

The Burger Court Opinion Writing Database

Ham v. South Carolina

409 U.S. 524 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



W
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 19, 1972

Re: No. 71-5139 - Ham v. South Carolina

Dear Bill:

Please join me.

Regards,

WRB

Mr. Justice Rehnquist

Copies to the Conference

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-5139

Gene Ham, Petitioner,	} On Writ of Certiorari to the	
v.		Supreme Court of South
State of South Carolina.		Carolina.

[January —, 1973]

MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

I, too, concur in that portion of the majority's opinion which holds that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on *voir dire*. I think, however, that it was an abuse of discretion for the trial judge to preclude the defendant from an inquiry by which prospective jurors' prejudice to hair growth could have been explored.

It is unquestioned that a defendant has the constitutional right to a trial by a neutral and impartial jury. Criminal convictions have ~~never~~ been reversed when the limitations on *voir dire* have unreasonably infringed the exercise of this right. *Aldridge v. United States*, 283 U. S. 308. Such reversals have not been limited to incidents where the defendant was precluded from inquiring into possible racial prejudice. In both *Burford v. United States*, 339 U. S. 258, and *Dennis v. United States*, 339 U. S. 162, defendants were held to have the right to inquire into possible prejudices concerning the defendants' alleged ties with the Communist party. In *Aldridge v. United States*, 283 U. S. 308, 313, this Court made it clear that *voir dire* aimed at disclosing "prejudices of a serious character" must be allowed.

Prejudice to hair growth is unquestionably of a "serious character."

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-5139

Gene Ham, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of South
State of South Carolina. } Carolina.

[January —, 1973]

MR. JUSTICE DOUGLAS, concurring in part and dissenting in part.

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It is unquestioned that a defendant has the constitutional right to a trial by a neutral and impartial jury. Criminal convictions have been reversed when the limitations on *voir dire* have unreasonably infringed the exercise of this right. *Aldridge v. United States*, 283 U. S. 308. Such reversals have not been limited to incidents where the defendant was precluded from inquiring into possible racial prejudice. In both *Burford v. United States*, 339 U. S. 258, and *Dennis v. United States*, 339 U. S. 162, defendants were held to have the right to inquire into possible prejudices concerning the defendants' alleged ties with the Communist party. In *Aldridge v. United States*, 283 U. S. 308, 313, this Court made it clear that *voir dire* aimed at disclosing "prejudices of a serious character" must be allowed.

Prejudice to hair growth is unquestionably of a "serious character." Nothing is more indicative of the importance currently being attached to hair growth by the

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 27, 1972

RE: No. 71-5139 - Ham v. South Carolina

Dear Bill:

I wonder if you would consider deleting at page 4 the sentence beginning the ninth line from the bottom, "The inquiry as to racial prejudice, etc." I share Thurgood's concern that this may imply that only questions as to racial prejudice are within the sweep of the Fourteenth Amendment, although I fully agree with you that the refusal to ask the question addressed to the fact that petitioner wore a beard does not reach the level of a constitutional violation.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Cr

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

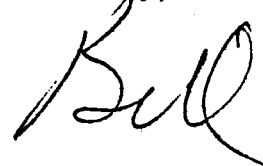
December 27, 1972

RE: No. 71-5139 - Ham v. South Carolina

Dear Bill:

Thank you so much for taking care
of my concern as to the sentence on page
4. I am happy to join you.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 6, 1972

71-5139 - Ham v. South Carolina

Dear Bill,

I am glad to join your opinion for the Court in this case. Since we are to reverse this judgment for the judge's refusal to ask the questions concerning race, I wonder if it is necessary to discuss the other questions at any length beyond mention in a footnote.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

B
M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 7, 1972

Re: No. 71-5139 - Ham v. South Carolina

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

Circulated: DEC 27 1972

No. 71-5139

Recirculated: _____

Gene Ham, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of South
State of South Carolina. } Carolina.

[January —, 1973]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I concur in that portion of the majority's opinion which holds that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on *voir dire*. I also agree that on this record, we cannot say that the judge was required to ask questions about pretrial publicity. I cannot agree, however, that the judge acted properly in totally foreclosing other reasonable and relevant avenues of inquiry as to possible prejudice.

Long before the Sixth Amendment was made applicable to the States through the Due Process Clause of the Fourteenth Amendment, see *Duncan v. Louisiana*, 391 U. S. 145 (1968), this Court held that the right to an "impartial" jury was basic to our system of justice.

"In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors. The failure to afford an accused a fair hearing violates even the minimal standards of due process In the language of Lord Coke, a juror must be as 'indifferent as he stands sworn.' Co. Litt. 155b. His verdict must be based upon the evidence developed at trial. Cf. *Thompson v. City of Louisville*, 362 U. S. 199. This is true, regardless of the heinousness

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN
H

December 7, 1972

Re: No. 71-5139 - Ham v. South Carolina

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

Copies to the Conference

G M

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 7, 1972

Re: No. 71-1539 Ham v. South Carolina

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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For The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 12/5/72

Recirculated: _____

No. 71-5139

Gene Ham, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of South
State of South Carolina. } Carolina.

[December —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted in the South Carolina trial court of the possession of marihuana in violation of state law.¹ He was sentenced to 18 months' confinement, and on appeal his conviction was affirmed by a divided South Carolina Supreme Court. 256 S. C. 1 (1971). We granted certiorari limited to the question of whether the trial judge's refusal to examine jurors on *voir dire* as to possible prejudice against petitioner violated the latter's federal constitutional rights. 404 U. S. 1057 (1972).

Petitioner is a young, bearded black who has lived most of his life in Florence County, South Carolina. He appears to have been well known locally for his work in such civil rights activities as the Southern Christian Leadership Conference and the Bi-Racial Committee of the City of Florence. He has never previously been convicted of a crime. His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.

Prior to the trial judge's *voir dire* examination of prospective jurors, petitioner's counsel requested the

¹ S. C. Code § 32-1506 (1962).

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

2nd DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: 12/7/72

No. 71-5139

Gene Ham, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of South
State of South Carolina. } Carolina.

[December —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted in the South Carolina trial court of the possession of marihuana in violation of state law.¹ He was sentenced to 18 months' confinement, and on appeal his conviction was affirmed by a divided South Carolina Supreme Court. 256 S. C. 1 (1971). We granted certiorari limited to the question of whether the trial judge's refusal to examine jurors on *voir dire* as to possible prejudice against petitioner violated the latter's federal constitutional rights. 404 U. S. 1057 (1972).

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Prior to the trial judge's *voir dire* examination of prospective jurors, petitioner's counsel requested the

¹ S. C. Code § 32-1506 (1962).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

3rd DRAFT

From: Rehnquist, J.

SUPREME COURT OF THE UNITED STATES

No. 71-5139

Recirculated: 12/8/72

Gene Ham, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of South
State of South Carolina. } Carolina.

[December —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted in the South Carolina trial court of the possession of marihuana in violation of state law.¹ He was sentenced to 18 months' confinement, and on appeal his conviction was affirmed by a divided South Carolina Supreme Court. 256 S. C. 1 (1971). We granted certiorari limited to the question of whether the trial judge's refusal to examine jurors on *voir dire* as to possible prejudice against petitioner violated the latter's federal constitutional rights. 404 U. S. 1057 (1972).

Petitioner is a young, bearded Negro who has lived most of his life in Florence County, South Carolina. He appears to have been well known locally for his work in such civil rights activities as the Southern Christian Leadership Conference and the Bi-Racial Committee of the City of Florence. He has never previously been convicted of a crime. His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.

Prior to the trial judge's *voir dire* examination of prospective jurors, petitioner's counsel requested the

¹ S. C. Code § 32-1506 (1962).

Changed "black" to "Negro" throughout

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

4th DRAFT

Circulated: _____

SUPREME COURT OF THE UNITED STATES

Recirculated: 12/28/72

No. 71-5139

Gene Ham, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of South
State of South Carolina. } Carolina.

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[December —, 1972]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted in the South Carolina trial court of the possession of marihuana in violation of state law.¹ He was sentenced to 18 months' confinement, and on appeal his conviction was affirmed by a divided South Carolina Supreme Court. 256 S. C. 1 (1971). We granted certiorari limited to the question of whether the trial judge's refusal to examine jurors on *voir dire* as to possible prejudice against petitioner violated the latter's federal constitutional rights. 404 U. S. 1057 (1972).

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Prior to the trial judge's *voir dire* examination of prospective jurors, petitioner's counsel requested the

¹ S. C. Code § 32-1506 (1962).

Supreme Court of the United States 71-5139
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 17, 1973

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Ham v. South Carolina

In Sellers v. South Carolina, No. 71-5991, the petitioner is a Negro who was convicted in state court of common law riot in connection with the widely publicized events surrounding the attempt to desegregate a bowling alley in Orangeburg, South Carolina. During voir dire his counsel requested that the trial judge ask of prospective jurors some 192 questions, half of them relating to possible racial prejudice. Although the judge refused to ask all of these questions on the ground that to do so would be too time-consuming, he did ask each prospective juror some 28 questions, including the following two:

"Would the fact that the defendant is a Negro and a former Program Secretary of the Student Non-Violent Committee and a member of the Student National Coordinating Committee cause you to be prejudiced against the defendant in any way?"

"Do you believe that Black people, because of their race, are more likely to lie than other people?"

I believe that these questions fully comport with the Ham requirement that questions be asked that are "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain." Accordingly, I would deny the petition for certiorari.

Ross v. Massachusetts, No. 72-5119, is in a different posture. The petitioner here is a Negro who was convicted along with two others of armed robbery, assault and battery, and assault with intent to commit murder in connection with an attack made against a white security officer. During