

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DAWUD MAJID MU'MIN, Petitioner V VIRGINIA

CASE NO: 90-5193

PLACE: Washington, D.C.

DATE: February 20, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAWUD MAJID MU'MIN, :

4 Petitioner :

5 v. : No. 90-5193

6 VIRGINIA :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, February 20, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:01 a.m.

13 APPEARANCES:

14 JOHN H. BLUME, ESQ., Columbia, South Carolina;
15 on behalf of the Petitioner.

16 JOHN H. McLEES, ESQ., Assistant Attorney General of
17 Virginia, Richmond, Virginia; on behalf of the
18 Respondent.

C O N T E N T S

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On behalf of the Respondent	31

P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear next in case No. 90-5193, Dawud Majid Mu'Min v. Virginia.

Mr. Blume? Let's move along, please, at the counsel table. We have another case. You may proceed, Mr. Blume.

ORAL ARGUMENT OF JOHN BLUME

ON BEHALF OF THE PETITIONER

MR. BLUME: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves the question whether, in a capital case, involving pervasive, prejudicial pretrial publicity, which a majority of the potential jurors have been exposed to, may a trial judge prohibit any inquiry whatsoever regarding what the jurors know.

In answering that question, the pertinent facts in Mr. Mu'Min's case need to be briefly reviewed. He was charged in the fall of 1988 with capital murder. At that time he was serving a 48-year sentence for murder in the Virginia Department of Corrections. The case drew substantial press attention due to the nature of the crime and its unusual historical context.

The articles, as the dissenting justices of the Virginia Supreme Court noted, were very negative in their

1 tone and their content. They included reports that Mr.
2 Mu'Min had confessed to the murder; that a rape was
3 involved in this crime; the details of his 1973 murder
4 conviction, including the fact that the death penalty was
5 not an available punishment due to this Court's decision
6 in Furman; Mr. Mu'Min's juvenile, criminal, prison and
7 parole records as well as a number of other bad acts.

8 Furthermore, this case became part of the then
9 national debate about the laxity of the correction system.
10 There were articles which indicated that all public
11 officials associated with this crime should be fired as
12 well as stories comparing Mr. Mu'Min's offense to a crime
13 committed by the then infamous Willy Horton, and other
14 crimes committed by Virginia prisoners.

15 This case became caught up in the themes of the
16 Bush/Dukakis presidential campaign. Politicians,
17 candidates, and public officials, including the prosecutor
18 in this case, used it as an example of all that was wrong
19 with the criminal justice system. Then Governor Baliles
20 suspended the work release program with great media
21 fanfare as a result of this offense.

22 The then Virginia Department of Transportation
23 Secretary, Vivian Watt, made a public apology to the
24 victim's family and to the citizens of the county as a
25 result of this crime. As a result of this media coverage,

1 counsel requested that certain voir dire questions be
2 asked regarding the content of the information that the
3 potential jurors had been exposed to. The trial judge,
4 however, refused to ask or permit any questions to this
5 effect and only allowed several short questions regarding
6 whether, in spite of the media accounts, the jurors could
7 be impartial.

8 QUESTION: He did allow questions as to whether
9 they had seen media accounts?

10 MR. BLUME: Yes, he allowed one question which
11 was, have you read anything about the case. Then he
12 allowed -- then there were several follow-up questions
13 asked which are specifically set forth in Rule 14(a) of
14 the Virginia supreme court rules which were; would that
15 information affect your impartiality, followed up by, do
16 you believe that you can enter the jury box with an open
17 mind and wait until the entire case is presented before
18 reaching a fixed opinion as to Mr. Mu'Min's guilt or
19 innocence, and then he essentially asked that
20 question -- the same question again. And that was the
21 sole thrust of the --

22 QUESTION: And what you saw was to interrogate
23 the jurors who said they had seen something about what it
24 was they had seen?

25 MR. BLUME: What counsel sought to ask were

1 several questions regarding what the jurors had seen about
2 the case, yes. The trial judge adhered to this
3 decision --

4 QUESTION: Are there questions that -- that
5 counsel proposed to be asked in the record?

6 MR. BLUME: Yes, they are --

7 QUESTION: Well --

8 MR. BLUME: -- in the joint appendix in the
9 first few pages, beginning at page --

10 QUESTION: All right.

11 MR. BLUME: -- 2 are his proposed voir dire
12 questions.

13 QUESTION: Fine.

14 MR. BLUME: The trial judge adhered to this
15 decision despite the fact that when the jury was
16 attempting to be selected that 16 of the 20-some original
17 panel called acknowledged that they had read about the
18 case. In fact, 8 of 12 jurors who ultimately convicted
19 Mr. Mu'Min of murder and sentenced him to death had read
20 stories in the press, although we have no idea what they
21 had read.

22 QUESTION: Was that disclosed by interviewing
23 the jurors after the trial?

24 MR. BLUME: What -- which ones had read about
25 the case?

1 QUESTION: Yes.

2 MR. BLUME: No, the judge said --

3 QUESTION: This is just based on what
4 was -- what were the responses to the questions asked by
5 the judge on voir dire?

6 MR. BLUME: Yes, Justice Kennedy. The judge
7 said, has anyone acquired any information about the
8 account -- about the case to the news accounts? The
9 jurors raised their hand. They noted who they were, and
10 then he asked these several follow-up questions, so you
11 had an idea of who it was based upon that. It's in the
12 transcript -- the record. It's also in the joint
13 appendix.

14 QUESTION: Was there a motion to change venue in
15 this case?

16 MR. BLUME: Yes, Your Honor. The motion was
17 made several times. It was made pretrial. The judge said
18 it's premature. That was when a number of these articles
19 were brought to his attention. The judge denied the
20 motion, said we'll wait and see what happens during the
21 jury selection process. However, he also made several
22 remarks there which I think are factors that need to be
23 considered. He said that it's my opinion if you can get a
24 fair and impartial jury in this county -- I've heard it
25 said, you know, that with approval, you can get an

1 impartial jury here for anything if you want to. And made
2 several remarks like that.

3 Then there was -- during the jury selection
4 process -- the jurors indicated that they had -- these
5 jurors indicated that they had read about the case.
6 Counsel moved to ask the questions. That was denied. He
7 then asked that all the jurors who had read about the case
8 be excused for cause. That was denied. He then renewed
9 his motion for a change of venue.

10 QUESTION: Do you think that -- is part of your
11 claim that the publicity was so pervasive that bias should
12 automatically be presumed?

13 MR. BLUME: No. Mr. Mu'Min does not contend
14 that this is a Irvin v. Dowd presumed prejudice case. I
15 think the rule Mr. Mu'Min seeks is really more modest than
16 that. This Court has essentially gone further than needs
17 to be gone here and has adopted a rule, as in Irvin, that
18 under some circumstances a trial -- a juror's assertions
19 of impartiality can be, and in fact must be, disregarded.

20 QUESTION: Well, there's not a whole lot left of
21 Irvin after Murphy against Florida and Patton against
22 Yount.

23 MR. BLUME: There -- well, the significant thing
24 about those cases I believe is -- in Patton v. Yount I
25 think supports Mr. Mu'Min's contention. The

1 presumption --

2 QUESTION: Well, let's -- let's talk about that
3 precise point. I thought that in Patton against Yount we
4 said that the State trial court's finding of impartiality
5 could only be overturned from manifest error. Now, I take
6 it the rule you want us to adopt is one that says anytime
7 there's a lot of pretrial media coverage in a capital
8 case, that absent content questions such as you proposed
9 during voir dire that we're going to be able to presume
10 that that's manifest error.

11 MR. BLUME: No, Justice O'Connor, I don't really
12 believe that's the rule that we seek. Let me say this
13 about Patton. The Court gave the finding of
14 impartiality -- the presumption of correctness in
15 Patton -- and explicitly said this. We do so because the
16 trial judge allowed a searching voir dire which was
17 specifically designed to elicit juror bias as a result of
18 the publicity. That simply did not happen here. This
19 Court has acknowledged in other cases that without an
20 adequate voir dire, the judge's findings of impartiality
21 cannot --should be afforded due deference.

22 QUESTION: Well, of course, we have to
23 distinguish, don't we, to some extent whether it is a
24 proceeding arising in State court or one in Federal court.
25 Certainly, we can impose different requirements in Federal

1 court than we would be required to impose by the due
2 process clause for State court proceedings.

3 MR. BLUME: There is no question that this
4 Court's supervisory power over Federal court proceedings
5 is broader. But nevertheless, the Sixth Amendment right
6 to a fair and impartial jury applies in State court
7 criminal proceedings. And it must --

8 QUESTION: Yes, but you have here a
9 determination by the trial court judge that the jurors who
10 were impanelled were fair and impartial. And he made that
11 determination based on their responses to these
12 generalized inquiries.

13 MR. BLUME: He essentially -- I think that the
14 fair reading of what happened is he took their silence on
15 faith. The jurors could have been found to be impartial
16 here by totally remaining silent. All they had to do was
17 not respond to the questions about regarding whether you
18 could be fair and impartial. They didn't have to say a
19 word.

20 QUESTION: Well, well, and there wasn't -- there
21 wouldn't be anything you could do about it under -- in a
22 Federal court if they just stayed silent. You wouldn't
23 say, I insist on individual voir dire of every single
24 member of the venire.

25 MR. BLUME: No, Mr. Mu'Min is not here seeking

1 individual sequestered voir dire. However, I think if the
2 Sixth Amendment right to a fair and impartial jury is to
3 mean anything, it must mean that when the publicity, taken
4 as a whole, poses a constitutionally significant risk that
5 the jurors may have been influenced by prejudicial,
6 extraneous information, may have formed an opinion about
7 the case, or be otherwise biased or partial as to guilt,
8 or in a capital case, as to either guilt or the
9 appropriate punishment, and one or more jurors have been
10 exposed to that information, then some reasonable inquiry
11 must be made.

12 I think more concretely in a case such as Mr.
13 Mu'Min's where the publicity contains information which is
14 inadmissible or inaccurate, which is material, and which
15 is likely to mislead or inflame the jury as to guilt or
16 punishment, some inquiry must be permitted as to what the
17 jurors know. Again, this is a more modest rule than what
18 has already been adopted by this Court in Irvin, which is
19 that sometimes jurors' assertions of impartiality must be
20 disbelieved. It involves a narrower -- a narrower
21 procedural rule than that adopted in Irvin but is
22 nevertheless necessary to its implementation, because
23 under some circumstances, as this Court has acknowledged,
24 pretrial publicity can impinge upon a defendant's right to
25 a fair and impartial jury.

1 This Court has also acknowledged that a
2 defendant's protection against that infringement -- his
3 protection against the effects of negative pretrial
4 publicity is his ability to demonstrate actual juror bias.
5 Without some fair opportunity of finding out in a case
6 such as this what the jurors know, that right simply
7 cannot be honored.

8 QUESTION: Well, to follow that through, Mr.
9 Blume. What is -- what is the goal of these further
10 questions? To exercise peremptories, to challenge for
11 cause?

12 MR. BLUME: There's certainly no question that
13 any defense lawyer would want to know this for
14 peremptories, but that is not the thrust of the concern.
15 The concern is without this information, the trial judge
16 simply cannot fairly evaluate the jurors' assertions of
17 impartiality. I think in --

18 QUESTION: Well, so -- but I mean, what
19 specifically are you trying to develop? Challenges for
20 cause?

21 MR. BLUME: I think it would be -- there would
22 be a number of things. One, it would give the judge a
23 basis to determine the jurors' assertions of impartiality.

24 QUESTION: But I mean -- but from your -- from
25 the point of view of the defendant?

1 MR. BLUME: It would be whether the juror was
2 qualified to serve -- or if he would be excused for cause.

3 QUESTION: Excused for cause.

4 MR. BLUME: I think several things could come
5 out. One, a judge would have something to evaluate it
6 against. It is -- it seems to me the essence of a judge's
7 duty to apply the law to the relevant facts.

8 QUESTION: Can you -- do you suggest at all of
9 these 58 or more questions have anything to do with
10 publicity?

11 MR. BLUME: No, I don't think Mr. Mu'Min's
12 position here -- it's actually only 4 or 5 that had to do
13 with the media -- depends on any one particular question.
14 Those questions or some reasonable substitutes needed to
15 be asked. They didn't need to be asked by counsel --

16 QUESTION: I know, but the argument -- how many
17 of these questions have to do with the fundamental issue
18 about whether or not a juror might be biased because of
19 publicity?

20 MR. BLUME: There were 3 or 4, I think, in the
21 record that he sought to ask which were denied which had
22 to do with that particular fact.

23 QUESTION: Well, you -- this list is headed up,
24 petitioner's proposed voir dire questions.

25 MR. BLUME: Yes, that's the entire list that he

1 submitted -- that he submitted in the case. It's only
2 several, which I believe are on page 4 and 5. There are
3 several questions at the bottom of 4 and the top of 5
4 which are relevant to this.

5 QUESTION: Mr. Blume, what I don't see about
6 those questions -- I mean, you know, what have you -- the
7 judge -- it's on pages I guess about 47 and on -- of 48
8 and on of the -- of the appendix -- joint appendix. The
9 judge spent a good deal of time making sure that the
10 jurors understood that whatever they had heard, they were
11 not to take into account, and asking them whether they
12 could impartially decide the case despite that. And one
13 of the members of the venire was excused on that basis,
14 because he --

15 MR. BLUME: One of the numbers was.

16 QUESTION: And he asked the question more than
17 once. He asked it several times, right?

18 MR. BLUME: He really only went into it one
19 time. There were a couple panels that were brought in
20 where they weren't sure whether those people had been
21 asked. They weren't part of the original panel, so as new
22 people were brought in, they were then asked the same
23 question. So it wasn't the same people being questioned
24 over and over about it.

25 QUESTION: Well, I see him as being rather

1 persistent about it. He says, I'll read it -- I'll repeat
2 it in a different fashion. He goes into it several ways.
3 Now, explain to me how it would help being sure that they
4 weren't just feigning about being able to be impartial.
5 How would it have helped to have asked the particular
6 questions that you wanted asked such as, what have you
7 seen, read, or heard about this case? I mean they admit
8 that they've seen, read, and heard stuff. Why would it
9 help to know what it is that they've seen? Why would that
10 help you to determine whether they could be impartial?

11 MR. BLUME: Well, Justice Scalia, let me give a
12 few concrete examples --

13 QUESTION: Now, that I'd like.

14 MR. BLUME: -- of what I think would happen in a
15 case.

16 QUESTION: Okay.

17 MR. BLUME: A potential juror called, what have
18 you seen about the case -- what have you read about the
19 case? Well, I read that Mr. Mu'Min has a long prior
20 record. Would you be able to put that out of your mind?
21 No. Well, that juror -- no judge would agree to that
22 juror's qualified. Another example --

23 QUESTION: Excuse me, why would he answer no to
24 that question, but answer yes to the more general
25 question, has anything that you've heard or read about the

1 case so made up your mind that you couldn't put it out of
2 your mind?

3 MR. BLUME: Because I think that due to the
4 nature of the prejudicial information, the way pretrial
5 publicity prejudices someone -- it's important to
6 understand what they know. A juror may or may not know,
7 for example, that they're not supposed to consider an
8 individual's prior criminal record. The straight
9 question, would this affect your decision? Without
10 knowing it, they don't know the legal standard. This
11 Court has recognized in numerous contexts that the juror
12 cannot be the ultimate arbiter of their own impartiality.
13 They do not know the correct legal standard. It's -- the
14 Court has also recognized and I think it's true that
15 jurors -- it's difficult to determine juror bias, because
16 they may not want to reveal it or they've --

17 QUESTION: Well, the kind of --

18 MR. BLUME: -- also may not know it.

19 QUESTION: The kind of voir dire you're talking
20 about with Justice Scalia, Mr. Blume, would have to be
21 sequestered voir dire. You don't want a juror standing up
22 in front of the whole panel and saying, well, I read that
23 he'd been such and such, and such and such, and thereby
24 infecting every other member of the panel.

25 MR. BLUME: Justice Rehnquist, I think the term

1 individual --

2 QUESTION: I'm the Chief Justice.

3 MR. BLUME: I'm sorry, Chief Justice Rehnquist.
4 I think the term individual sequestered voir dire suggests
5 an elaborateness of procedure that is not necessary.
6 There are a number of ways you could have done this and of
7 course that would be free to the States to determine how
8 to implement the constitutional right.

9 QUESTION: Well, you -- you would -- you would
10 have had to sequestered the individual being
11 interrogated -- the venire person being
12 interrogated -- from the rest of the potential jurors,
13 would you not?

14 MR. BLUME: I think there are a number of ways
15 you can do it.

16 QUESTION: Can you answer my question yes or no?

17 MR. BLUME: I -- yes. I don't know that you
18 necessarily would. Let me give you a way in which we do
19 other things in criminal courts which might be relevant.

20 Often potential jurors are asked, have you ever
21 been a victim of a crime. Rather than take everyone out
22 and individually sequester the juror, that person is asked
23 to come to the bench and then the lawyers and the judge
24 talk briefly at the bench and you find it out. That's a
25 procedure that could be used. Questionnaires is possibly

1 another way to elicit what they know.

2 The point is that this does not lead inevitably
3 to individual sequestered voir dire. The States, you
4 know, some States may decide to go that way, as they done
5 with Turner. This Court's decision in Turner -- they've
6 developed different ways to try and implement that
7 constitutional right. The fact that they -- that it may
8 require some follow-up of it does not mean that the
9 opposite conclusion should be drawn and that nothing
10 should be allowed to be done.

11 QUESTION: Suppose that the judge had granted
12 these questions 32 through 41, have you heard
13 anything -- where did you get it? Have you heard any
14 opinions about the case and so on? And your final -- 41,
15 you say, can you disregard anything that might have been
16 said and try this case on the law and the evidence you
17 hear in this courtroom? Now -- and the juror says, yes.
18 And I suppose you can say, in order to get him off, if you
19 don't -- you just have to say you don't believe him. And
20 you ask the judge not to believe him.

21 MR. BLUME: Well, that, you know, may or may not
22 happen, depending on what an individual juror says. But
23 that's the kind of --

24 QUESTION: Well, I know but -- but to get
25 him -- unless you're going to challenge -- unless you're

1 going to -- well, I suppose it is -- be possible that
2 after the juror is -- is -- answers these questions, he
3 may say he -- no, I am biased.

4 MR. BLUME: That is another phenomenon which
5 this Court has recognized and which is documented in the
6 literature.

7 QUESTION: But if he says -- the juror says, no,
8 I can try the case fairly --

9 MR. BLUME: Then the judge would one -- he would
10 have a number of facts against which to judge the juror's
11 assertions of impartiality and, two, the juror may change
12 their mind. But if the judge heard all that, found the
13 juror to be impartial, then that finding would be entitled
14 to the presumption of correctness, that it would be made
15 on the basis of an adequate voir dire. Without it -- with
16 the procedures utilized in this case, essentially the
17 judge had to accept what the jurors said about their own
18 impartiality on faith. But again, it is a fundamental
19 principle that jurors cannot be the final ultimate
20 arbiters of their own impartiality.

21 QUESTION: He's finally going to have to accept
22 it one way or the other even at the end of this -- of the
23 series of questions you want to propose -- the final
24 question still is, in spite of what you've heard, can you
25 be impartial? The juror says, yes. And the judge still

1 makes a certain subjective assessment; is this juror
2 telling the truth?

3 MR. BLUME: Yes, but then the judge has some
4 facts, some -- against which to apply the legal criteria.
5 I think the -- an analogy might be a suppression hearing.
6 I don't think that anybody would reasonably say that
7 all -- a lawyer can ask a police officer at a suppression
8 hearing is, was the confession that you took from my
9 client free and voluntary? You're entitled to get some
10 information out. That is the essence of a judge's duty,
11 to apply law to facts. Without that, there is no way to
12 have any idea what the jurors know.

13 QUESTION: Mr. Blume, one can presume facts.
14 Now, you're arguing this doesn't have to be done in all
15 cases, but just when there's been a lot of pretrial
16 publicity. And I assume this judge knew of the pretrial
17 publicity. He'd been advised of it. Why couldn't he say
18 to himself, I will assume that all of these jurors know
19 all of that pretrial publicity. And even if each one came
20 up and said to me, I read -- you know, it's a small
21 town -- it's a local newspaper -- I read every one of
22 those articles. Even if they knew all of it, I would
23 still accept their word. Now, why -- couldn't you say
24 that?

25 MR. BLUME: First, in this record we have

1 affirmative evidence that the trial judge did not believe
2 that. He said affirmatively in the record, that I think
3 the media believe their stories are more widely read than
4 they in fact are. So we know in this record that is not
5 what the judge thought.

6 QUESTION: Un-huh.

7 MR. BLUME: However, even then, assuming that
8 the -- you still would not have any way in which the juror
9 talked about the information -- that demeanor of evidence
10 is relevant in this. In fact, in this case on a less
11 relevant issue, the judge excused a juror who said they
12 were opposed to the Islamic faith, because he didn't like
13 the way they said it. That's the type of things judges
14 do, but they do it by hearing at least a little bit about
15 what the jurors know. And in this context, in this type
16 of prejudicial pretrial information, some idea of what the
17 jurors know is necessary. It's a --

18 QUESTION: I don't understand your first point.
19 Why is it that the judge's assumption that the media think
20 that more people read them than do -- why does that
21 preclude his having made this decision on the assumption
22 that everybody read everything?

23 MR. BLUME: No, I'm saying this particular judge
24 said that, so we know that he didn't think --

25 QUESTION: He didn't believe everybody in fact

1 read everything, but he could have made his judgment as to
2 whether he would believe their assertion of impartiality
3 on the assumption that they had all read everything.
4 Could he make that assumption?

5 MR. BLUME: Well, we know that he didn't do it
6 here. But assuming a judge did --

7 QUESTION: Well, wait -- why do we know he
8 didn't do it here? That's what I'm asking you.

9 MR. BLUME: It seems to me he --

10 QUESTION: Because he doesn't believe -- because
11 he thinks the media think that they are more widely read
12 than they in fact are.

13 MR. BLUME: And that he said --

14 QUESTION: I'm saying that he assumed it,
15 not -- for purposes of his judgment -- not that he
16 believed it was true, but for purposes of whether he would
17 believe the jury, he assumed that they had read all of the
18 pretrial publicity. Couldn't he do that?

19 MR. BLUME: He might do that, but again then you
20 still would not have any idea of what -- how a particular
21 juror reacted to that. If you knew the jurors knew all
22 that, for example, then it seems to me a defendant would
23 still be entitled to know how they reacted to it.

24 Let's go to another example which would arise
25 out of the type of publicity in this case. The prosecutor

1 in the 1973 case made statements to the press, which were
2 reported, that Mr. Mu'Min got a 48-year sentence in '73
3 because the death penalty was not available. Let's assume
4 a juror knew that. A fair question would seem to me to
5 be, well, can you put that out of your mind when you're
6 determining Mr. Mu'Min's punishment? A juror may say, no,
7 I feel -- that would be tough for me. I feel like he beat
8 the death penalty on a legal technicality in '73 and
9 should be sentenced to death now.

10 That would be possibly a logical follow-up to
11 having some idea of what the jurors know. This is a
12 different type bias than race bias, than the race bias
13 identified in Turner which is a more generic type bias
14 which is easy to focus a juror's attention on. The bias
15 that results from pretrial publicity is necessarily more
16 fact specific. It depends on what the media accounts say.
17 And this Court has acknowledged that. It said that the
18 extent and the tone of publicity can affect a juror's
19 ability to be impartial.

20 So you have to have some fair opportunity in a
21 case with this pervasiveness of publicity to -- to at
22 least find out what the jurors know and then to find out
23 how that might affect them.

24 QUESTION: Mr. Blume, in Turner against Murray
25 on which you place some reliance, where the concern was

1 the refusal or failure by the trial court to ask some voir
2 dire questions about racial bias, the court left in place
3 the conviction, did it not?

4 MR. BLUME: Yes, ma'am.

5 QUESTION: And yet you think that we have to
6 overturn your client's conviction?

7 MR. BLUME: I think there are several
8 reasons --

9 QUESTION: How do you square that with what the
10 Court did in Turner?

11 MR. BLUME: I think there are several reasons,
12 Justice O'Connor, that that's true. First, I think what
13 the Court said in Turner was that the nature of the racial
14 bias of that case would not have affected the
15 guilt/innocence determination. That is necessarily
16 different, I think, than the type of information that was
17 involved in this case which contained a number of facts
18 which are not admitted at the guilt or innocence phase of
19 this trial. And essentially what the Court said in
20 Turner, as I understand it, was not that the error was
21 harmless as to Mr. Turner's guilt, but that there was no
22 Sixth Amendment violation as to his guilt. I don't think
23 you can draw that same conclusion from the type of
24 publicity in this case.

25 But nevertheless, drawing upon Turner, the

1 violation in this case certainly cannot be harmless,
2 assuming harmless error applies at the sentencing phase.

3 QUESTION: What is the general rule that you're
4 proposing for our adoption -- that in every case where
5 there is the potential of prejudicial publicity, there
6 must be a sufficient voir dire to enable attorneys to make
7 a motion to excuse for cause?

8 MR. BLUME: The rule, as I tried to formulate
9 it, was that if the publicity taken as a whole poses a
10 constitutionally significant risk that the jurors may have
11 been influenced by prejudicial, extraneous information,
12 may have formed an opinion about the case, or may be
13 otherwise biased or partial as to guilt, or in a capital
14 case, as to guilt or punishment, and one or more jurors
15 have read about the information, then some reasonable
16 inquires must be permitted. That's simply in --

17 QUESTION: Some -- wait a minute -- some
18 reasonable inquires must be permitted -- by the judge?

19 MR. BLUME: The judge would be fine. Mr. Mu'Min
20 was not seeking the counsel to ask the questions himself.
21 If the judge had asked these questions, that would have
22 been fine. Some States the judge does voir dire and some
23 States the lawyers do it.

24 QUESTION: And how do you assess
25 reasonableness -- by whether or not it would give a review

1 in court or counsel in the case an adequate basis to
2 determine whether or not there's cause for excusal?

3 MR. BLUME: I think first of whether it would
4 give the judge a basis. He again is the one who
5 ultimately decide whether the juror is partial or not, and
6 he has to have some facts. I think certainly it would
7 help for a review in court to have the information to know
8 what the jurors knew and to be able to evaluate their
9 assertions of impartiality against that standard. It is,
10 I admit, an area of line drawing, but nevertheless, as in
11 many other areas, even in the race cases, *Ristaino v.*
12 *Ross, Rosales-Lopez v. The United States*, the court has
13 acknowledged that in cases involving interracial crimes,
14 lines have to be drawn. I think it would certainly be the
15 same here. But that doesn't mean that the opposite line
16 should be drawn and say that we're never going to allow
17 people to know what jurors know.

18 QUESTION: Well, why is there -- I don't
19 understand this line drawing. It's in -- I thought from
20 your brief all you asked for was to find out what
21 the -- what the jurors know.

22 MR. BLUME: Yes, that --

23 QUESTION: It's a simple line. I don't know why
24 you even went with it through a case of massive publicity.
25 If a juror says he's heard about the case, your position

1 is he ought to be able to find out what he's heard
2 about it --

3 MR. BLUME: I think --

4 QUESTION: -- whether his wife wrote a letter to
5 the governor about it or whatever it was. Isn't that your
6 position? You just want to know what the jurors know.

7 MR. BLUME: Yes, I think under some
8 circumstances if you can show that something about the
9 information --

10 QUESTION: Well, they said they knew something
11 about it.

12 MR. BLUME: Yes, I think if you can show,
13 though, the points -- I think that if you can show that
14 there's something prejudicial about the information that
15 the juror might know, you would need to know, you know,
16 what that is. Without it, the judge simply cannot
17 determine whether a juror is impartial.

18 QUESTION: And if -- the U.S. Constitution
19 requires that.

20 MR. BLUME: I think certainly this Court has
21 recognized that, that the trial judge has an affirmative
22 constitutional duty under the due process clause in the
23 Sixth Amendment to ensure the right to a fair and
24 impartial jury, and that under some circumstances that
25 will require an adequate voir dire. This Court has

1 recognized that in numerous cases. In a way I think this
2 is the flip side of the freedom --

3 QUESTION: You say under some circumstances or
4 as Justice Stevens says, under all circumstances? I
5 thought you were agreeing with him. Now he's saying under
6 all circumstances -- that you always have a right to know
7 what all jurors know. So in every case --

8 MR. BLUME: I think there is a constitutional
9 difference that can be drawn from this Court's decisions
10 about the particular ways in which pervasive, prejudicial
11 publicity can affect a juror's determination. That is a
12 distinction this Court has drawn and it seems to me to be
13 a reasonable one -- that jurors are likely to be
14 influenced by what they read about the case. In a way --

15 QUESTION: Well, suppose -- suppose the court said that
16 he's not going allow any inquiries as to whether or not
17 jurors have relatives in law enforcement. And you were
18 very concerned because it was a small community and there
19 was a danger there might be a connection with law
20 enforcement. Now, would you accept that as a reasonable
21 ruling by the trial court?

22 MR. BLUME: It -- you know, you would need to
23 know the facts of the case. How it related to it, and it
24 may make a difference. But the point here I think is
25 again this Court specifically recognized --

1 QUESTION: Well, but the question is -- the
2 question is why should it just be limited to pretrial
3 publicity? There are any number of
4 disqualifications -- disqualifying reasons not to sit a
5 juror.

6 MR. BLUME: That's true, but I do think that
7 from a constitutional vantage point, this Court has
8 recognized in numerous decisions that pervasive,
9 prejudicial publicity has a -- can affect a juror's
10 ability to serve in a unique way. And --

11 QUESTION: More so than by being related to a
12 witness or to someone whose engaged in the prosecution of
13 the case?

14 MR. BLUME: Well, those -- excuse me -- those
15 questions were permitted in this case.

16 QUESTION: Well, I assuming that they weren't
17 in order to test the standard that you're proposing for
18 our adoption.

19 MR. BLUME: There may be other circumstances
20 which entitle constitutionally a defendant to ask certain
21 questions. I mean it may be -- and that may be one of
22 them. But I do think that a reasonable line which this
23 Court has already drawn in numerous cases is that
24 publicity may affect jurors in unique ways. And that
25 seems to me to be a reasonable one. In a way, this is the

1 flip side of the freedom of the press cases. I mean this
2 Court and numerous State and federal courts have over the
3 last years recognized and -- the right of the press to
4 cover criminal cases. And they've invalidated a number of
5 measures which restrict press access to those cases.

6 The court has also noted the increasing
7 frequency with which the press covers criminal cases.
8 However, if that's true, it seems to me to be also
9 necessarily true that in order to protect a defendant's
10 right, especially a capital defendant's right -- someone
11 whose life is at stake -- his right to a fair and
12 impartial jury -- there are some circumstances such as the
13 one in Mr. Mu'Min's case which you're entitled to
14 have -- find out what it is the jurors know.

15 QUESTION: Well, that doesn't necessarily
16 follow. I mean the reason we may be concerned -- might
17 not the reason we're concerned be that excessive publicity
18 will cause numerous people like Mr. Syphrett, in this
19 case, to have to eliminate himself from the venire, who
20 otherwise wouldn't be eliminated. Isn't that a good
21 explanation?

22 MR. BLUME: It is an explanation, Justice
23 Scalia. But I do think this Court's decisions also bring
24 that principle into play, that due to the frequency with
25 which the press reports things and the freedom that this

1 Court has given in the coverage of criminal trials, and
2 this Court has specifically recognized that in Gannett
3 Company, Nebraska Press and numerous other decisions that
4 a defendant has to have a right to find out -- I mean to
5 test the juror's ability to serve.

6 QUESTION: Thank you, Mr. Blume. Mr. McLees,
7 we'll hear now from you.

8 This case was tried where -- in Prince William
9 County?

10 MR. McLEES: Yes, it was, Your Honor.

11 QUESTION: And what -- the county seat is
12 Manassas?

13 MR. McLEES: That's correct, Your Honor. It was
14 tried in Manassas.

15 QUESTION: What's the -- what's the approximate
16 population of Prince William County? A couple hundred
17 thousand?

18 MR. McLEES: Your Honor, in 1988 at the time
19 this case -- or at the time this publicity occurred, the
20 approximate population was 194,700, Your Honor. That's
21 not in the record, but it is in public records.

22 ORAL ARGUMENT OF JOHN McLEES

23 ON BEHALF OF THE RESPONDENT

24 MR. McLEES: Mr. Chief Justice, may it please
25 the Court:

1 Today, Dawud Mu'Min asks the Court to rule as a
2 matter of constitutional law, as he argues in page 38 of
3 his opening brief, that impartiality of a juror must be
4 determined on the basis of information elicited by the
5 court or counsel regarding the content of the publicity to
6 which that juror has been exposed.

7 QUESTION: Not only that, but if he's heard
8 about it from any person.

9 MR. McLEES: Yes, Your Honor, I think that the
10 logic of his rule extends to inquiries of that sort.

11 QUESTION: Well, the question was asked, have
12 you heard about it from any other persons?

13 MR. McLEES: Yes, details of sources as well as
14 content. We contend that the adoption of such an
15 inflexible rule as a matter of constitutional law is
16 unnecessary in order to ensure the defendant a fair
17 trial --

18 QUESTION: What do you think the rule ought to
19 be? Apparently we have indicated in Irvin against Dowd
20 and Patton against Yount that pretrial publicity in some
21 cases may create some presumption of prejudice. What do
22 you think the rule is? What are those cases?

23 MR. McLEES: I -- Your Honor, I think the rule
24 should be that first, content questioning of the sort
25 we're discussing here is a tool like any other. It is a

1 tool which the trial court may find helpful in picking a
2 jury, but it is a tool which the trial court in his or her
3 discretion may choose to use or not use in order to ensure
4 that the --

5 QUESTION: I don't understand what rule you
6 propose we adopt. I'm -- I maybe misunderstand, but
7 I -- what is it you're saying is our rule?

8 MR. McLEES: That -- the rule should be, Your
9 Honor, that the use of content questioning is one of the
10 many matters that is within the discretion of the trial
11 court in conducting a voir dire, because there are a
12 number of other objective factors which the court can
13 consider.

14 QUESTION: Well, what's the more general rule
15 that you proceed from? Do you acknowledge that every
16 trial judge has a duty to make inquiry with respect to the
17 juror's impartiality?

18 MR. McLEES: Yes, Your Honor. The --

19 QUESTION: All right, and I take it that inquiry
20 should be of reasonable scope to disclose likely areas of
21 partiality.

22 MR. McLEES: Yes, Your Honor. It --

23 QUESTION: You would agree with that rule?

24 MR. McLEES: Yes, I would. It must be
25 sufficient to ensure that the defendant receives a fair

1 trial before a fair tribunal.

2 QUESTION: All right, well, if that's true -- if
3 publicity is a particular problem in a particular case,
4 then I assume that some questions must be directed toward
5 publicity under your view?

6 MR. McLEES: I think that it is -- yes. I think
7 that in a high publicity case, that questioning should be
8 addressed toward publicity.

9 QUESTION: So all that we're arguing about in
10 this case is the reasonableness of the inquiry that was
11 made?

12 MR. McLEES: Well, we're arguing, Your
13 Honor -- I think it's more than whether the trial court
14 abused its discretion in this case. I think we're arguing
15 as -- whether the court is required to include content
16 questioning in that reasonable inquiry -- whether the
17 trial court has -- without content questioning, whether
18 the trial court can make a reliable determination as to
19 whether the juror's statement of impartiality can be --

20 QUESTION: Well, I'll assume petitioner's counselor will
21 say content questions are just one tool. He should have
22 done something more than what he did, and I offer content
23 questions. If you have some alternative, maybe that's
24 fine. I suppose that's what he's going to tell us on
25 rebuttal.

1 MR. McLEES: Well, Your Honor, what he has
2 maintained both in his brief and in oral argument is that
3 the error of the trial court here is in not asking any
4 content questions and that content questions are a sine
5 qua non of a determination that a juror can be believed
6 when they say, I will not be affected in my judgment by
7 the pretrial publicity.

8 QUESTION: Well, do you take the position that
9 regardless of the pretrial publicity and the particular
10 circumstances that the generalized questions asked by the
11 trial judge here would always be sufficient?

12 MR. McLEES: No. I don't think that we
13 can -- that we can make a broad statement to that effect.
14 I think that --

15 QUESTION: So would you acknowledge that
16 sometimes content questions must be asked?

17 MR. McLEES: I don't necessarily acknowledge
18 there is any particular circumstance where this Court can
19 draw a bright-line rule and say, here, as a matter of
20 constitutional law, content questions are required.

21 QUESTION: Do you think in some cases they would
22 be constitutionally required?

23 MR. McLEES: It would depend -- yes, Justice
24 O'Connor, yes. It would depend --

25 QUESTION: Yes. And how do we draw that line?

1 How do we know when they have to be asked?

2 MR. McLEES: By applying the objective factors
3 that this Court laid down in *Murphy v. Florida* for
4 determining when there is reason to question the veracity
5 or the reliability of a juror's assurances that they can
6 be impartial.

7 In this case, as Justice Scalia pointed out, the
8 trial court could assume for the purpose of judgment, for
9 the sake of argument, that every juror had read everything
10 in the articles that were demonstrated in the record.

11 And --

12 QUESTION: Yes, but -- but that doesn't really
13 cover every possible source of information that might have
14 been available. They might have attended a meeting of the
15 American Legion which was formulating a resolution to send
16 to the governor to improve correction practices. And that
17 might be where they heard about it.

18 MR. McLEES: That's correct, Your Honor.

19 QUESTION: Well, then that might put a little
20 different cast on the thing or they might have seen a copy
21 of the letter that the spouse wrote to the governor
22 protesting this outrage. There are a lot of ways of
23 getting information other than just what's in the public
24 press.

25 MR. McLEES: That's correct, Your Honor. But

1 the trial court --

2 QUESTION: Let me just ask you this
3 hypothetical. Supposing during the trial a juror came to
4 the judge and said, there was some material about the case
5 in the jury room which we all read, but we're all
6 satisfied we can still be impartial. Do you think the
7 judge would have any duty to say, what was the material?

8 MR. McLEES: I think that -- yes, he would. And
9 I think --

10 QUESTION: A constitutional duty?

11 MR. McLEES: Yes, Your Honor.

12 QUESTION: And how is that case different from
13 this?

14 MR. McLEES: It's different from this case
15 because as -- when -- once the jury is impanelled and the
16 jury is instructed, of course, that they are to decide the
17 case based solely on the law and the evidence that comes
18 in in the courtroom, then a breach of that instruction of
19 the court -- a breach of the juror's duty by receiving
20 some other sort of information -- is an exception.

21 QUESTION: There is no other -- it was there
22 just lying on the table when they got there, and they
23 couldn't help but see it.

24 MR. McLEES: Well, I'm not suggesting that
25 it -- it require that the juror be guilty of wrong doing,

1 but that's an exception to the rule. The rule is the
2 juror doesn't receive any outside information. The rule
3 has been breached here because the juror saw this
4 information lying on the table. I think that -- because
5 that's the exception to the rule, that merits specific
6 inquiry, and also it merits specific inquiry because it's
7 so much more immediate and it's a fact in the very bosom
8 of the court, in the jury room, the --

9 QUESTION: Well, how do you know it's more
10 immediate? You could -- it may be that at breakfast that
11 very morning, the voir dire -- the venire person had
12 gotten all the information.

13 MR. McLEES: Well --

14 QUESTION: You don't even know that -- you don't
15 know whether it was a newspaper a month ago or in a
16 conversation with a group of friends the very day.

17 MR. McLEES: We -- Justice Stevens, we never
18 know necessarily everything that may affect a given
19 individual who comes to court to sit on jury duty. In any
20 case, regardless of whether there's pretrial publicity or
21 not, a juror may have ridden up in the courthouse elevator
22 with someone who made a comment about the bad person who
23 was on trial that day. But we can't hope to ask
24 everything specifically --

25 QUESTION: Well, the general question -- do you

1 know anything about the defendant or the facts of the case
2 would bring that out, and then you say what do you know.
3 It's a very routine way to do it.

4 MR. McLEES: But that -- bringing that out is
5 not going to help the trial judge necessarily determine
6 whether he believes the juror can set that aside as the
7 juror responds --

8 QUESTION: You don't think it would help the
9 trial judge to know what they had read?

10 MR. McLEES: I don't think that the trial judge
11 needs to know that in every case.

12 QUESTION: Maybe he doesn't need to, but you
13 don't think it would help him at any -- you don't think
14 there's a distinction between the wide variety of ways in
15 which people can get information about a case and the
16 nature of the information?

17 MR. McLEES: It may help in some cases, Justice
18 Stevens. That's why I say in some cases a trial judge at
19 his or her discretion may find it helpful to ask content
20 questions. I'm saying that it should not be required as
21 an inflexible constitutional rule.

22 QUESTION: Only sometimes -- I -- as a
23 constitutional rule. I was disappointed to hear your
24 response to Justice O'Connor, because I had -- I had
25 thought that one of the advantages of your

1 position -- perhaps the only advantage -- was that it
2 doesn't get us into the very difficult line drawing
3 questions that some of the colloquy with Mr. Blume was
4 bringing out. But now you tell me we're into that anyway.

5 MR. McLEES: I don't --

6 QUESTION: Sometimes we're going to have to say
7 the Constitution does require it.

8 MR. McLEES: Well, I don't think that the Court
9 can draw a line to say when content questioning is
10 required and when it is not.

11 QUESTION: But there is such a line? There is
12 one but we can't draw it.

13 MR. McLEES: It's in the nature of a
14 discretionary ruling that each case must be decided on its
15 own facts and circumstances.

16 QUESTION: Then the Constitution never requires
17 it. It's always discretionary.

18 MR. McLEES: Well, I think that what the Court
19 must do in order to -- to determine whether there's reason
20 to question a juror's statement that regardless of what I
21 read or heard in the media or on the street, I can judge
22 this case fairly and impartially, is evaluate the other
23 factors this Court spelled out in *Murphy v. Florida*. And
24 specifically in *Murphy*, this Court said that the timing of
25 the publicity should be considered. In this case, the

1 vast bulk of the publicity occurred more than 3 months
2 before Mu'Min's trial commenced. In --

3 QUESTION: Well, counsel, before the -- what
4 about a question like this. What do you know about this
5 case and where did you get your information from, to each
6 juror?

7 MR. McLEES: Well, Your Honor, that -- that is
8 essentially what Mu'Min sought to ask in this case.

9 QUESTION: Not -- not those words.

10 MR. McLEES: Not in those words, but that's the
11 essence of what he sought to ask and --

12 QUESTION: I don't -- I don't think so. I think
13 he said it had gone just a step further.

14 MR. McLEES: Well, we submit that that is not
15 constitutionally required.

16 QUESTION: I mean suppose somebody told this
17 juror that I am a member of the adriscatory process of the
18 police department and I know that that sucker is guilty.
19 Shouldn't the judge know that? And my question would get
20 that.

21 MR. McLEES: Your Honor, the -- if we -- if we
22 accept a rule that that question itself must be asked in
23 order to uncover that -- that specific item of bias that
24 Your Honor referred to --

25 QUESTION: Yes.

1 MR. McLEES: -- rather than the general
2 questions which this Court asked -- and by the way
3 in -- with respect to the publicity, the trial judge
4 rephrased the question five different ways as far as
5 whether they could impartial.

6 QUESTION: My point -- would you object to that
7 phrase?

8 MR. McLEES: Would I object to that question,
9 Your Honor?

10 QUESTION: Well, answer it the way I suggested
11 it.

12 MR. McLEES: I would certainly object to it
13 being constitutionally required. I don't -- I don't
14 believe it's constitutionally required, because it
15 assumes -- to say that that is necessary in order to
16 assess the jurors' veracity when they say they can be
17 impartial. It assumes that you can't -- that a juror's
18 statements are inherently suspect and that's one of the
19 problems with Mu'Min's theory is that it runs counter to
20 one of the basic assumptions that our system of trial by
21 jury is founded on.

22 This Court rejected the idea that a jury's
23 statements of impartiality are inherently suspect in Smith
24 v. Phillips. Even in the context of a postverdict hearing
25 where a juror was accused of misconduct, in a sense, in

1 developing a bias during the course of trial.

2 QUESTION: Don't the -- doesn't the court
3 instruct the jury that you can't use anything except what
4 you hear in this courtroom?

5 MR. McLEES: I'm sorry, Your Honor?

6 QUESTION: Doesn't the judge instruct the jury
7 that you cannot use any information except what you hear
8 in this courtroom?

9 MR. McLEES: Yes, sir.

10 QUESTION: Doesn't he do that every time?

11 MR. McLEES: Yes. Yes.

12 QUESTION: Well, what's the difference of what I
13 asked? I asked what did you learn about this case outside
14 of this courtroom.

15 MR. McLEES: Well, the difference is that by
16 requiring that the court or counsel ask the juror to
17 recount what they've heard or read or learned outside the
18 courtroom, you assume or you imply that the juror's
19 statement that I haven't heard anything -- I don't know
20 anything about this case that I can't put aside and be
21 fair and impartial. The juror's statement when he comes
22 into court, as a matter of fact, that I have no opinion
23 about this case, which all the jurors in the panel in this
24 case said, except juror Syphrett, hold --

25 QUESTION: Yes, but that overlooks the

1 possibility the juror may really believe that and they may
2 have heard exactly as Justice Marshall posits that my
3 neighbor is a -- works for the police department and he
4 told my wife this guy is definitely guilty. I know enough
5 not to pay any attention to that. So -- and this is his
6 own thought process, and I'll say I can't. But if you
7 heard that as a judge you'd probably excuse that juror
8 even though he sincerely says I think I can put it to one
9 side.

10 MR. MCLEES: Well, I think that as a trial judge
11 in dealing with that situation, the judge needs to
12 consider the demeanor of the juror.

13 QUESTION: Well, that's right.

14 QUESTION: Well, isn't the nature of bias and
15 impartiality often the fact that the person does not
16 recognize that he or she has the bias? I mean, it's not
17 just active animosity toward a party that we're interested
18 in. But it's -- are those assumptions that the juror is
19 not maybe even sure of -- that he holds until he's
20 examined about them or she's examined about them with some
21 specificity. Or am I wrong about that?

22 MR. MCLEES: Well, of course, the jurors in this
23 case were aware of what they had read or heard about the
24 case. It's not a situation where a juror needs to be
25 confronted with some unknown item of information about the

1 case which might engender or trigger a bias that they're
2 not aware of with general question. What they -- the
3 jurors in this case come into court aware of what they
4 have read or heard and it's just a question of whether the
5 court is going to be required to make them reveal that.
6 As far as --

7 QUESTION: All that you've just said doesn't
8 become true, however, any more if the publicity is more
9 recent than 3 months. Now, when else doesn't it become
10 true?

11 MR. McLEES: I didn't -- I didn't mean --

12 QUESTION: Well, I'm trying to find out what
13 other -- in what other cases Virginia has to individually
14 question the jurors in isolation from the others. You say
15 if it's very recent publicity, the court would have had to
16 do it.

17 MR. McLEES: No, Your Honor. I said --

18 QUESTION: No? I thought that's what you said.

19 QUESTION: -- the recency of the publicity if
20 one of many factors that the court should consider.

21 QUESTION: And must consider under the
22 Constitution, right?

23 MR. McLEES: In determining whether the court
24 has reason to doubt a juror's assurances of impartiality.

25 QUESTION: So we're just going to have to look

1 at it case by case and decide whether the Constitution
2 requires it or not?

3 MR. McLEES: Not the Supreme Court, Your Honor.
4 Trial courts will, and trial courts do, as a matter of
5 fact, as a --

6 QUESTION: And reviewing courts will review them
7 on constitutional grounds. What other factors? How
8 recent the publicity was. What else is there?

9 MR. McLEES: The nature of the publicity
10 itself -- what it reflected in the publicity. In this
11 case, the publicity is factual in nature to the extent
12 that there was outrage expressed. It was expressed at the
13 Virginia Department of Corrections, and Mu'Min's counsel
14 tried to turn that to his advantage in arguing in
15 mitigation, putting the Department of Corrections on trial
16 and taking the heat off his client.

17 Another factor that should be considered is the
18 atmosphere of the community. There was no demonstration
19 in this case of a hostile community atmosphere. This is a
20 large, busy suburban community and they have other things
21 on their mind besides this one very tragic case.

22 The Court should consider the trial atmosphere
23 itself. In this case, the trial atmosphere was
24 impeccable. The Court should consider the number of
25 jurors in the voir dire process who express some kind of

1 negative opinion about the defendant or about the case.
2 In this case, the only juror who expressed a negative
3 opinion was juror Syphrett and he was excused for cause by
4 the trial court without even giving the Commonwealth the
5 opportunity to try to rehabilitate him.

6 QUESTION: I agree that the judge who's
7 conducting the trial should consider all those things in
8 his discretion, but as I understand your argument, a
9 reviewing court should consider all those things in
10 deciding whether the Constitution has been violated by not
11 conducting individual interrogation.

12 MR. McLEES: Well, I think --

13 QUESTION: That's the position you want us to
14 enunciate.

15 MR. McLEES: Not exactly, Your Honor. Our
16 position is that an abuse of discretion may, in some
17 conceivable cases, amount to a constitutional violation,
18 but that in the normal -- in the normal case that is not
19 the case. The other factors that are involved are the
20 demeanor of the jurors during voir dire. In this case,
21 the trial judge was sensitive to the demeanor of the
22 jurors. That's demonstrated by the voir dire of juror
23 Haines, who gave all the right answers in black and white
24 on the record, but the trial judge detected something in
25 her demeanor that suggested she wasn't being as candid as

1 she might be and excused her for cause.

2 QUESTION: Which indicates that some specific
3 questions are helpful to the fact finder.

4 MR. McLEES: That's correct, Your Honor. And
5 many specific questions were asked in this case on factors
6 where the trial judge in his discretion found that they
7 were appropriate. The trial court asked two questions
8 addressing the racial aspects of the case. They asked a
9 question addressing the aspect of the case as a sexual
10 crime. They asked a question about jurors' attitudes
11 toward people of the Islamic faith.

12 And the jurors were candid and open. They
13 didn't feel reticent in responding to these. We've got
14 two jurors speaking up and saying they didn't approve of
15 the Islamic faith. We've got Mr. Syphrett saying straight
16 out that he can't be fair. We've got Ms. Deiotte saying
17 that she thinks she can be fair, but you never really know
18 until you test it. And she was excused for cause, which
19 does not appear in the joint appendix, but on page 329 of
20 the appendix from the supreme court of Virginia, it shows
21 that she was excused for cause.

22 QUESTION: Could you answer a few brief
23 questions about Virginia procedure? Is it either the
24 practice or permitted by statute to inquire of the jurors
25 after the trial was over as to sources of bias? Were the

1 jurors in this case questioned by counsel?

2 MR. McLEES: They -- on the record, they were
3 not. I have --

4 QUESTION: Was anything offered in
5 postconviction proceedings to show that they had been
6 questioned?

7 MR. McLEES: This is direct appeal, Your Honor.
8 There's been no --

9 QUESTION: There have been no -- there have been
10 no postconvictions?

11 MR. McLEES: No, no, sir. There has been
12 nothing.

13 QUESTION: And the other question I have
14 is -- does the trial court always ask the questions?

15 MR. McLEES: No. The trial court always asks
16 questions, but the trial court is required by law to
17 permit counsel to ask questions also, and in fact, this
18 case the trial court permitted counsel to ask extensive
19 questions.

20 QUESTION: To ask the questions directly -- not
21 just to submit the questions?

22 MR. McLEES: Exactly. Yes, sir.

23 QUESTION: Thank you.

24 MR. McLEES: In this case, the defense counsel
25 asked many questions in panels of four and three and --

1 QUESTION: I know, but he wouldn't let them to
2 inquire specifically what they had read or seen?

3 MR. McLEES: No, Your Honor. No, that's
4 the -- that's the controversy.

5 QUESTION: He cut that off.

6 MR. McLEES: Yes, sir. Now, although when the
7 trial court found it necessary and --

8 QUESTION: Especially, he didn't want -- he
9 didn't want anybody asking what the -- what the juror had
10 heard from his or her spouse.

11 MR. McLEES: Well, he didn't find it necessary
12 to go into that in order to determine that he believed
13 those jurors when they said they could be fair.
14 He -- when the trial court found it helpful or necessary
15 to go into content questioning, in this case he did so.
16 With juror Walters -- now each of these jurors in panels
17 of four was questioned by defense counsel about whether
18 they had discussed the case with anyone -- so they
19 addressed not just, what have you read in the newspaper,
20 but they knew who had or had not discussed the case which
21 of course involved -- would involve information that
22 wasn't in the --

23 QUESTION: How far do you allow him to go in
24 that -- when they said, yes, we have discussed it with
25 somebody?

1 MR. MCLEES: In one panel, several gentlemen
2 indicated they discussed it with their wives when they'd
3 read about it in the newspaper and the trial judge said,
4 we don't need to go into the content of that. In another
5 panel, Ms. Walters indicated -- was the only one in
6 another panel who indicated that she'd discussed it with
7 someone. She was a school crossing guard employed by the
8 Prince William County police and she said she had
9 discussed it with her lieutenant, who was her supervisor
10 in her job. And in that case, the trial court and defense
11 counsel both inquired into the content of the conversation
12 she'd had with her supervisor and at the conclusion of
13 that examination, Mu'Min elected not to challenge Ms.
14 Walters for cause and didn't use any peremptory challenge
15 against her either. And in fact, Ms. Walters did sit and
16 try this case.

17 In other panels, where -- in one panel a juror
18 indicated that he had discussed the case just casually and
19 the judge didn't feel it necessary in that situation to go
20 into the content of his discussions. In another panel, a
21 woman said that she had discussed the case with several
22 people and she was excused for cause for a different
23 reason. And in a final panel, juror Deiotte indicated
24 that she had discussed the case with certain people. Ms.
25 Deiotte was employed in the news media and eventually she

1 was excused for cause, because she -- she said that she
2 knew one of the witnesses in the case and she really felt
3 that that might influence her impartiality.

4 QUESTION: Is she the one who had a paper to get
5 out?

6 MR. McLEES: Yes, sir.

7 At the conclusion of the small panel voir dire,
8 Mu'Min did not renew his motion for change of venue, and
9 we submit that this may be indicative that in his mind at
10 that point, having concluded the entire voir dire,
11 concerns about the impartiality of the jury were not
12 uttermost in his mind.

13 Now, the assumption that is involved in Mu'Min's
14 position that you can't trust what a juror says -- if a
15 juror says, I have no opinion about a case -- is this
16 proven by the kind of candor he shares --

17 QUESTION: Well, I don't think it's his position
18 that you necessarily can never distrust -- that you can
19 never trust -- a thing inherently distrustful. His
20 position is that you can't assess it in fact, without
21 knowing more than you -- than this judge was willing to
22 inquiry into.

23 MR. McLEES: Your Honor, our position is that
24 jurors -- I think the law is well established -- is that
25 jurors are presumed to be impartial and it is incumbent

1 upon the defense to demonstrate partiality. And in order
2 to do that, one of the things that they must do is
3 demonstrate some reason to -- why the trial court should
4 distrust a juror's statement about whether or not they
5 have an opinion in the case, and that simply was not done
6 in this case.

7 The amicus brief suggests that jurors come into
8 court eager to please the trial judge and eager to give
9 the right answer and seem to be fair. We suggest that
10 jurors are real life people with real life problems of
11 their own. And they're called into court at substantial
12 inconvenience and with -- to hear a grisly murder case for
13 a week with the ultimate wrenching prospect of deciding
14 whether an individual should live or die. They don't have
15 a particular incentive to sit on jury duty. Their
16 practical incentives far counterbalance any kind of
17 inclination they have to give some answer that
18 theoretically the trial judge suggests; and in fact, the
19 record in this case shows the trial judge didn't suggest
20 that he wanted the jurors to say they could be impartial.

21 In five different ways he gave them the
22 opportunity. He rephrased the question and gave them the
23 opportunity to say that they could judge the case
24 fairly -- they could not judge the case fairly. And as
25 soon as one or more of them did, he excused them for

1 cause. We submit that the adoption of this rule would go
2 farther than this Court gone in requiring voir dire
3 questions in the past.

4 In Turner v. Murray, in Ham v. South Carolina,
5 where this Court has required specific types of voir dire
6 questions, what the court has required is that the juror
7 be confronted with a possible source of bias and asked to
8 search their conscience and state whether they would be
9 subject to that bias or not. The question mandated by the
10 court in Turner was the defendant, Willy Lloyd Turner, as
11 a member of the Negro race. The victim, Jack Smith, was a
12 white Caucasian. Will these facts prejudice you against
13 Willy Lloyd Turner or affect your ability to render a fair
14 and impartial verdict based solely on the evidence?

15 And the question mandated -- the questions
16 mandated in Ham v. South Carolina were similar. What
17 Mu'Min wants to do here is far more intrusive. What he
18 wants to do is search the juror's memory for facts and
19 then dispute the juror's statements about the juror's
20 reaction to those facts. That kind of intrusive inquiry
21 has never been required by this Court and we submit that
22 it should not be.

23 The effects if it were would be undesirable on
24 the American jury trial system. It would require
25 individual voir dire in one method or another in every

1 case to prevent other jurors from being exposed to this
2 information that one juror may have that supposedly would
3 be contaminatory.

4 There would be no principled way to restrict the
5 inquiry to simply cases of pretrial publicity as Justice
6 Stevens' question I think brought out and as Mu'Min
7 conceded at trial, the same logic would apply in other
8 situations. In death penalty qualification, if a
9 prosecutor wants to probe a juror's assurances that they
10 can follow the law and consider imposing the death
11 penalty --

12 QUESTION: Do you think it would make any
13 difference if the juror had been in the store and seen it,
14 but didn't think that would affect his prejudice -- seen
15 what happened?

16 MR. MCLEES: It may be something that the trial
17 court would want to consider --

18 QUESTION: Whether or not the juror was actually
19 a witness.

20 MR. MCLEES: -- in deciding whether content
21 questioning would be desireable or would be helpful in the
22 case.

23 QUESTION: But not -- you don't have
24 to -- you're not required to find out whether he saw the
25 crime committed.

1 MR. McLEES: Well --

2 QUESTION: That might be the source of one of
3 these juror's information for all we know. Might have
4 been in the store and watched the whole thing take place,
5 but I can be fair because I know what happened.

6 MR. McLEES: Certainly the trial court in this
7 case asked the jurors if they received information about
8 the case from the news media or --

9 QUESTION: They'd say yes, they did, but I
10 can --

11 MR. McLEES: The trial court asked if the juror
12 had an opinion about the case. And that is a crucial -- I
13 think that is a crucial aspect of voir dire -- is
14 determining if a juror has an opinion. None of the jurors
15 in this case indicated they even had an opinion about the
16 case, much less an opinion that they could set
17 aside -- that they could not set aside and judge the case
18 on law and the evidence, except for juror Syphrett who
19 said he couldn't be fair and he was excused.

20 So a crucial question is whether the juror has
21 formed an opinion about the case. If Mu'Min's rule is
22 adopted, it will apply to death penalty qualification.
23 The prosecutor will be able to explore the content of a
24 juror's religious beliefs about capital punishment in
25 order to assess their veracity.

1 A defense attorney in examining a juror whose
2 been a victim of a crime may be able to probe the
3 juror -- the content of the juror's memories of the pain
4 and fear and humiliation of their own crime in order to
5 assess their ability to be fair.

6 In these and many other --

7 QUESTION: Thank you, Mr. McLees.

8 MR. McLEES: Thank you, Your Honor.

9 CHIEF JUSTICE REHNQUIST: Your time has expired.
10 The case is submitted.

11 (Whereupon, at 12:02 p.m., the case in the
12 above-entitled matter was submitted.)
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CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that
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#90-5193 - DAWUD MAJID MU'MIN, Petitioner V. Virginia

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BY *Robert H. Harte*
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