punishment is raised or is being imposed in the Commonwealth of Virginia, and the District Court found that as a matter of law, the statistics were not acceptable.

We would suggest to the court that this case

is guided by the principles enunciated by the Court in Ristaino versus Ross. In that case, this Court said that simply having a black defendant and a white victim is not a special circumstance to warrant the specific inquiry into possible racial prejudice.

And we submit that in this case, the judge did what he is constitutionally required to do. At a time when all the veniremen were present, the defendant, who is black, stood at the time the indictment was read and requested trial by jury, so when all of the veniremen knew the race of the defendant, the judge then asked two questions. Do any of you know any reason whatsoever why you cannot render a fair and impartial verdict in these cases either for the defendant or for the Commonwealth of Virginia? The second question the judge asked the veniremen, do any of you know why you cannot render an impartial verdict in this case?

Now, we submit that those questions, absent the sepcial circumstance as noted by this Court in Ham versus South Carolina, is all that is mandated under constitutional law.

QUESTION: General Kulp -- oh, excuse me.

QUESTION: Well, counsel, Mr. Snook responds to that by saying there was no way the jurors could have known at that time that it was a white victim. And

presumably they could see that it was a black defendant, but not that it was a white victim, and he also says, this is a capital case in which the jury will have broad discretion in sentencing, so perhaps you ought to address yourself to those aspects of the argument.

MR. KULP: Justice O'Connor, it is true that in this case the jury when they were asked these questions did not know the race of the defendant -- or the victim, and as a matter of fact, all during the case neither the prosecutor nor the defendant ever made anything of race either of the defendant or the victim, and it wasn't until about the second or third day of trial when the prosecutor introduced a photograph of the body that the jurors virtually became aware that he was white. So, there was never any issue made to the jury by the prosecutor or even in the defendant's case that he was white.

Now, it seems that in Ristaino, when the general question was asked, one of the jurors was excused because he admitted to racial bias, and we submit that this is certainly a clear indication that when they know the race of the defendant, that is where the bias, if any there is, would come into play, and since in Ristaino one of the jurors admitted to racial bais, we think that the general question then would draw

out from a juror who is going to be honest, and we submit that the asking of the additional question -- there is nothing to indicate that a juror, if they were harboring racial bais and they were asked the normal questions and they didn't answer in the affirmative, there is nothing to really indicate that they would answer any more truthfully to a more pointed question.

Now, the fact that it is a capital case, of course, in Virginia, as I have indicated, the jury must find beyond a reasonable doubt one of two aggravating circumstances. This is, it appears to me, much like in the trial itself. In other words, there are certain factual issues that a jury must focus upon in order to find that a person is subject to capital punishment.

Now, this Court in the past, while it has recognized the qualitative different nature of death sentences, has never gone and taken the step of carving out a separate and distinct series of laws to apply to capital cases. For example, in Barefoot versus Estelle, this Court said that there is no reason not to apply the normal rules of evidence as to using an expert.

The Court applies the same standard in capital and noncapital cases in Strickland versus Washington, when you deal with ineffective assistance of counsel, and in Wainwright versus Witt the Court said that the

excusing for causing of jurors is the same, that you apply the same standard whether you are talking about a capital case or a noncapital case.

And we submit that there have been no persuasive reasons presented to this Court which would justify a step as saying that simply because it is a capital case, that therefore you should ask different questions.

QUESTION: Do you concede that on the record of this case it is apparent that the judge did not exercise discretion in making this determination --

MR. KULP: No, Your Honor.

QUESTION: -- whether to ask the question?

MR. KULP: No, Your Honor. We would say that he did in fact on the record exercise his discretion. When the question was presented to him, the prosecutor said, Your Honor, this is not a racial case, there is nothing racially involved, and the record will show that the petitioner has conceded that there was nothing in the circumstances of this case that would indicate any racial animosity.

And so the prosecutor said, Your Honor, this is not a racial case. All we have is a black defendant and a white victim. Now, the defendant, his attorneys did not offer anything to the judge to the contrary, and

the judge indicated, well, the Supreme Court has already ruled on that.

QUESTION: What if the defendants had offered all the things that they have offered here in this court to the trial judge. Do you think the trial judge under those circumstances could have declined to ask a question about racial violence?

MR. KULP: Yes, Your Honor, I think he could have. If we take the things that they have presented, first they said that because you have different races. Well, this Court has already said in Ristaino that is not a special circumstance.

They indicated that there is a past history of racial discrimination, and we submit that there is no indication in this case, there is no indication that under the new capital punishment laws in Virginia that there is any racial discrimination in the imposition of capital punishment in Virginia.

They talk about there are only four peremptory strikes.

QUESTION: Well, they have produced a number of studies now that presumably could support their position, and you think if all of those things had been available to the trial judge, it would have been appropriate for the judge to refuse to ask a single

question about racial bias?

MR. KULP: Yes, Your Honor, because even though they have introduced --

QUESTION: If it had been in a federal court, he would have had -- the judge would have to ask.

MR. KULP: Yes, ma'am. That's correct, Your Honor, but the court has recognized in Rosales that under its supervisory authority, that the court has closer supervision in the federal courts.

QUESTION: Yes, but in Rosales, although it was a supervisory case, the reason the rule was imposed was because when there is a -- where the victim and the defendant are of different races, there is a reasonable possibility of prejudice. That is what the Court said. Right or wrong, that is what it said, and it is a violent crime. A violent crime plus victim and defendant of different races, that raises a reasonable possibility of prejudice.

Now, if you accept that, I would think that at least that is this Court's opinion that in those circumstances there is a reasonable possibility. What would you think if you accepted that in your case? Do you think the question should be asked if there is a reasonable possibility of prejudice?

MR. KULP: Well, Justice White, I think to

answer your question if you have a special circumstance, as was --

QUESTION: Well, the special circumstance in Rosales was identified specifically. That is one of the special circumstances where as a supervisory matter the question must be asked, but only because that raises a reasonable possibility of prejudice, just those special circumstances.

MR. KULP: I think, Justice White, that the Court did not find that that was a reasonable possibility apparently in all circumstances, because in Ristaino you had a violent crime, blacks on white, and the Court said that does not call for a per se rule, and so it seems to me that what the Court has done in Rosales is applied its supervisory authority, but they said --

QUESTION: Well, there is no doubt about that, but the predicate for its rule was that -- at least the rule that it applied and found to have been satisfied here in Rosales was this rule I just stated to you.

MR. KULP: Yes, sir.

QUESTION: That must be inconsistent with Ristaino.

MR. KULP: It is. It could not stand, Ristaino could not stand on that basis because it was --

in that case it was --

QUESTION: Which came first?

MR. KULP: Ristaino came first. Rosales made clear, Justice White, that the Court was not overturning Ristaino, but was simply using its authority in a supervisory role. And in this case, the facts of the case clearly show that there was no contest as to the guilt in this case. The defendant's attorneys when they were arguing to the jury clearly told the jury this case has never been about guilt or innocence. In fact, there is overwhelming evidence of his guilt.

One looks at the circumstances and aggravation, the Supreme Court of Virginia said that his past record is perhaps the worst they had seen up until that time.

It had a prior murder conviction, and within a period of four years he had three other malicious wounding cases, and so the Court, even, Justice White, in Rosales, the Court said that even if the judge failed to honor the defendant's request, it will not be reversible error where the circumstances of the case indicate that there is a reasonable possibility that racial prejudice might have influenced the jury, in other words, if there is no possibility that it influenced the jury.

QUESTION: Did you understand that the attack in this case is on the conviction or the death sentence or both?

MR. KULP: Well, I think the petitioner's relief asked for in both his petition or in his initial brief and the reply brief talks in terms of both, either send it back for a retrial entirely or send it back for sentencing. It certainly seems to me that in this case there is absolutely no question about the guilt.

The case -- the defendant was found in the store. We had four eye witnesses. There has never been any question as to his guilt. And his counsel so admitted to the jurors at the sentencing phase. So, I am not sure what he is asking for, Justice White, but he has seemed to ask in both terms. So we would ask this Court not to overrule Ristaino.

In fact, petitioner is not asking the Court to do that. And we believe that if significant studies were produced which in fact judged how capital punishment were being imposed in Virginia, and they showed some discriminatory effect, then we believe that certainly would be taken into consideration by the trial judge as a special circumstance.

QUESTION: Counsel, wouldn't you be in a better position, you, if the judge had at least looked

at the report?

MR. KULP: Justice Marshall --

QUESTION: Wouldn't the judge close his mind and say the Sureme Court has said that is unimportant, so I am not interested in it?

MR. KULP: Justice Marshall, I don't think he closed his mind. I don't think that ccunsel ever presented the --

QUESTION: Didn't he say that? He didn't say close his mind, but didn't he say the Supreme Court has ruled on this and that is it?

MR. KULP: He said that, yes, sir, but the attorneys did not --

QUESTION: Well, wouldn't you have been better off if he had looked at it?

QUESTION: Well, it wasn't here.

MR. KULP: It was not there.

QUESTION: Wouldn't you have been better off if he had asked for it?

MR. KULP: Well, I assume, but I think that the judge is like anyone else. He has to exercise his discretion, and the duty on counsel is to bring these thingsd to his attention. They did not bring these matters that they are now relying on to his attention, and we submit that there was nothing in this case over

which the judge abused his discretion. He was simply following what I believe was the law which was set down by this Court in Ristaino only three years before he ruled in this case.

And we would ask the Court in this -- for example, the death penalty in Virginia has only been under the new statute since 1977, and between 1977 and 1985, June of 1985, there have only been 212 people charged with capital murder in the State of Virginia. The petitioner indicates in his petition that there are 32 people on death row in Virginia, which would leave us then 180 people who have been charged with capital murder who have had some disposition other than the death sentence.

So, if we take half of those and consider that half of those 180 are black and half of those 180 --

QUESTION: Is there any discretion in the prosecutor as to -- for a particular crime whether to charge capital murder or something else?

MR. KULP: Yes, Justice White, there is, but these were 212 people actually indicated for capital murder.

QUESTION: And the prosecutor then was urging the death penalty?

MR. KULP: Well, I think at least certainly

initially, Justice White, but we obviously know some people were convicted of lesser offenses.

QUESTION: Well, I know. Yes.

MR. KULP: So he at least charged him. In other words, these were not the situation where he had already exercised his discretion in order to bring the charge, but we are not talking about people where the prosecutor did not ever exercise discretion or assume to begin with that he would not make the charge.

So I am simply suggesting that --

QUESTION: Am I correct, we don't know how many of these 180 people actually were eligible for the death penalty in the sense that the jury had an opportunity to impose it?

MR. KULP: Justice Stevens, we know by a survey that we did that more blacks who killed whites who were convicted of capital murder received life imprisonment than they did the death sentence. And that is all we are --

QUESTION: Yes, but that is a comparison within the universe of blacks who killed whites. It doesn't compare blacks who killed whites with blacks who killed blacks or whites who killed whites.

MR. KULP: Well, we know, again, by just a survey that we did that more people who were actually

convicted of capital murder, whether they be black on white, white on white, whatever it is, more people received life sentences than they did the death sentence.

QUESTION: Is that in the record?

MR. KULP: No, sir. The point I am trying to say is that the studies which we think are fundamentally flawed because the raw materials or the raw data that they use do not reflect how capital punishment is being imposed in Virginia, and so we just ran a survey of all the prosecutors to just find out, and so we are confident that if they compared capital cases or persons who were charged with capital murder, that these studies would not indicate, as Gross and Morrow tried to suggest, that the likelihood of receiving a death sentence is greater if a black kills a white. Those facts simply would not stand up if they used correct information.

QUESTION: Has Virginia ever imposed a death penalty on a black who killed a black?

MR. KULP: Yes, sir, Your Honor, and one has been executed within the last year.

QUESTION: May I ask in your study of the Ristaino case which involves a black defendant and a white prison guard as I remember it, does the record

tell us whether the jurors knew that the victim was white at the time of the voir dire? Do you happen to know?

MR. KULP: No, sir, I don't think it does. Justice Stevens, the record indicates that at least one of the jurors knew the defendant was black, but it doesn't go on to show even if all the others did, and there is no indication as I can see in the opinion that they knew that the guard was white.

QUESTION: And that one excused himself without really knowing the race of the victim.

MR. KULP: Yes, sir. We can't tell from the record.

QUESTION: Don't you have the defendant in court during the voir dire?

MR. KULP: I say, in our case, all of the jurors were aware of the defendant's race when they were asked, but in Ristaino the record is not clear.

QUESTION: Were there blacks on the jury that convicted this man?

MR. KULP: In this case the jury, the makeup of the jury was four blacks and eight whites.

QUESTION: Who was the foreman?

MR. KULP: The foreman was black, Mr. Warsling. And so we submit that when the judge has all

these things before him, in other words, when the veniremen came before the judge, he was well aware that the venire consisted of a good portion of blacks, and I think that this is a thing that the judge could take into consideration as to whether he thought it was going to be necessary to ask a specific question as proposed by the defendant.

We woul ask this Court to retain the rule in Ristaino because we believe it is a workable rule. We think it worked in this case, and we would ask the Court to affirm not only the judgment of guilt but also the sentence.

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

ORAL ARGUMENT OF J. LLOYD SNOOK, III, ESQ.,
APPOINTED BY THIS COURT,
ON BEHALF OF THE PETITIONER - REBUTTAL

MR. SNOOK: Yes, Your Honor, I do.

QUESTION: What do you ask, Mr. Snook? Do you attack the conviction?

MR. SNOOK: Your Honor, what we have --

QUESTION: Just yes or no.

MR. SNOOK: The problem is that, if I may, Your Honor, the isue is a bit more complicated than that, and I don't want to concede something --

QUESTION: Well, you are bound to come out with a conclusion. Tell me what it is first.

MR. SNOOK: Ultimately, I would suspect that if he were retried on guilt, he would be convicted anyway, and what we really most want is to keep him out of the electric chair.

QUESTION: Well, normally when only a sentence is under attack, we just vacate the sentence and leave the conviction intact.

MR. SNOOK: That's right.

QUESTION: If this hadn't been -- if the same crime had been charged except it wasn't charged as a capital crime, would you be here?

MR. SNOOK: Well, obviously, we are predicating our whole approach on the fact that it is capital --

QUESTION: Well, so you can just answer no, you wouldn't be here, would you?

MR. SNOOK: No, we would not be. Not in that sense, no. If I might --

QUESTION: Not in that sense? You wouldn't be here.

MR. SNOOK: Justice White, if I might, let me say that the problem that I have is that under this Court's decisions such as Toomey versus Ohio and cases

of that nature that have dealt with the abridgement of the right to an impartial finder of fact, an impartial trier, this Court has never attempted to get into harmless error analyses. Because we have mounted an attack on the impartiality of the finder of fact, then I don't feel that I can properly concede to you that we should not go back for a new trial on guilt or innocence as well.

QUESTION: Then why do you hinge your whole case on it being a death case? You should say in any violent case, any case of a murder where the victim is white and the defendant is black, this question must be asked.

MR. SNOOK: I may be being excessively cautious, Your Honor, in not trying to concede something that may have ramifications or implications that I don't want. As I say, my concern -- before the Fourth Circuit, after I was being asked essentially the same question, I acknowledged that there really wasn't much question about guilt.

QUESTION: Let me just ask you then, do you ask us to set aside the conviction as well as the death sentence? Yes or no?

MR. SNOOK: Yes. I also recognize that this Court could probably properly set aside only the death

sentence.

QUESTION: You qualified your answer to Justice White by saying there isn't much doubt of his guilt. There is none whatever, is there?

MR. SNOOK: I don't think there really is. No, Your Honor. Not as to whether he committed the murder and that kind of -- I mean, I think there are some other issues one might get into, but to be perfectly candid --

QUESTION: The fact of guilt doesn't necessarily answer your constitutional question, but --

MR. SNOOK: No, but --

QUESTION: And you client also tried to kill another person at the same time.

MR. SNOOK: I don't believe he did, Your Honor.

QUESTION: He shot one person who didn't die.

MR. SNOOK: No, he did not.

QUESTION: Are you sure of that? You know the record better than I do.

MR. SNOOK: I am pretty sure, Your Honor, there was only one person shot at, and that was Jack Smith. He was disarmed immediately after that by the guard -- by the police officer, but the problem is that this Court has held, and the reason I am trying not to

concede more than I have to is that this Court has held in Irvin versus Dowd among other places that you don't try to apply a harmless error analysis in a case where it has been found that there is a violation of the right to an impartial factfinder, and that is applied in Irvin versus Dowd irrespective, as this Court said, irrespective of the guilt, irrespective of the heinousness of the crime, irrespective of the station of the offender.

Now, let me talk just a second about how this study that we were talking about earlier came to get into the record. In the appendix, at Page 12 and 13, Mr. Woodard says, "The statement that I made regarding the disproportionate application of the death penalty is based on a study which again I would state that we would like to submit subsequently."

QUESTION: Who did Mr. Woodard represent?

MR. SNOOK: Woodard is the counsel for petitioner, counsel for defendant.

QUESTION: And when was this?

MR. SNOOK: This was -- in the preliminary goings on before the calling of the jury, before the voir dire, when he was making his objection to the constitutionality of the statute. He said, "We would like Mr. Grizzard to see it," obviously implying that he

had it there, and then later on the judge says, "Well, gentlemen of course, our Supreme Court has ruled on ths question in practically every case that has gone up. I so rule at this time. I note your exception in the record."

"Your Honor, may we preserve the right to submit that sutdy," and the court then says, "You can submit any study you desire and I will file it as part of the record," but I think the implication is clear that had they been allowed to go forward, they would have gone forward.

Now, the other --

QUESTION: What does that mean, to say they would have gone forward? Forward to what?

MR. SNOOK: In addressing the concern that this Court may be having as to whether the judge had the issue and the facts in front of him on which to base the motion or the argument we are now making, he would have had them there, would have had the facts in front of him in the form of that study sufficient to allow an open-minded judge to look at them, read them, and understand them, but he obviously had closed his mind before he got to that point.

QUESTION: He closed his mind, as you put it, on the basis of the decision of the Supreme Court of the

United States. He is supposed to follow decisions of this Court, is he not?

MR. SNOOK: Well, yes, he is, except that this Court had not in 1979 and still has not to this day ruled in anything that is precedential, that has any precedential value as opposed to denials of cert that the Virginia death penalty statute is being fairly applied.

This is the first time that a Virginia death case has come to this Court, so in a very strict sense the judge was incorrect in saying that this particular issue had been resolved.

QUESTION: I wasn't addressing the correctness of his statement. I was addressing what he said.

MR. SNOOK: He may well have perceived it wrong, but that was his perception, and yes, he should follow the dictates of this Court.

QUESTION: Or else perhaps he was referring to the Supreme Court of Virginia.

MR. SNOOK: That is also possible. He was not clear on that.

QUESTION: If it is important, if it turns out to have any relevance to this case, is there any question about what the composition of the jury was? It isn't any secret, is it? What was the composition?

MR. SNOOK: It isn't any secret now. I will be perfectly honest with you. I did not know the composition of the jury until -- because it had not come up at any point in the proceedings of record. I didn't know the composition until I saw the addendum to the respondent's brief. This is the reason we filed the motion that we did to strike that affidavit. I have no reason to doubt it, quite frankly, and in fact what information I have from trial counsel confirms it. It also confirms --

QUESTION: That is all I need to know.

MR. SNOOK: It also confirms that the commonwealth struck virtually all blacks, and the defendant struck all whites, and that they perceived that there was a real racial problem there.

Anyway, a couple of other issues that I want to touch on that have been raised in your questions to Mr. Kulp --

CHIEF JUSTICE BURGER: Your time has expired, Mr. Snook.

MR. SNOOK: -- but I see I don't have any more time. Thank you, Your Honor.

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

(Whereupon, at 2:03 o'clock p.m., the case in

the above-entitled matter was submitted.)

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:

#84-6646 - WILLIE LLOYD TURNER, Petitioner V. ALLYN R. SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

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BY Paul A. Richardson

(REPORTER)