

The Burger Court Opinion Writing Database

Smith v. Phillips

455 U.S. 209 (1982)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

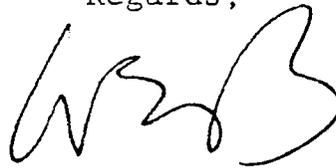
December 19, 1981

Re: No. 80-1082 - Smith v. Phillips

Dear Bill:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written in a cursive style.

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 16, 1981

RE: No. 80-1082 Smith v. Phillips

Dear Thurgood:

You, John and I are in dissent in the above.
Would you be willing to undertake the dissent?

Sincerely, -



Justice Marshall

cc: Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1981

RE: No. 80-1082 Smith v. Phillips

Dear Bill:

I'll await the dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in dark ink.

Justice Rehnquist

cc: The Conference

12

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 7, 1981

RE: No. 80-1082 Smith v. Phillips

Dear Thurgood:

Please join me.

Sincerely,

Bire

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 8, 1981

Re: 80-1082 - Smith v. Phillips

Dear Bill,

Please join me.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

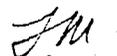
December 3, 1981

Re: No.80-1082 - Smith v. Phillips

Dear Bill:

"In due course" we shall circulate a dissent.

Sincerely,



T.M.

Justice Rehnquist

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: 9 DEC 1981

Recirculated: _____

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Re: No. 1082 Smith v. Phillips

JUSTICE MARSHALL, dissenting.

Juror John Smith Smith vigorously pursued employment with the office of the prosecutor throughout the course of his jury service in respondent's state criminal trial. The prosecutor learned of Smith's efforts during the trial, but improperly failed to disclose this information until after the jury had returned a verdict of guilty against respondent. The state court conducted a post-trial evidentiary hearing and determined that the juror was not actually biased. Thus, it ruled that respondent was not prejudiced, and refused to set aside the conviction. Respondent subsequently filed a petition for a writ of habeas corpus in the United States District Court for the

STYLISTIC CHANGES THROUGHOUT

PP. 6, 8, 9, 10, 11, 15, 20

8 DEC 1981

(Printed)

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1082

HAROLD J. SMITH, SUPERINTENDENT, ATTICA
CORRECTIONAL FACILITY *v.* WILLIAM R. PHILLIPS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[December —, 1981]

JUSTICE MARSHALL, dissenting.

Juror John Smith Smith vigorously pursued employment with the office of the prosecutor throughout the course of his jury service in respondent's state criminal trial. The prosecutor learned of Smith's efforts during the trial, but improperly failed to disclose this information until after the jury had returned a verdict of guilty against respondent. The state court conducted a post-trial evidentiary hearing and determined that the juror was not actually biased. Thus, it ruled that respondent was not prejudiced, and refused to set aside the conviction. Respondent subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that he was denied his constitutional right to an impartial jury. The District Court ruled that the conviction should be set aside, and the United States Court of Appeals for the Second Circuit affirmed. A majority of this Court now reverses, holding that the post-trial evidentiary hearing provided sufficient protection to respondent's right to an impartial jury. Because I find the majority's analysis completely unpersuasive, I dissent.

I

The right to a trial by an impartial jury lies at the very

pp. 1, 2, 17
stylistic changes throughout

28 DEC 1981

2nd
~~1st~~ PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1082

HAROLD J. SMITH, SUPERINTENDENT, ATTICA
CORRECTIONAL FACILITY *v.* WILLIAM R. PHILLIPS
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[December —, 1981]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and
JUSTICE STEVENS join, dissenting.

Juror John Smith vigorously pursued employment with the office of the prosecutor throughout the course of his jury service in respondent's state criminal trial. The prosecutor learned of Smith's efforts during the trial, but improperly failed to disclose this information until after the jury had returned a verdict of guilty against respondent. The state court conducted a post-trial evidentiary hearing and determined that the juror was not actually biased. Thus, it ruled that respondent was not prejudiced, and refused to set aside the conviction. Respondent subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that he was denied his constitutional right to an impartial jury. The District Court ruled that the conviction should be set aside, and the United States Court of Appeals for the Second Circuit affirmed. A majority of this Court now reverses, holding that the post-trial evidentiary hearing provided sufficient protection to respondent's right to an impartial jury. Because I find the majority's analysis completely unpersuasive, I dissent.

I

The right to a trial by an impartial jury lies at the very

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 18, 1982

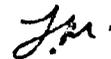
Re: No. 80-1082 - Smith v. Phillips

MEMORANDUM TO THE CONFERENCE

I propose adding the following paragraph to the conclusion of my dissent in the above case:

The majority concedes that due process means an unbiased jury, "capable and willing to decide the case solely on the evidence." Post, at 8. All respondent has asked for is the opportunity to be tried by such a jury. If the prosecutor had taken the simple step of informing the trial judge that Smith had applied for employment with his office, Smith could have been replaced, and respondent would have received an opportunity to be tried by an impartial jury. Because the prosecutor deliberately failed to do so, however, a juror who was almost certainly prejudiced against respondent participated in the evaluation of the evidence. If due process really does mean a full and fair opportunity to be tried by an unbiased jury, "capable and willing to decide the case solely on the evidence" -- then in this case, due process has been denied.

Sincerely,



T.M.

22 JAN 1982

3rd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1082

HAROLD J. SMITH, SUPERINTENDENT, ATTICA
CORRECTIONAL FACILITY *v.* WILLIAM R. PHILLIPS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[January —, 1982]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and
JUSTICE STEVENS join, dissenting.

Juror John Smith vigorously pursued employment with the office of the prosecutor throughout the course of his jury service in respondent's state criminal trial. The prosecutor learned of Smith's efforts during the trial, but improperly failed to disclose this information until after the jury had returned a verdict of guilty against respondent. The state court conducted a post-trial evidentiary hearing and determined that the juror was not actually biased. Thus, it ruled that respondent was not prejudiced, and refused to set aside the conviction. Respondent subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York, claiming that he was denied his constitutional right to an impartial jury. The District Court ruled that the conviction should be set aside, and the United States Court of Appeals for the Second Circuit affirmed. A majority of this Court now reverses, holding that the post-trial evidentiary hearing provided sufficient protection to respondent's right to an impartial jury. Because I find the majority's analysis completely unpersuasive, I dissent.

I

The right to a trial by an impartial jury lies at the very

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 15, 1981

Re: No. 80-1082 - Smith v. Phillips

Dear Bill:

Please join me.

Sincerely,



Justice Rehnquist

cc: The Conference

HAB

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 15, 1981

Re: No. 80-1082 - Smith v. Phillips

Dear Bill:

Please join me.

Sincerely,



Justice Rehnquist

cc: The Conference

[NOTE TO JUSTICE REHNQUIST ONLY:]

P.S. Dear Bill:

Would there be any merit in pointing out that the CA2 affirmance was by a divided vote? This could be done either on page 2 or, perhaps preferably, on page 5. I personally think that, when we reverse, it helps to show a division of opinion in the court below.



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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 8, 1981

80-1082 Smith v. Phillips

Dear Bill:

Please join me in your opinion for the Court.

I would hope, however, that you would omit the sentence near the top of page 11 to the effect that "may be" the failure of counsel promptly to inform the trial judge and defense counsel was "unethical".

My recollection is that the trial judge who had the greatest familiarity with the situation, made no finding of unethical conduct. My impression is that it was characterized as a mistake in judgment. In any event, as the sentence in question is in no way essential to our decision, I see no reason to suggest unprofessional conduct. Coming from this Court, this could affect the careers of the lawyers in question.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

pp. 5, 6, 8, 9, 10, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: DEC 3 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1082

**HAROLD J. SMITH, SUPERINTENDENT, ATTICA
CORRECTIONAL FACILITY, PETITIONER, v. WIL-
LIAM R. PHILLIPS**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

[December —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was convicted in November 1972 by a New York state court jury on two counts of murder and one count of attempted murder. After trial, respondent moved to vacate his conviction pursuant to § 330.30 of the New York Criminal Procedure Law (CPL),¹ and a hearing on his motion was held pursuant to New York CPL § 330.40.² The hearing was held before the Justice who presided at respondent's trial, and the motion to vacate was denied by him in an opin-

¹Section 330.30 provides in pertinent part:

"At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; . . ."

²CPL § 330.40 provides that motions to set aside the verdict under CPL § 330.30 must be decided by hearing if they allege disputed facts sufficient to grant the motion. At the hearing, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion." CPL § 330.40(g).

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Stylistic changes
throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1082

HAROLD J. SMITH, SUPERINTENDENT, ATTICA
CORRECTIONAL FACILITY *v.* WILLIAM R. PHILLIPS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[December —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was convicted in November 1972 by a New York state court jury on two counts of murder and one count of attempted murder. After trial, respondent moved to vacate his conviction pursuant to § 330.30 of the New York Criminal Procedure Law (CPL),¹ and a hearing on his motion was held pursuant to New York CPL § 330.40.² The hearing was held before the Justice who presided at respondent's trial, and the motion to vacate was denied by him in an opinion concluding "beyond a reasonable doubt" that the events

¹ Section 330.30 provides in pertinent part:

"At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict: . . ."

² CPL § 330.40 provides that motions to set aside the verdict under CPL § 330.30 must be decided by hearing if they allege disputed facts sufficient to grant the motion. At the hearing, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion." CPL § 330.40(g).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 9, 1981

Re: No. 80-1082 Smith v. Phillips

Dear Lewis:

I will delete the sentence identified in your memorandum of December 8th in the next draft of the opinion in this case.

Sincerely,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

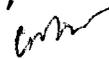
December 16, 1981

Re: No. 80-1082 Smith v. Phillips

Dear Harry:

I think your suggestion about referring to the fact that the case in the Court of Appeals was decided by a divided vote is a sensible one, and will make an appropriate change in the present draft.

Sincerely,



Justice Blackmun

pp. 3, 5, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: DEC 23 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1082

HAROLD J. SMITH, SUPERINTENDENT, ATTICA
CORRECTIONAL FACILITY v. WILLIAM R. PHILLIPS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[December —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent was convicted in November 1972 by a New York state court jury on two counts of murder and one count of attempted murder. After trial, respondent moved to vacate his conviction pursuant to § 330.30 of the New York Criminal Procedure Law (CPL),¹ and a hearing on his motion was held pursuant to New York CPL § 330.40.² The hearing was held before the Justice who presided at respondent's trial, and the motion to vacate was denied by him in an opinion concluding "beyond a reasonable doubt" that the events

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"At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:

2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; . . ."

²CPL § 330.40 provides that motions to set aside the verdict under CPL § 330.30 must be decided by hearing if they allege disputed facts sufficient to grant the motion. At the hearing, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion." CPL § 330.40(g).

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HAB

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 17, 1982

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 80-1082, Smith v. Phillips

In McMichael v. Henderson, No. 81-5079, the petitioner moved to set aside his conviction of manslaughter in the first degree, alleging an improper contact between the prosecution and a juror in his criminal case. The juror took her seat on petitioner's jury knowing that she might be called as a witness in a separate criminal trial. Because of her presence on petitioner's jury she was not called as a witness in the separate trial, but overheard prosecutors discussing her failure to disclose her possible role as a witness.

The trial judge held hearings and denied petitioner's motion, concluding that petitioner had shown no prejudice from the juror's connection with the separate trial. Petitioner's conviction was affirmed on appeal.

Petitioner sought a writ of habeas corpus under 28 U.S.C. § 2254, claiming that he had been denied his constitutional right to an impartial jury. The DC presumed that the state trial judge's factual findings were correct, and distinguished the CA 2 decision which we reversed in Smith v. Phillips. CA 2 affirmed by order.

The decision in McMichael comports with our holding in Smith v. Phillips that federal habeas courts are not to overturn state criminal convictions on grounds of juror partiality absent a showing of actual bias. I recommend that the Court deny certiorari. ✓

Sincerely,



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 3, 1981

Re: 80-1082 - Smith v. Phillips

Dear Bill:

At page 6 of your opinion you describe the Remmer case as one involving a juror who had been "approached by someone offering money in exchange for a favorable verdict." Justice Minton, writing for the Court noted, however, that the prosecutor, the judge, and the FBI had apparently concluded that the statement to the juror had been "made in jest." 347 U.S., at 228. Ordering a hearing to verify the accuracy of that conclusion is obviously quite different from what might have been required if an actual bribe attempt had occurred. In all events, I shall wait for Thurgood's dissent and possibly add a word or two of my own.

Respectfully,



Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 4, 1981

Re: 80-1082 - Smith v. Phillips

Dear Thurgood:

My join in your dissent is unconditional and unqualified because I think it is an excellent opinion. I have three very minor suggestions that you may decide are not significant enough to bother with but I submit them for your consideration.

First, as a partial response to the majority's reference to the fact that the juror disclosed during the voir dire examination that he was interested in a law enforcement career, it might be worth noting that the defendant at the trial was himself a law enforcement officer and therefore might not have thought that such a career interest would be unfavorable to the defense. That, however, is of course entirely different from an application for a job with the prosecutor in the particular case.

Second, I am not sure that your opinion makes it entirely clear that the first trial ended in a hung jury.

Third, you might want to consider, possibly in footnote 16, pointing out that if a judge had an application pending with a litigant while he was trying a case, there isn't the slightest doubt that bias would be presumed no matter how vigorously he protested that he was actually impartial.

As I indicated, these are just thoughts that occurred to me as I was reading your opinion.

Respectfully,

Justice Marshall



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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 4, 1981

Re: 80-1082 - Smith v. Phillips

Dear Thurgood:

Please join me in your dissenting opinion.

Respectfully,



Justice Marshall

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: DEC 18 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1082

HAROLD J. SMITH, SUPERINTENDENT, ATTICA
CORRECTIONAL FACILITY *v.* WILLIAM R. PHILLIPS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[December —, 1981]

JUSTICE O'CONNOR, concurring.

I concur in the Court's opinion, but write separately to express my view that the opinion does not foreclose the use of "implied bias" in appropriate circumstances.

I

Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.

Nevertheless, I believe that in most instances a post-conviction hearing will be adequate to determine whether a juror is biased. A hearing permits counsel to probe the juror's memory, his reasons for acting as he did, and his understanding of the consequences of his actions. A hearing also permits the trial judge to observe the juror's demeanor under cross examination and to evaluate his answers in light of the particular circumstances of the case.

I am concerned, however, that in certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a mis-

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