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Sixth Amendment--The Demise of the Doctrine of Implied Juror Bias

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SIXTH AMENDMENT—THE DEMISE OF THE DOCTRINE OF IMPLIED JUROR BIAS

Smith v. Phillips, 102 S. Ct. 940 (1982).

I. INTRODUCTION

In *Smith v. Phillips*,[1] the United States Supreme Court held that a juror who seeks employment with the prosecutor's office during the course of a criminal defendant's trial does not necessarily compromise the defendant's sixth amendment right to an impartial jury.[2] The Court did not deny that an individual biased in favor of either party cannot be impartial or that a criminal jury including such an individual violates the guarantees of the sixth amendment.[3] The Court also recognized that the juror's actions in *Phillips* raised a serious question of whether he was biased in favor of the prosecution.[4] Nevertheless, the Court held that a post-trial evidentiary hearing could adequately determine whether the juror was prejudiced based largely upon the juror's own testimony.[5] Because the juror in *Phillips* did not admit to bias at the post-trial hearing, and because the defendant could offer no independent evidence of "actual" bias, the Supreme Court rejected the defendant's sixth amendment challenge to his conviction.[6] By deciding that the juror's disclaimers sufficiently established his impartiality, the Court severely undermined Phillips's sixth amendment right to an impartial jury. Under the circumstances in *Phillips*, the Supreme Court should have deemed the juror biased as a matter of law, rather than insisting upon proof of "actual" bias in a post-trial hearing.

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1 102 S. Ct. 940 (1982).

2 The sixth amendment to the United States Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend VI. The sixth amendment right to an impartial jury is applicable to the states through the due process clause of the fourteenth amendment. Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

3 *See, e.g.*, Turner v. Louisiana, 379 U.S. 466 (1965); Leonard v. United States, 378 U.S. 544 (1964); Irvin v. Dowd, 366 U.S. 717 (1961).

4 *See* 102 S. Ct. 948 ("Smith's job application . . . requir[ed] a post-trial hearing on juror bias . . . .").

5 *Id.* at 946 & n.7. *See also id.* at 951-52 (Marshall, J., dissenting).

6 *Id.* at 944, 948. *See also id.* at 951-52 (Marshall, J., dissenting).

The Court also made a broader ruling in *Phillips*. It decided to abandon altogether the position that courts should generally deem a juror biased as a matter of law when an average man under the juror's circumstances would not be able to reach an impartial verdict. A criminal defendant can no longer rely upon this "implied bias doctrine" to establish a sixth amendment violation, but must instead prove "actual" juror bias under even the most suspicious of circumstances.[7]

II. *SMITH V. PHILLIPS*

A. THE FACTS

On March 29, 1972, a grand jury charged William R. Phillips with the 1968 murders of a pimp and a prostitute and the attempted murder of a customer at their bordello.[8] The former New York City police officer's first trial for these offenses commenced before a New York jury on June 28, 1972.[9] In August of 1972, the judge declared a mistrial because the jury was deadlocked ten to two for acquittal.[10] Phillips's second trial on these charges began on September 16, 1974 before the New York County Supreme Court.[11]

Voir dire for the second trial commenced on September 17, 1974.[12] One prospective juror, John Smith, stated that he had been employed as a store detective between 1972 and 1973. He acknowledged that he hoped to work overseas with the Federal Drug Enforcement Agency and that he had already submitted an application for the position.[13] Despite Smith's interest in law enforcement, defense counsel did not challenge him, and the court swore Smith in as a juror on September 23, 1974.[14]

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[7] *See id.* at 945 ("[T]he remedy for allegation of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); *id.* at 946 ("[D]ue process means a jury capable and willing to decide the case solely on the evidence before it . . . . Such determinations may properly be made at a hearing like that ordered in *Remmer* and held in this case."). *See also id.* at 952 (Marshall, J., dissenting) ("Indeed, [the majority] would apparently insist on proof of actual bias, not only when a juror had applied for employment with the prosecutor's office, but also when the juror was already employed in the prosecutor's office, or when he served as a prosecuting attorney.").

[8] Phillips v. Smith, 632 F.2d 1019, 1020 (2d Cir. 1980), *rev'd*, 102 S. Ct. 940 (1982).

[9] Phillips v. Smith, 485 F. Supp. 1365, 1366-67 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 1019 (2d Cir. 1980), *rev'd*, 102 S. Ct. 940 (1982).

[10] 632 F.2d at 1020.

[11] *Id.*

[12] People v. Phillips, 87 Misc. 2d 613, 614, 384 N.Y.S.2d 906, 907 (N.Y. Sup. Ct. 1975), *aff'd*, 52 A.D.2d 758, 384 N.Y.S.2d 715 (N.Y. App. Div.), *appeal denied*, 39 N.Y.2d 949, 352 N.E.2d 894, 386 N.Y.S.2d 1039 (1976).

[13] *Id.* at 619, 384 N.Y.S.2d at 911.

[14] 632 F.2d at 1020. The remaining eleven jurors and four alternate jurors were selected within the next ten days. *Id.*

The majority and dissenting Supreme Court opinions disagreed over the significance of the defense counsel's failure to challenge Smith. Justice Rehnquist's majority opinion at least

After voir dire, on the same day that he was sworn in, John Smith met with Rudolph Fontaine, a criminal court officer.[15] Fontaine mentioned that there was an opening for a major felony investigator at the New York County District Attorney's office, the office preparing to prosecute Phillips. Smith expressed interest in the position. Accordingly, Fontaine asked employees of the District Attorney's office about the application procedure.[16]

About halfway through Phillips's trial, John Smith submitted his application to the District Attorney's office for the position of major felony investigator.[17] Smith's application first reached the desk of Assistant District Attorney Conboy.[18] On November 9, 1974, Conboy gave it to the Assistant District Attorney primarily responsible for reviewing applications, Joan Sudolnik. She in turn forwarded the application to John Lang, another assistant to the District Attorney.[19] On November 13, Fontaine spoke to Assistant District Attorney Robert Holmes about Smith's application, and informed him that Smith was on the Phillips jury.[20] Holmes immediately informed Sudolnik that one of her job applicants was currently hearing the Phillips case. Sudolnik told her secretary and Lang not to contact Smith until after the trial.[21]

On November 14, Sudolnik met with the Assistant District Attorneys prosecuting Phillips, Jack Litman and Phillip LaPenta, to advise them of the Smith problem. Litman told Sudolnik that he did not want to see anything relating to Smith's application.[22] Litman and LaPenta

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hinted that, since the defense counsel was satisfied as to the impartiality of a juror with an interest in law enforcement, Smith's subsequent application to the office prosecuting Phillips would not effect the defense counsel's opinion of Smith's impartiality. 102 S. Ct. at 943-94 n.4. Justice Marshall pointed out, however, that since the defendant was a former police officer, Smith's general interest in law enforcement would not necessarily work to Phillips's disadvantage. He argued that a juror's general interest in law enforcement is far different from a juror's fear that his future employment may rest upon his finding the defendant guilty. *Id.* at 952 & n.5 (Marshall, J., dissenting).

15 632 F.2d at 1020.

16 *Id.*

17 *Id.* at 1021. Smith's October 23, 1974 application stated that "I understand that a Federal [sic] Funded investigation unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator. Attached is my resume. Letters of recommendation will be furnished upon request. Thank you for your consideration." 485 F. Supp. at 1367 n.2.

Several days later, Fontaine introduced Smith to Mario Piazza, a jury warden for the New York Supreme Court. 632 F.2d at 1020-21. Thereafter, Smith met regularly with Fontaine and Piazza to discuss the progress of his application through the District Attorney's office. 102 S. Ct. at 952 (Marshall, J., dissenting).

18 632 F.2d at 1021; 485 F. Supp. 1368 n.3.

19 632 F.2d at 1020-21.

20 *Id.* at 1021.

21 *Id.*

22 *Id.*

then conferred about the matter and decided that they had no duty to inform the court or defense counsel about Smith's application because Smith had already expressed an interest in law enforcement during voir dire.[23]

On November 21, the jury found Phillips guilty of both murders and of the attempted murder.[24] The next day, Smith called the New York County District Attorney's office to check on his application.[25] Sudolnik did not return his call, so Smith asked his former employer, Walter Reilly, to contact the District Attorney's office. Reilly reached Sudolnik, gave Smith a good recommendation, and mentioned that Smith had been on the Phillips jury.[26] Sudolnik replied that Smith's application would be considered with the others.[27]

On December 4, 1974, LaPenta informed Chief Assistant District Attorney John Keenan about Smith's application.[28] Keenan then conferred with District Attorney Richard Kuh about the matter. On December 9, Kuh told the trial court and defense counsel that Smith had applied to his office during the trial and that his office had known that Smith was a juror.[29] Phillips's attorney moved to set aside the verdict pursuant to section 330.30(2) of New York Criminal Procedure Law, and the trial judge held a post-trial hearing in accordance with section 330.40 of New York Criminal Procedure Law.[30]

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[23] *Id.* The prosecutors did, however, inform the court of the circumstances surrounding another juror to the Phillips case, Lawrence Bethel. On November 18th, two days before the jury retired to deliberate, the prosecutors disclosed that Bethel had been arrested on a narcotics charge and had agreed to cooperate with the government. 102 S. Ct. at 958 (Marshall, J., dissenting); 87 Misc. 2d at 614-15, 384 N.Y.S.2d at 908. The court accordingly dismissed Bethel from the Phillips jury and replaced him with an alternate juror. 102 S. Ct. at 958 (Marshall, J., dissenting). When the jury began to deliberate on November 20th, three alternate jurors remained. 102 S. Ct. at 944.

[24] *Id.*; 632 F.2d at 1020. Smith is serving concurrent sentences of up to a life term of imprisonment. 485 F. Supp. at 1366.

[25] 102 S. Ct. at 952 (Marshall, J., dissenting); 632 F.2d at 1021.

[26] 632 F.2d at 1021.

[27] *Id.*

[28] *Id.*; 87 Misc. 2d at 618, 384 N.Y.S.2d at 910.

[29] 102 S. Ct. at 944.

[30] *Id.* at 942-44. 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:
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> . . . .
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> (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. . . .

N.Y. CRIMINAL PROCEDURE LAW § 330.30 (McKinney 1971). § 330.40(2) provides that:

B. THE LOWER COURTS' DECISIONS

At the conclusion of the post-trial hearing, the trial judge found that Phillips had not sustained his burden of proving that Smith had impaired his sixth amendment right to an impartial jury.[31] Judge Birns based his finding in part on Smith's testimony that "I swore on oath to listen to the evidence and to render a verdict on that evidence. I did so."[32] He also considered Smith's testimony that his desire for employment with the prosecutor's office did not affect his verdict: "That didn't enter my mind; I didn't think about it that way."[33] Smith's statements during voir dire also influenced the trial judge, who found that Smith's application reflected no more than the "predilection for law enforcement" made evident during Smith's pretrial questioning.[34] Although the judge characterized Smith's activities as "unprecedented imprudence on the part of a juror" and the prosecutors' failure to inform the court of Smith's application as "unique misjudgment," he found that Smith's application did not reflect a premature conclusion about the defendant's guilt.[35] The appellate division of the New York supreme court affirmed this finding,[36] and the New York Court of Appeals denied leave to appeal.[37]

Having exhausted his state court remedies, Phillips filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254.[38] The United States District Court for the Southern District of New York issued the

(d) The Court must grant the motion if:
(i) The moving papers allege a ground constituting legal basis for the motion; and
(ii) Such papers contain sworn allegations of all facts essential to support such ground; and
(iii) All the essential facts are conceded by the people to be true.
(e) The court may deny the motion if:
(i) The moving papers do not allege any ground constituting legal basis for the motion; or
(ii) The moving papers do not contain sworn allegations of all facts essential to support the motion.
(f) If the court does not determine the motion pursuant to paragraphs (d) or (e), it must conduct a hearing and make findings of fact essential to the determination thereof;
(g) Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

Id. § 330.40(2).

31 87 Misc. 2d at 621, 384 N.Y.S.2d at 912.

32 *Id.* at 621, 384 N.Y.S.2d at 911-12.

33 *Id.* at 621, 384 N.Y.S.2d at 912.

34 *Id.*

35 *Id.* at 631, 384 N.Y.S.2d at 918. *See supra* note 17.

36 52 A.D.2d 758, 384 N.Y.S.2d 715 (N.Y. App. Div. 1976).

37 39 N.Y.2d 949, 352 N.E.2d 894, 386 N.Y.S.2d 1039 (1976).

38 632 F.2d at 1020; 485 F. Supp. at 1369. 28 U.S.C. § 2254(a) (1976) provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

writ, holding that Smith was biased as a matter of law and that his presence on the Phillips jury therefore violated the defendant's right to an impartial jury.[39] The court recognized that "actual" bias exists only when there is evidence of a juror's prejudiced state of mind,[40] and it agreed with the state trial court that the evidence offered at the post-trial hearing was insufficient to show actual bias.[41] The court found, however, that when a juror applies for employment with the prosecuting attorney's office during the course of the defendant's trial, and that application is still pending during the period of the jury's deliberations, a court must conclusively presume that the juror is biased.[42] Such a conclusive presumption, the court pointed out, is not unreasonably burdensome since the facts in *Phillips* are not likely to recur often.[43]

On appeal, the United States Court of Appeals for the Second Circuit did not rule upon the district court's finding that Smith was impliedly biased because "the 'average' juror in his position 'would indeed be likely to favor the prosecutor's position.' "[44] Instead, it affirmed the district court's decision on the ground that the prosecutors' misconduct deprived the defendant of a fair trial.[45] To condone the prosecutors' withholding of information which cast substantial doubt upon Smith's impartiality would prejudice the defendant and would "ill serve to maintain public confidence in the integrity of the judicial process."[46] The court relied on *Brady v. Maryland*[47] and *United States v. Agurs*[48] to hold that a "prosecutor may not keep silent when he knows that a juror has applied to become his employee."[49]

C. THE SUPREME COURT OPINIONS

In *Smith v. Phillips*, the Supreme Court rejected Phillips's implied bias and prosecutorial misconduct claims and reversed the decisions

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Justice Rehnquist's majority opinion incorrectly states that Smith waited four years after the New York Court of Appeals denied him leave to appeal to pursue habeas corpus relief. 102 S. Ct. at 943. Since Smith filed his habeas corpus petition in April of 1979, 485 F. Supp. at 1369, and the New York Court of Appeals issued its decision in May of 1976, 39 N.Y.2d 949, 352 N.E.2d 894, 386 N.Y.S.2d 1039, only three years had elapsed between the time that Smith exhausted his state court remedies and the time that he filed his petition for habeas corpus.

39 485 F. Supp. at 1371-72.

40 *Id.* at 1370.

41 *Id.* at 1370-71.

42 *Id.* at 1369, 1371-72.

43 *Id.* at 1372.

44 632 F.2d at 1022 (quoting 485 F. Supp. at 1371-72).

45 *Id.* at 1022-24.

46 *Id.* at 1023.

47 373 U.S. 83 (1963).

48 427 U.S. 97 (1976).

49 632 F.2d at 1024.

granting him habeas corpus relief.[50] Writing for the majority, Justice Rehnquist first disposed of the defendant's claim that "a court cannot possible ascertain the impartiality of a juror [in Smith's position] by relying solely upon the testimony of the juror in question."[51] In holding that a court could indeed do so, Justice Rehnquist did not invoke the analysis normally applied to claims of implied bias, under which the court analyzes the facts and decides whether, in general, "men under such circumstances ought to be considered as capable of hearing fairly and of deciding impartially."[52] Instead, the majority dismissed the defendant's implied bias claim by holding that the sixth amendment is triggered only by proof of *actual* bias. "This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."[53] The Court made it clear that a defendant can only prove such "actual bias" by proving subjective bias: "Respondent correctly notes that determinations made in [this] type [of] hearing will frequently turn upon the testimony of the juror in question . . . ."[54] Since Smith did not admit to bias at the hearing before the New York trial court and Phillips could not provide independent evidence of Smith's prejudice, the Supreme Court held that Phillips had not established a violation of the sixth amendment.[55]

The remainder of the majority's analysis followed tautologically from its assumption that an evidentiary hearing will adequately reveal any prejudice on the part of a juror. Justice Rehnquist pointed out that the resolution of prosecutorial misconduct claims turns on the fairness of the trial rather than the culpability of the prosecutor.[56] Since an evidentiary hearing will adequately reveal juror prejudice, and since Phillips's hearing did not reveal such prejudice, Smith's conduct did not harm Phillips. Because Smith's actions did not affect the fairness of the trial,

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50 102 S. Ct. 940 (1982).

51 102 S. Ct. at 945. Chief Justice Burger and Justices White, Blackmun, and Powell joined Justice Rehnquist's majority opinion.

52 United States v. Burr, 25 F. Cas. 49, 51 (C.C.D. Va. 1807) (No. 14,692g).

53 102 S. Ct. at 945. Justice Rehnquist cited five cases in support of his claim that a hearing into actual bias is an adequate remedy for claims of juror impartiality: Chandler v. Florida, 449 U.S. 560 (1981); Remmer v. United States, 347 U.S. 227 (1954); Dennis v. United States, 339 U.S. 162 (1950); Frazier v. United States, 335 U.S. 497 (1948); United States v. Wood, 299 U.S. 123 (1936). For a discussion of these cases, see *infra* text accompanying notes 83-105.

54 102 S. Ct. at 946 n.7. Defense counsel asserted that frequently the only evidence of a juror's state of mind is the juror's own assertions and that any denial of bias by a juror is inherently suspect. The Court responded that " 'one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.' " *Id.* (quoting Dennis v. United States, 339 U.S. 162, 171 (1954)).

55 102 S. Ct. at 945-46.

56 *Id.* at 947 (citing United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963)).

the proseuctors' failure to inform the court of Smith's application could not affect the fairness of the trial and could not, therefore, be the basis of a valid claim of prosecutorial misconduct.[57]

Justice O'Connor concurred in the majority's opinion on the understanding that it did not preclude the use of the implied bias doctrine in appropriate circumstances.[58] While she agreed that a hearing would adequately reveal juror bias in most cases, including *Phillips*, she was concerned that a hearing may not show juror prejudice in "some extreme situations."[59] According to Justice O'Connor, the sixth amendment requires that a juror be deemed biased as a matter of law when, for example, a juror is an employee of the prosecutor, or when a juror is a relative of one of the participants in the trial, or when a juror was a witness or somehow involved in the crime.[60] She pointed out that no previous case precluded the use of the implied bias doctrine in appropriate situations.[61]

Justices Brennan and Stevens joined Justice Marshall in dissent. Justice Marshall argued that, "where the probability of bias is very high, and where the evidence adduced at a hearing can offer little assurance that prejudice does not exist, the juror should be deemed biased as a matter of law."[62] According to Justice Marshall, the *Phillips* case presented a situation calling for the application of the implied bias doctrine. The probability of Smith's bias in favor of the prosecution was

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[57] *Id.* at 948. The majority also noted that the trial court's finding that there was no evidence of actual bias is presumptively correct under 28 U.S.C. § 2254(d) (1976) since this was a habeas corpus action. *Id.* at 946 (citing Sumner v. Mata, 449 U.S. 539 (1981)).

[58] *Id.* at 948 (O'Connor, J., concurring).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 949 (O'Connor, J., concurring) (citing Leonard v. United States, 378 U.S. 544 (1964)). Justice O'Connor also pointed out that while 28 U.S.C. § 2254(d) (1976) does provide that a state court's findings of facts are presumptively correct in habeas corpus proceedings, the statute also lists exceptions to the general rule:

> [A] determination after a hearing on the merits of a factual issue, made by a State court of component jurisdiction . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .
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> . . . .
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> . . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; [or]
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> (7) that the applicant was otherwise denied due process of law in the State court proceeding . . . .

102 S. Ct. at 948 n.1 (O'Connor, J., concurring). In those unusual circumstances in which a hearing is inadequate to discover bias, one of these exceptions may be utilized to overcome the presumed correctness of a state court's finding that the juror was not biased. *Id.* (O'Connor, J., concurring). *See also id.* at 957 (Marshall, J., dissenting).

[62] *Id.* at 953 (Marshall, J., dissenting).

enhanced not only by his application to the prosecutor's office during the trial, but also by his vigorous pursuit of that position.[63] Justice Marshall also argued that it was unlikely that a post-trial evidentiary hearing would reveal any prejudice on the part of Smith. He pointed out that any juror is "unlikely to admit that he had been unable to weigh the evidence fairly."[64] A juror will be especially reluctant to admit bias, Justice Marshall continued, when the juror knows that it was his own misconduct which created the doubt as to his impartiality.[65]

Justice Marshall disagreed vehemently with the majority's assertion that the Court had "long held" that an evidentiary hearing is adequate to resolve *all* questions of juror bias.[66] He argued that the Court had previously employed the implied bias doctrine in those few situations in which the probability of bias was high and a hearing was not likely to reveal the bias.[67]

The dissent also would have affirmed the lower court decisions on the alternate ground that the prosecutors' misconduct deprived Phillips of due process of law. Justice Marshall assumed arguendo that the majority correctly interpreted *Brady* and *Agurs* to require a showing of prejudice.[68] According to the dissent, however, Phillips had suffered such prejudice when the prosecutors failed to disclose Smith's application before the jury retired to deliberate. Justice Marshall contended that if the prosecution had not withheld this information, the trial judge probably would have replaced Smith with an alternate juror.[69] The dis-

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63 *Id.* at 952 (Marshall, J., dissenting).

64 *Id.* at 953 (Marshall, J., dissenting).

65 *Id.* at 955 (Marshall, J., dissenting). The dissent found unworkable Justice O'Connor's distinction between employees of the prosecutor, to whom the implied bias doctrine should apply, and those applying for a position with the prosecutor's office, to whom the doctrine should not apply. Justice Marshall argued that when an applicant's job prospects are at stake he may be even more "anxious to please" than he would be if he had already secured the position. *Id.* at 953 n.8.

66 *Id.* at 955 (Marshall, J., dissenting).

67 *Id.* at 956-57 (Marshall, J., dissenting).

68 *Id.* at 957-58 (Marshall, J., dissenting). Prior Supreme Court decisions unquestionably support Justice Rehnquist's assertion that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Id.* at 947. In *Brady*, the Court focused upon the materiality of the withheld evidence. Brady v. Maryland, 373 U.S. at 87. In *Agurs* the Court noted:

> [T]he constitutional obligation is [not to be] measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. . . . Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

United States v. Agurs, 427 U.S. at 110 (citation omitted).

69 *Id.* at 958-59 (Marshall, J., dissenting). The Court substituted an alternate juror for

sent concluded by stating that "[i]f 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."[70]

III. CRITIQUE OF *SMITH V. PHILLIPS*

A. THE DISTINCTION BETWEEN "ACTUAL" AND "IMPLIED" BIAS

The majority in *Phillips* responded to the defendant's implied bias argument by holding that claims of implied bias are not cognizable under the sixth amendment guarantee to an impartial jury. The Supreme Court held that a defendant can establish a sixth amendment violation only by showing actual bias on the part of a juror.[71] A clear grasp of the distinction between "actual bias" and "implied bias" is thus essential both to an understanding of the radical step which the Supreme Court has taken in *Phillips* and to an evaluation of its statement that precedent dictated the result.[72] Although the concepts have been employed since the early 1800s, the labels "actual bias" and "implied bias" have arisen only within the last twenty years.

An inquiry into "actual bias" involves a determination of a juror's subjective state of mind,[73] which normally turns on the only possible evidence of a juror's psychological state—the juror's own admission or denial of bias.[74] The juror's testimony renders irrelevant indirect evidence of prejudice, such as a juror's relation to a party.[75] Furthermore, a finding of prejudice normally comes to an appellate court with a strong presumption of validity because it involves a credibility finding by the trial judge.[76] In contrast, inquiries into "implied bias" have involved an

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Bethel upon learning of his cooperation with the prosecution. *Id.* at 958 (Marshall, J., dissenting).

70 *Id.* at 960 (Marshall, J., dissenting) (quoting the majority opinion, 102 S. Ct. at 946).

71 *Id.* at 945.

72 *Id.*

73 *See* Phillips v. Smith, 485 F. Supp. at 1370 ("Actual bias may be said to exist where there is sufficient evidence of a juror's prejudicial state of mind."); BLACK'S LAW DICTIONARY 147 (rev. 5th ed. 1979) ("*Actual bias* consists in the existence of a state of mind on the part of the juror which satisfies the court, in the exercise of sound discretion, that the juror cannot try the issues impartially and without prejudice to the substantial rights of the party challenging.") (emphasis in original).

74 *See* Smith v. Phillips, 102 S. Ct. at 951-52 (Marshall, J., dissenting) ("[T]he majority . . . holds that the juror's simple assertion, after the verdict, that he was not biased sufficiently protects respondent's right to trial by an impartial jury."); *id.* at 946 n.7 ("Respondent correctly notes that determinations made in . . . [actual bias] hearings will frequently turn upon the testimony of the juror in question . . . ."); United States v. Haynes, 398 F.2d 980, 984 (2d Cir. 1968) ("[Actual] bias is based upon express proof, e.g., by a voir dire admission by the prospective juror of a state of mind prejudicial to a party's interest.").

75 *See supra* note 74.

76 In explaining why Smith's actions did not prevent him from reaching an impartial

objective determination of the verifiable facts surrounding a juror's relation to a party,[77] a determination which turned on whether the average man in the juror's situation could render an impartial verdict.[78] Thus, a juror's disclaimer of bias was of no consequence.[79] Finally, a finding of implied bias was normally reviewable by an appellate court as a question of law.

Prior to the Supreme Court's decision in *Phillips*, a defendant could show a violation of his right to an impartial jury by means of either the actual bias doctrine or the implied bias doctrine.[80] If a juror would not admit to bias when questioned by a judge, pre-*Phillips* decisions held that the defendant could still show a violation of his rights if the average

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verdict, the majority simply stated that "[t]he trial judge expressly so found." 102 S. Ct. at 948.

77 *See* United States v. Caldwell, 543 F.2d 1333, 1345-46 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976) ("[T]here are occasions upon which further questioning is needed to permit the trial court to make its own judgment of a juror's impartiality based on objective facts, rather than relying exclusively on the jurors' subjective determinations of whether they were prejudiced.").

78 *See* Irvin v. Dowd, 366 U.S. 717, 727 (1961) (in finding jurors impliedly biased despite their disclaimers, the Supreme Court noted that widespread adverse publicity was "so persistent that it unconsciously fights detachment from the mental processes of the average man"); Dennis v. United States, 339 U.S. 162, 176 (1950) (Black, J., dissenting); Tumey v. Ohio, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."); United States v. Haynes, 398 F.2d at 984; United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (a person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice"); Phillips v. Smith, 485 F. Supp. at 1370. *See also* BLACK'S LAW DICTIONARY 124 (rev. 5th ed. 1979) ("average man test").

79 *See supra* note 78. *See also* United States v. Haynes, 398 F.2d at 984 ("The question of implied bias remains. In determining whether a prospective juror should be excluded on this ground his statements . . . are totally irrevelant . . . ."); Phillips v. Smith, 485 F. Supp. at 1370 ("Where . . . a juror . . . is a party to a relationship which, as a matter of law, raises the presumption of partiality . . . [t]his presumption is conclusive and may not be defeated by affirmations of neutrality by the juror.").

80 For examples of federal circuit court opinions which have recognized the applicability of both the implied bias doctrine and the actual bias doctrine to the right to an impartial jury, without necessarily referring to these concepts by name, see Goins v. McKeen, 605 F.2d 947, 951 (6th Cir. 1979); United States v. Haldeman, 559 F.2d 31, 60 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); United States v. Caldwell, 543 F.2d 1333, 1345-46 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976); United States *ex rel.* Doggett v. Yeager, 472 F.2d 229, 236-39 (3d Cir. 1973); Mikus v. United States, 433 F.2d 719, 723 (2d Cir. 1970); United States v. Haynes, 398 F.2d 980, 983-84 (2d Cir. 1968); Jackson v. United States, 395 F.2d 615, 618 (D.C. Cir. 1968); Photostat Corp. v. Ball, 338 F.2d 783, 785 (10th Cir. 1964); United States *ex rel.* Bloeth v. Denno, 313 F.2d 364, 372-73 (2d Cir. 1963) (en banc). Justice Marshall also cites a number of cases which suggest that the implied bias doctrine should be the basis for granting a new trial in certain situations. 102 S. Ct. at 957 n.19 (Marshall, J., dissenting). *But see* United States v. Kelton, 518 F.2d 531, 533 (8th Cir. 1975) (rejects the applicability of the implied bias doctrine).

man in the juror's circumstances would be incapable of rendering a fair verdict.[81] Because these decisions directly contradict the majority's statement that "the [only] remedy for allegations of juror partiality is a[n] . . . opportunity to prove actual bias,"[82] an examination of the precedents marshalled in support of the statement is in order.

B. CASES RELIED UPON BY THE MAJORITY

The majority first relied upon *Remmer v. United States*.[83] In *Remmer I*, the defendant claimed that a juror was biased against him because someone had approached the juror with a bribe for a favorable verdict.[84] The majority in *Phillips* made much of the fact that the Supreme Court remanded the case for a hearing into the juror's possible prejudice. In so doing, it implied that *Remmer I* demonstrates that the remedy for claims of juror prejudice is a hearing into actual bias.[85] The majority failed to mention, however, that the Court's subsequent resolution of this case in *Remmer II*[86] shows that *Remmer I* did not hold that a defendant can only prove a violation of his right to an impartial jury by proving actual juror bias. At the conclusion of the hearing on remand, the trial judge found that the juror was not biased, relying upon the juror's testimony to that effect.[87] If the defendant could have succeeded only proving actual juror bias, this finding would have ended the case.[88] Yet, in *Remmer II*, the Supreme Court held that the defendant's right to an impartial jury had been violated, and it ordered a new trial. The Supreme Court stated: "We think this evidence . . . reveals such a state of facts that neither Mr. Smith [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror."[89] In short, without explicitly identifying it as such, the Court in *Remmer II* applied the implied bias doctrine to find a violation of the right to an impartial jury.[90]

Similarly, the next group of cases relied upon by the majority support the viability of the implied bias doctrine and does not establish that

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[81] Rather than relying upon the traditional "average man" formulation, Justice Marshall argues that bias should be implied as a matter of law "only when the probability of bias is particularly great, and when an evidentiary hearing is particularly unlikely to reveal that bias." 102 S. Ct. at 955 n.14 (Marshall, J., dissenting). The practical difference between the two formulations is uncertain.

[82] *Id.* at 945.

[83] 347 U.S. 227 (1954) *(Remmer I)*.

[84] *Id.* at 228.

[85] 102 S. Ct. at 945.

[86] Remmer v. United States, 350 U.S. 377 (1956) *(Remmer II)*.

[87] United States v. Remmer, 122 F. Supp. 673, 675 (D. Nev. 1954).

[88] *See supra* notes 73-76 and accompanying text.

[89] 350 U.S. at 381-82.

[90] *See supra* notes 77-80 and accompanying text.

a defendant's only remedy is to prove actual juror bias. Three cases—*United States v. Wood*,[91] *Frazier v. United States*,[92] and *Dennis v. United States*[93]—reversed the Court's earlier decision in *Crawford v. United States*[94] that an employee of any branch of the federal government should be declared impliedly biased whenever the federal government is a party to a suit.[95] These cases, however, only struck down the implied bias doctrine as defined in the narrow sense that bias will be implied from the mere fact of governmental employment in cases involving the federal government.[96] For example, one of these cases held that a defendant convicted of larceny in the District of Columbia could not rely upon *Crawford*'s implied biased doctrine to have a Treasury Department clerk declared biased as a matter of law.[97]

The cases did not strike down the implied bias doctrine as it is presently understood. They declared that a defendant has a right to prove "actual bias,"[98] specifically defining "actual bias" to include bias arising from suspicious circumstances:

> The phrase "actual bias" is used in this opinion as it was in the *Wood* case. The *Wood* opinion . . . regarded *"actual bias" . . . as including not only prejudice in the subjective sense but also such as might be thought implicitly to arise "in view of the nature or circumstances of his employment*, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise."[99]

In holding that a defendant has a right to show "actual bias" as thus defined, *Wood*, *Frazier*, and *Dennis* allow a defendant to show juror bias from the particular circumstances surrounding a juror's relation to a

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91 299 U.S. 123 (1936).

92 335 U.S. 497 (1948).

93 339 U.S. 162 (1950).

94 212 U.S. 183 (1909), *overruled in part*, 299 U.S. 123 (1936).

95 Between the *Crawford* and *Wood* decisions, Congress passed an act that removed the per se qualification of all government employees from jury service in suits involving the federal government. Act of Congress of August 22, 1935, D.C. CODE ENCYCL. § 11-2302 (West 1966). Congress passed this legislation to overcome the problems that the *Crawford* decision had caused in the District of Columbia. As of 1935, the *Crawford* ruling disqualified over 44% of the otherwise qualified jurors in the nation's capital whenever the federal government was a party to the suit. Frazier v. United States, 335 U.S. 497, 508 n.17 (1948). In view of the "public need," the *Wood* Court upheld the constitutionality of the act. 299 U.S. at 148-49.

96 *See* United States v. Wood, 299 U.S. at 141 ("[W]e are unable to accept the ruling in the *Crawford* case . . . that the mere fact of a governmental employment, unrelated to the particular issues or circumstances of a criminal prosecution, created an absolute disqualification to serve as a juror in a criminal case."). *See also* Dennis v. United States, 339 U.S. at 172; Frazier v. United States, 335 U.S. at 508 n.17.

97 United States v. Wood, 299 U.S. 123 (1936).

98 339 U.S. at 171-72; 335 U.S. at 510; 299 U.S. at 133.

99 Frazier v. United States, 335 U.S. at 510 n.19 (quoting United States v. Wood, 299 U.S. at 133-34) (emphasis added).

party.[100]

Chandler v. Florida[101] is the final case relied upon by the majority to establish the proposition that the Court had "long held" that a defendant can show a violation of his right to an impartial jury only by proving actual juror bias. The Supreme Court in *Chandler* again did not use the phrases "implied bias" and "actual bias." If the opinion is read in terms of these concepts, however, it becomes evident that the case does not support the majority's position.

The defendant in *Chandler* argued that the sixth amendment commands an absolute ban on all broadcast coverage of a defendant's criminal trial unless the defendant consents to the publicity.[102] In analyzing this claim, the Supreme Court in *Chandler* applied the principle of the implied bias doctrine: if broadcasting per se "invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple: prohibition of broadcast coverage of trials would be required."[103] The Court did not find the broadcasting would invariably prejudice jurors, but it did note that defendants remained free to show prejudice from particular circumstances, such as those present in a "Roman circus" or a "Yankee Stadium" atmosphere.[104] The Court also expressly disavowed reliance on the jurors' testimony that the broadcasting would not affect their verdict.[105] Thus, the Court in *Chandler* applied the principles of the implied bias doctrine rather than holding that the doctrine has no vitality, as the majority in *Phillips* implied.

C. THE WISDOM OF ABANDONING THE "IMPLIED BIAS" DOCTRINE

The majority in *Phillips* did not articulate a rationale for its position that the opportunity to prove actual bias adequately protects a defendant's right to an impartial jury. Rather, the majority relied upon precedents which do not support its conclusion.[106] The majority makes hollow the guarantee of the sixth amendment when it conditions a defendant's right to an impartial jury upon the statements of the allegedly biased juror. If the circumstances indicate prejudice, the sixth amendment should require that the juror be deemed prejudiced as a matter of law. A number of opinions support this argument.

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100 *See* 49 MICH. L. REV. 130, 132 & n.15 (1950).

101 449 U.S. 560 (1981).

102 *Id.* at 574-75.

103 *Id.* at 575.

104 *Id.* at 582.

105 *Id.* at 581.

106 *See supra* text accompanying notes 83-105.

In 1807, Chief Justice Marshall rejected the position of the *Phillips* majority in the trial of Aaron Burr:

> The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a *suspicion* of partiality. The relationship may be remote; the person may never have seen the party; *he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury* because in general persons in a similar situation would feel prejudice.[107]

Chief Justice Marshall first formulated what is now referred to as the "average man" test to be applied when a juror's impartiality is at issue: "Those who try the impartiality of a juror ought to . . . determine, according to their best judgment, whether in general men under such circumstances ought to be considered as capable of hearing fairly . . . the testimony which may be offered to them . . . ."[108]

In *Crawford v. United States*, the Supreme Court unanimously reaffirmed the applicability of the implied bias doctrine in some situations:

> *Bias* or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it *might exist in the mind of one* (on account of his relations with one of the parties) *who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence*. The law therefore most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.[109]

Justices Black and Frankfurter next confronted the issue of implied bias in their dissenting opinions in *Dennis*. Justice Black pointed out: "The test of bias . . . is not what the particular juror believes he could do."[110] Justice Frankfurter went further and explained the rationale for what is now known as the "implied bias" doctrine:

> The constitutional command for trial by an "impartial jury" casts upon the judiciary the exercise of judgment in determining the circum-

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107 United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (No. 14,692g) (emphasis added).

108 *Id.* at 51. Chief Justice Marshall prefaced his opinion with the following observation:

> The great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring their verdict according to that testimony, and according to the law arising on it. This is not to be expected, certainly the law does not expect it, where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion that the person whom they are to try is guilty or innocent of the charge alleged against him.

Id. at 50.

109 212 U.S. 183, 196 (1909) (emphasis added), *overruled on other grounds*, United States v. Wood, 299 U.S. 123 (1936).

110 339 U.S. at 176 (Black, J., dissenting).

> stances which preclude that free, fearless and disinterested capacity in analyzing evidence which is indispensable if jurymen are to deal impartially with an accusation. The judgment that a court must thus exercise in finding "disqualification for bias" of persons who belong to a particular class is a psychological judgment. It is a judgment founded on human experience and not on technical learning . . . .
>
> The reason for disqualifying a whole class on the ground of bias is the law's recognition that if the circumstances of that class in the run of instances are likely to generate bias, consciously or unconsciously, it would be a hopeless endeavor to search out the impact of these circumstances on the mind and judgment of a particular individual.[111]

In *Irvin v. Dodd*,[112] a decision post-dating four of the five decisions relied upon by the majority in *Phillips*, the Supreme Court unanimously applied the "implied bias" doctrine *sub silento* to overturn the conviction of a defendant. The defendant in *Irvin* was tried in a community highly prejudiced against him because of massive pre-trial publicity. The trial judge personally examined each member of the jury, and each juror indicated that he could be impartial.[113] Although the defendant made no showing of "actual bias," the Court declared his conviction void. "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."[114] "[A]ccounting for the frailties of human nature—we can only say that in light of the circumstances here the finding of impartiality does not meet constitutional standards."[115]

Similarly, in *Leonard v. United States*,[116] the Supreme Court agreed with the Solicitor General that certain individuals should be "automatically disqualified" from serving as jurors.[117] The defendant in *Leonard* received two separate trials for closely related crimes. At the conclusion of the first trial, the jury announced its guilty verdict in the presence of five jurors who were to sit on the jury in the second trial. The Court reversed the second jury's finding that the defendant was guilty, holding that the procedure followed by the district court was plainly erroneous.[118] In *Turner v. Louisiana*,[119] the Court once again overturned a conviction as violative of the sixth amendment right to an impartial jury although the defendant produced no evidence of the jury's actual

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111 *Id.* at 181 (Frankfurter, J., dissenting). *See also id.* at 175-81 (Black, J., dissenting).

112 366 U.S. 717 (1961).

113 *Id.* at 724.

114 *Id.* at 728.

115 *Id.* at 727-28.

116 378 U.S. 544 (1964) (per curiam).

117 *Id.* at 545.

118 *Id.*

119 379 U.S. 466 (1965).

bias.[120] The *Turner* Court decided that "it would be blinking reality not to recognize the extreme prejudice *inherent* in [a] continual association throughout the trial between the jurors and . . . two key witnesses for the prosecution."[121]

Thus, the majority in *Phillips* took issue with the wisdom of many prior opinions of the Supreme Court when it decided to take the unprecedented step of abolishing the implied bias doctrine. Perhaps the judicial safeguards of voir dire and peremptory challenges eliminate the need for the doctrine in most cases, since these safeguards themselves help to ensure the impartiality of a jury.[122] *Phillips*, however, shows that these safeguards are far from infallible. During voir dire, Phillips's counsel asked juror Smith about his future employment plans. Smith responded that he planned to obtain overseas employment with the Federal Drug Enforcement Agency.[123] There was nothing more that Phillips's counsel could have asked at that time regarding Smith's bias. It was impossible for the defendant to elicit the prejudicial circumstances during voir dire, and hence to have reason to exercise a peremptory challenge, since Smith had not yet applied for the position with the District Attorney's office.

IV. CONCLUSION

The Supreme Court's decision to abandon the implied bias doctrine as a safeguard to the right to an impartial jury was not dictated by precedent. Indeed, prior opinions uniformly argued for the position that the doctrine served a necessary role in protecting sixth amendment rights of defendants. If the Supreme Court had applied the doctrine to the facts in *Phillips*, it may well have ordered a new trial. Any judgment "founded upon human experience"[124] would conclude that a juror vigorously applying for a position with the office prosecuting the defendant may well favor the position of his prospective employer.[125] Because of

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120 *Id.* at 474 (Clark, J., dissenting).

121 *Id.* at 473.

122 *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 219 (1965).

123 87 Misc. 2d at 619, 384 N.Y.S.2d at 911.

124 Dennis v. United States, 339 U.S. at 181 (Frankfurter, J., dissenting). *See supra* text accompanying note 111.

125 *Cf.* Martin v. State Farm Mut. Auto. Ins. Co., 392 So. 2d 11 (Fla. Dist. Ct. App. 1980) (employee of hospital where defendant was president, chief of staff, and member of board of directors declared impliedly biased, despite employee's assertions to the contrary); Haak v. State, — Ind. —, 417 N.E.2d 321 (1981) (wife of man who accepted position with district attorney's office which was prosecuting defendant held impliedly biased, despite her disclaimers); State v. Simmons, 390 So. 2d 1317 (La. 1980) (deputy sheriff who worked closely with district attorney's office impliedly biased, despite disclaimers to the contrary); People v. Branch, 59 A.D.2d 459, 399 N.Y.S.2d 930 (N.Y. App. Div. 1977), *aff'd*, 49 N.Y.2d 645, 389 N.E.2d 467, 415 N.Y.S.2d 985 (1979) (part-time police officer who in the past worked profes-

this truism, Phillips's conviction should have been reversed as violative of the sixth amendment.

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sionally with the presenting prosecutor deemed impliedly biased in criminal case, despite disclaimers).