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# CONSTITUTIONAL LAW—DUE PROCESS SAFEGUARDING THE RIGHT TO AN IMPARTIAL JURY: THE ADEQUACY OF POST-TRIAL HEARINGS

## *Smith v. Phillips*

### I. INTRODUCTION

“Due process does not require a new trial every time a juror has been placed in a potentially compromising situation.”<sup>1</sup> With this spirit the Supreme Court rendered its opinion in the case of *Smith v. Phillips*.<sup>2</sup>

In the *Smith* case, during the trial, a juror applied to the prosecutor's office for a job as an investigator, but the prosecutor did not reveal this to the trial court or the respondent until several weeks after the jury returned its verdict. The respondent moved to set aside the verdict. A hearing was held, but relief was denied.<sup>3</sup> Subsequently, the respondent obtained *habeas corpus* relief<sup>4</sup> in the United States District Court,<sup>5</sup> and the United States Court of Appeals affirmed.<sup>6</sup> But the Supreme Court, noting that federal courts have no supervisory authority over state proceedings, reversed.<sup>7</sup> *Held*: due process adequately protects the right to an impartial jury upon alleged trial misconduct by requiring a post-trial hearing to determine if the defendant was prejudiced thereby.<sup>8</sup>

### II. BACKGROUND

Since its recognition in this country,<sup>9</sup> the right to a trial by jury<sup>10</sup> has been regarded as a “basic and fundamental feature” of American jurisprudence.<sup>11</sup> As a progeny of criminal trial proceedings, the right to a jury trial guarantees the criminally accused a fair trial by a panel of impartial jurors.<sup>12</sup> The courts have gone to great lengths to protect this right, in a broad variety

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1. *Smith v. Phillips*, 102 S. Ct. 940, 946 (1982).

2. 102 S. Ct. 940 (1982).

3. The trial judge concluded beyond a reasonable doubt that “the events giving rise to the motion did not influence the verdict.” *People v. Phillips*, 87 Misc. 2d 613, 614, 384 N.Y.2d 906, 918 (1975), *aff'd*, 52 A.D.2d 758 (1976), *aff'd*, 39 N.Y.2d 949 (1976).

4. A federal statutory remedy used to release prisoners unlawfully detained by the states. See 28 U.S.C. section 2241 (1971).

5. *Phillips v. Smith*, 485 F. Supp. 1365 (1980).

6. *Smith v. Phillips*, 632 F.2d 1019 (2d Cir. 1980).

7. *Smith*, 102 S. Ct. 940 (1982).

8. *Id.*

9. Trial by jury is of ancient and somewhat doubtful origin having been introduced into this country by the English colonists who considered it a right under English law. See generally Grooms, *Origin and Development of Trial by Jury*, 26 ALA. LAW. 162 (1965).

10. The right to a trial by jury is found in U.S. CONST. amend. VI.

11. See *Bailey v. Central Railway*, 319 U.S. 350, 354 (1943).

12. The sixth amendment to the United States Constitution guarantees that a defendant in a criminal prosecution has a right to an impartial jury. See *Irvin v. Dowd*, 366 U.S. 717 (1961).

of contexts,<sup>13</sup> under mandate of due process.<sup>14</sup>

The mechanisms utilized to safeguard the right to an impartial jury vary as much as the particular evils that due process seeks to prevent.<sup>15</sup> One of the varied mechanisms used to remedy trial misconduct—the granting of a new trial—has gained increasing attention from the Supreme Court.<sup>16</sup> Furthermore, the Court has shown a preference for permitting the trial judge who actually tried the case to remedy the situation.<sup>17</sup>

Notwithstanding the Court's preference for remedying wrongdoings by the trial judge, recognition has been given to the fact that certain misconduct necessarily has been remedied by ordering a new trial.<sup>18</sup>

### A. *Ascertaining Juror Bias*

Juror bias arises from such a variety of causes and depends so much on the circumstances of the particular case that no definite rule has been laid down for its determination.<sup>19</sup> But the major inquiry has been whether the juror has acted impartially in reaching a decision.<sup>20</sup>

In the leading case of *United States v. Woods*,<sup>21</sup> the Supreme Court recognized the perplexity involved in determining juror partiality. After acknowledging that the Constitutional requirement of an impartial jury "respects substance and essence,"<sup>22</sup> the court stated: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure."<sup>23</sup> Accordingly, the Court has used broad

13. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522 (1975) (the court striking down a state rule excluding women from compulsory jury service); *Ham v. South Carolina*, 409 U.S. 524 (1973) (holding that a trial judge may not deny a black defendant the opportunity to question prospective jurors on the subject of racial prejudice); *Peters v. Kiff*, 407 U.S. 493 (1972) (holding that a selection procedure that resulted in systematic exclusion of blacks is unconstitutional); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (the court reversing the trial court's denial of change in venue when entire community had seen the defendant confess to the crime).

14. U.S. CONST. amends. V, XIV.

15. *See, e.g.*, *Leonard v. United States*, 378 U.S. 544 (1964) (per curiam) (juror automatically disqualified after hearing verdict against the defendant in a prior trial); *Remmer v. United States*, 347 U.S. 227 (1954) (post trial hearing ordered to determine whether a juror was biased as a result of his desire to work for prosecutor); *United States v. Bando*, 244 F.2d 833 (2nd Cir. 1956) (holding that challenge for cause and preemptory challenge are primary means for securing an impartial jury), *cert. denied*, 355 U.S. 844 (1957).

16. *See generally* *Cupp v. Naughten*, 414 U.S. 141 (1973) (suggested that new trials have been improperly granted by federal courts in reviewing criminal convictions).

17. *See generally* *Remmer v. United States*, 347 U.S. 227 (1954) (court refusing to grant a new trial but ordering the trial judge to hold a hearing to determine if new trial is necessary).

18. *See* *Rideau v. Louisiana*, 373 U.S. 723 (1963) (trial court's failure to grant request for change in venue when entire community had heard confession necessarily warranted new trial); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (New trial granted when trial judge automatically excluded jurors who had scruples against capital punishment). Lower federal courts have also consistently ordered new trials to remedy trial misconduct. *See, e.g.*, *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981) (new trial granted where juror conceals information that would have resulted in disqualification for cause); *see also* *United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977) (new trial granted in robbery trial where two of jurors worked for bank that had been robbed).

19. *See generally* Note, *Community Hostility and Right to an Impartial Jury*, 60 COLUM. L. REV. 349 (1960).

20. *See* *Chandler v. Florida*, 449 U.S. 560 (1981).

21. 299 U.S. 123 (1936).

22. *Id.* at 145.

23. *Id.*

discretion in developing procedures used to ascertain bias.<sup>24</sup>

In reviewing claims of juror bias, the courts have distinguished between those actions which involve claims of actual bias and those which involve claims of implied bias,<sup>25</sup> while many states have enacted "implied bias statutes" that will automatically disqualify a juror.<sup>26</sup> Actual bias has been said to exist where there is sufficient evidence of a juror's prejudicial state of mind.<sup>27</sup> Where there is insufficient evidence of actual juror bias, the courts have found that a juror occupies a status or stands in a relationship to a party which as a matter of law raises the presumption of partiality.<sup>28</sup> It is this presumption that has led the courts to develop the implied bias rule.

Early common law provides the foundation for employing the test for implied bias<sup>29</sup> utilized by federal courts,<sup>30</sup> the average man test. In the landmark case of *Tumey v. Ohio*,<sup>31</sup> the Supreme Court explained the average man test as follows:

Every procedure which would offer a possible temptation to the average man 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.<sup>32</sup>

Although the *Tumey* case arose from accusations of judge bias, this statement has become the foundation for determining bias in criminal proceedings.<sup>33</sup>

Special attention has been given to a series of cases concerning government employment by a juror.<sup>34</sup> In these cases, the Supreme Court has made it clear that government employment of a juror, unrelated to the circumstances of a criminal prosecution, cannot raise a presumption of juror bias.

In *Woods*,<sup>35</sup> for example, the Court refused to imply bias where the only pertinent allegation was that three of the jurors were employed by the government. The Court reasoned that government employees have no different interest in a criminal matter than that of "any citizen who would like

24. See Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349, 354 (1960).

25. See, e.g., *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981).

26. See, e.g., CAL. PENAL CODE section 1074 (West 1970) ("Causes for Challenge for Implied Bias"); IDAHO CODE section 19-2020 (Grounds of Challenge for Implied Bias); N.D. CENT. CODE section 29-17-36 ("Matters Constituting Implied Bias Specified"). Several of these statutes have limited the implied bias doctrine to those situations specifically enumerated within the statute. See, e.g., *Robinson v. Terry*, 16 Okl. 241, 85 p. 451 (1906) (stating that a challenge for implied bias may be taken for the several causes set forth in the Oklahoma statute and for no other grounds).

27. See *Mikus v. United States*, 433 F.2d 719 (1970).

28. E.g., *United States v. Haynes*, 398 F.2d 980 (2nd Cir. 1968), cert. denied, 393 U.S. 1120 (1969). But see *United States v. Brown*, 644 F.2d 101 (2nd Cir. 1981) (court refuses to create "a set of unreasonably constricting presumptions that jurors be excused due to certain occupational and other special relationship where there is no showing of actual bias or prejudice") (quoting *Mikus v. United States*, 433 F.2d 719, 724 (2nd Cir. 1970)).

29. See *United States v. Burr*, 25 F. Cas. 50 (CC Va 1807) (No. 14,692).

30. See *Dennis v. United States*, 339 U.S. 162 (1950) (Black, J., dissenting).

31. 273 U.S. 510 (1927).

32. *Id.* at 532.

33. See generally *In re Murchison*, 349 U.S. 133 (1955); *In re Oliver*, 333 U.S. 257 (1948).

34. See, e.g., *Dennis*, 339 U.S. 162; *Frazier v. United States*, 335 U.S. 497 (1948); *Woods*, 299 U.S. 123.

35. *Woods*, 299 U.S. 123 (1936).

to see crime properly punished."<sup>36</sup> Nevertheless, the Court implied that exceptional circumstances may exist which would warrant a finding of implied bias based upon the employment affiliation of a juror.<sup>37</sup>

Another example of the Supreme Court's reluctance to imply bias can be seen in the leading case of *Remmer v. United States*.<sup>38</sup> In *Remmer* a juror in a federal criminal trial was approached by someone offering money in exchange for a verdict. Upon informing the trial judge, the juror was interviewed by the FBI.<sup>39</sup> The trial court, without holding a requested hearing, denied the defendant's motion for a new trial. Here, the Court recognized a rebuttable presumption of prejudice,<sup>40</sup> but held that the appropriate remedy was to order the trial court to hold a hearing to determine the impact upon the juror and whether the misconduct was prejudicial.<sup>41</sup>

The most liberal reading of the Court's holding in *Remmer* would lead to the conclusion that upon raising a presumption of prejudice, the appropriate remedy would be to hold a hearing to determine prejudicial effect rather than to imply bias. However, the Court failed to explain its reasoning in raising a rebuttable presumption rather than a conclusive presumption, leaving unclear the precise reach of its analysis.

Subsequently, the court implicitly applied the implied bias rule in *Leonard v. United States*.<sup>42</sup> In *Leonard* the Court held that prospective jurors who had heard the trial court announce a guilty verdict against the same defendant in the first trial should automatically be disqualified from sitting as jurors in a second trial on substantially similar charges.<sup>43</sup> Accordingly, the Court remanded the case for a new trial rather than raising a rebuttable presumption as it did in *Remmer*. The Court never addressed the question of when bias is to be presumed in *Leonard*, thereby leaving its holding applicable to its peculiar set of facts but further endorsing the implied bias rule.

Together *Woods*, *Remmer*, and *Leonard* demonstrate the difficulty with which the Court has had in ascertaining bias and formulating guidelines to safeguard jury impartiality. Reading the rules announced in them *in pari materia*,<sup>44</sup> one may conclude that in cases of alleged juror bias after rendition of a verdict, the appropriate remedy is to have the trial judge hold a hearing to determine whether the juror was actually biased unless the nature and circumstances of the events are so extreme that the law conclusively presumes bias and requires the granting of a new trial.

## B. *Prosecutor's Duty to Disclose*

The Constitutional duty of a prosecutor to disclose evidence to an accused has been a recurring issue for the Supreme Court and the subject of a

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36. *Id.* at 149.

37. *Id.* at 150; accord *Frazier*, 335 U.S. at 510.

38. 347 U.S. 227 (1954).

39. Neither the trial judge nor the prosecutor informed the defendant of the incident, and he and his counsel first learned of the matter by reading it in the newspaper. *See id.* at 228.

40. 347 U.S. at 229.

41. *Id.* at 330.

42. 378 U.S. 544 (1964) (per curiam).

43. *Id.* at 545.

44. A latin phrase meaning "construed together upon the same matter or subject." BLACK'S LAW DICTIONARY 711 (rev. 5th ed. 1979).

great deal of legal commentary.<sup>45</sup> Early cases dealing with the disclosure of evidence by the prosecutor dealt primarily with situations involving the prosecutor's use of known perjured testimony to obtain a conviction.<sup>46</sup> Such prosecutorial misconduct was held to be inconsistent with the concept of a fair trial and to constitute a denial of due process.<sup>47</sup> The focus in these cases was on the misconduct of the prosecutor rather than the harm suffered by the accused.<sup>48</sup>

Recently, the requirement of disclosure which the due process clause imposes on a prosecutor has been dealt with in an analogous context in the line of cases commencing with *Brady v. Maryland*.<sup>49</sup> In the landmark case of *Brady*, the Supreme Court announced the new doctrine to be applied in cases of prosecutorial suppression of evidence favorable to the accused in a criminal trial. The Court held that a prosecutor's suppression of evidence favorable to the accused violates due process where "the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor."<sup>50</sup>

The *Brady* test no longer accepts the earlier view<sup>51</sup> that prosecutorial misconduct alone denies the accused a fair trial in violation of due process. The thrust of the Court's holding in *Brady* is that only the suppression of material evidence requires the granting of a new trial.

The rule enunciated in *Brady* left open the question of what constitutes materiality. In *Giglio v. United States*,<sup>52</sup> the Court in applying the test set forth in *Brady* stated that "a new trial is required if the false testimony could in any reasonable likelihood have affected the judgement of the jury."<sup>53</sup> However, the Court appears to have rejected this statement in the case of *United States v. Agurs*<sup>54</sup> by specifically refusing to accept a similar test applied by the court of appeals in *Agurs*.<sup>55</sup>

In rejecting the test applied by the court of appeals, the Court stated: "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish materiality in the constitutional sense."<sup>56</sup> Accordingly, the Court ruled that the proper test in determining materiality to impose the constitu-

45. See, e.g., *United States v. Agurs*, 427 U.S. 97 (1976); *Moore v. Illinois*, 408 U.S. 786 (1972); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); *Naupue v. Illinois*, 360 U.S. 264 (1957); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 313 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

46. See Note, *The Duty of the Prosecutor to Disclose Unrequested Evidence: United States v. Agurs*, 4 PEPPERDINE L. REV. 435, 435 n.2 (1977).

47. See *Mooney*, 294 U.S. 103; see also *Pyle*, 313 U.S. 213.

48. See generally *Mooney*, 294 U.S. 103 (discussing the court's distaste for wrongful suppression of evidence by the prosecution).

49. 373 U.S. 83 (1963).

50. See *Id.* at 87.

51. See generally Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense*, 74 YALE L.J. 136 (1964).

52. 405 U.S. 150 (1972).

53. *Id.* at 154.

54. *Agurs*, 427 U.S. 97 (1976).

55. The court of appeals applied the following test for determining materiality: "Whether the undisclosed evidence, if brought to the attention of the jury might have led the jury to entertain a reasonable doubt about the appellant's guilt." *Agurs*, 510 F.2d 1249, 1253 (D.C. Cir. 1975), *rev'd*, 427 U.S. 97 (1976).

56. *Agurs*, 427 U.S. at 109, 110.

tional duty on the prosecutor to disclose evidence is "whether the omitted evidence created a reasonable doubt that did not otherwise exist."<sup>57</sup>

The test recognized by the court in *Agurs* reflects an overriding concern with the justice of finding guilt.<sup>58</sup> Thus, the omission of evidence must be evaluated in context with the entire record, and if there is no reasonable doubt about guilt, the omission is not material.<sup>59</sup> Consistent with *Brady*, *Agurs* shows a judicial reluctance to grant a new trial upon failure of the prosecutor to disclose information to the accused unless the accused can show that he was prejudiced thereby, focusing primarily upon the resulting verdict rather than deficient procedures.

### III. DISCUSSION OF THE PRINCIPAL CASE

In the case of *Smith v. Phillips*,<sup>60</sup> the issue before the Court was whether a post-trial hearing, utilized to determine the existence of bias and prejudice, sufficiently safeguards the right to an impartial jury where there was both juror and prosecutorial misconduct.

The respondent was convicted by a New York state court on two counts of murder and one count of attempted murder. After trial he moved to vacate his conviction, asserting that the juror's and prosecutor's conduct warranted a new trial under New York law.<sup>61</sup>

The respondent's motion to vacate his conviction was based upon the fact that a juror submitted, during the trial, an application for employment as a major felony investigator in the prosecutor's office. The prosecuting attorneys concluded that there was no need to inform the trial court or the respondent, but the district attorney informed the court and the respondent several weeks after the jury rendered its verdict.

A hearing was held before the judge who presided over the trial.<sup>62</sup> Finding that the irregularities presented were harmless and did not contribute to the verdict, the judge denied the motion.<sup>63</sup> The respondent's conviction was later affirmed by the Appellate Division of the New York Supreme Court,<sup>64</sup> and the New York Court of Appeals denied leave to appeal.<sup>65</sup>

Upon exhausting remedies in the state of New York, respondent sought *habeas corpus* relief<sup>66</sup> in the United States District Court, contending that he had been denied due process of law by the juror's conduct. The district court did not find evidence of actual juror bias<sup>67</sup> but nevertheless imputed bias to the juror under the "average man test".<sup>68</sup> Subsequently, the United

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57. *Id.* at 112.

58. *Id.*

59. *Id.* The *Agurs* court observed that the trial judge considered the entire record and remained convinced that the defendant was guilty, thus, holding that he was not denied due process of law.

60. 102 S. Ct. 940 (1982).

61. N.Y. CRIM. PROC. LAW section 330.40 (McKinney 1971) provides for a hearing upon allegations of alleged trial misconduct.

62. *People v. Phillips*, 87 Misc. 2d 613, 384 N.Y.S.2d 906 (1975).

63. *Id.* at 614, 384 N.Y.S.2d at 918.

64. *People v. Phillips*, 52 A.D.2d 758 (1976).

65. *People v. Phillips*, 39 N.Y.2d 949 (1976).

66. 28 U.S.C. section 2241 (1971) empowers federal courts to grant habeas corpus relief.

67. *Phillips*, 485 F. Supp. at 1371.

68. *Id.* at 1372.

States Court of Appeals affirmed on the ground that the prosecutor's failure to disclose the juror's action denied the respondent a fair trial.<sup>69</sup>

The United States Supreme Court, in rejecting the analysis of the district court and the court of appeals, found that the hearing held by the trial judge sufficiently safeguarded the respondent's right to an impartial jury.<sup>70</sup> To support its conclusion, the Court proclaimed that the trial judge properly conducted a hearing to determine whether the respondent's right to an impartial jury was violated, that the finding of the trial judge that the respondent was not prejudiced is presumptively correct,<sup>71</sup> and that federal courts have no supervisory powers over state court proceedings.<sup>72</sup>

The Court specifically rejected the district court's holding that due process required the trial court to imply bias to the juror. In its rejection the court stated that it has long been held that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."<sup>73</sup>

In reviewing the court of appeals' holding that the prosecutor's failure to disclose the information warranted a new trial, the court reasoned that the respondent had not proved that he was prejudiced thereby; thus, the court of appeals would punish society for the prosecutor's misbehavior. The Court went further to point out that the court of appeals misread its prior decisions when it concluded that due process was violated even in the absence of prejudice.<sup>74</sup>

Justice Marshall, joined by Justices Brennan and Stevens, in a vigorous dissent,<sup>75</sup> would affirm both of the lower federal court's decisions. In Marshall's view, the trial court's "fact finding" was inherently unreliable,<sup>76</sup> thereby rendering the post trial hearing insufficient to safeguard the respondent's right to an impartial jury and a fair trial.

The Court, in reversing the lower federal courts, stated that absent a constitutional violation it was error for the courts to order a new trial.<sup>77</sup> The Court found that no such violation occurred in this instance. Therefore, the Court held that the respondent was not denied due process of law by neither the juror's nor the prosecutor's conduct.

69. *Smith v. Phillips*, 632 F.2d 1019 (2d Cir. 1980). The court of appeals reasoned:

To condone the withholding by the prosecutor of information casting doubt as to the impartiality of a juror, such as the fact that he has applied to the prosecutor for employment, would not be fair to a defendant and would ill serve to maintain public confidence in the integrity of the judicial process.

*Id.* at 1023.

70. *Smith*, 102 S. Ct. 940 (1982).

71. The presumption that findings made in a state court are correct is found in 28 U.S.C. section 2554(d).

72. *Smith*, 102 S. Ct. at 948.

73. *Id.* at 945.

74. The court of appeals concluded that due process is violated when the prosecutor's actions treat the defendant unfairly or "impugn" the integrity of the judicial process. See *Smith*, 632 F.2d at 1023 (2d Cir. 1980), *rev'd*, 102 S. Ct. 940 (1982).

75. 102 S. Ct. 940 (1982) (Marshall, J., dissenting).

76. *Smith*, *id.* at 957.

77. *Id.* at 948.



## IV. THE SMITH ANALYSIS

The Supreme Court's decision in *Smith v. Phillips* represents a trend of the limit federal supervision of state courts' criminal convictions.<sup>78</sup> This judicial trend operates at the risk of diminishing protection of one of the most priceless rights under the constitution—the right to an impartial jury.<sup>79</sup>

Although the Court's early decisions reflect a basic concern for safeguarding the right to an impartial jury,<sup>80</sup> this concern is now being confronted with the Court's unwillingness to permit federal courts to overturn jury verdicts in state courts' proceedings.<sup>81</sup> In confronting this dilemma, the *Smith* Court reasoned that a state trial judge is watchful enough to protect this constitutional right. Under this reasoning, the Court ignored its teachings on the difficulty that exist in determining the existence of juror bias and the inadequacy of a post-trial hearing in making that determination.<sup>82</sup>

The *Smith* Court relied heavily on its decision in *Remmer*<sup>83</sup> in which the Court read *Remmer* to hold that the remedy for allegations of juror partiality is a hearing which gives the defendant the opportunity to prove actual bias. Under this liberal reading of the *Remmer* decision, the *Smith* Court failed to analyze why the defendant was not granted a new trial. In *Remmer*, the Court apparently directed the district court to hold a hearing because the district court denied the defendant's motion for a new trial *ex parte*<sup>84</sup> and refused to hold a hearing. Moreover, the record before the Supreme Court was inadequate to make any decision on the issue, for the misconduct in question was not revealed until after the trial.<sup>85</sup>

Furthermore, to read the *Remmer* decision as holding that the sole due process remedy for alleged violations of the right to an impartial jury is to give the accused an opportunity to prove actual bias would be to read too much into that decision. Significantly, the *Remmer* Court never addressed the question of whether the court could imply bias, but it did raise a rebuttable presumption of prejudice.<sup>86</sup>

The Court's teaching, as evidenced in *Leonard v. United States*,<sup>87</sup> is that in appropriate circumstances the courts can imply bias to a juror where there is an unusually high probability that a hearing will not reveal that bias. Although the concurring opinion<sup>88</sup> by Justice O'Connor and the dissenting

78. The Supreme Court has stated that federal courts hold no supervisory powers over state courts. See *Chandler v. Florida*, 449 U.S. 560 (1981); *Cupp v. Naughten*, 414 U.S. 141 (1973).

79. See generally *Cupp*, 414 U.S. 141 (holding that even undesirable, or universally condemned conduct at trial may not warrant overturning a state conviction).

80. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

81. See generally *Cupp*, 414 U.S. 141 (holding that federal courts can no longer overturn a state conviction unless clearly in violation of the Constitution).

82. See generally *Woods*, 299 U.S. 123 (suggesting that implied bias may be applied in extreme circumstances).

83. *Remmer*, 347 U.S. 227 (1954).

84. A latin phrase meaning "one party" was present in court. BLACK'S LAW DICTIONARY 314 (rev. 5th ed. 1979).

85. The court stated that it did not know from the record of the case what actually transpired. *Remmer*, 347 U.S. 227, 229 (1954).

86. Cf. *Leonard v. United States*, 378 U.S. 544 (1964) (per curiam) (raising a conclusive presumption of juror bias upon trial misconduct).

87. *Id.*

88. *Id.* at 940 (O'Connor, J., Concurring).

opinion<sup>89</sup> by Justice Marshall relied heavily upon the *Leonard* decision to preserve the implied bias rule, *Leonard* could be read to apply only to federal court trials since the case was tried in the United States District Court—leaving the question of whether federal courts can impose an implied bias rule upon the states unanswered.<sup>90</sup>

The inadequacy of the *Leonard* opinion is that it failed to announce whether the actions involved violated due process or were merely “undesirable and erroneous.” Accordingly, the majority condones the use of an implied bias rule in the federal system<sup>91</sup> in that federal courts have supervisory powers over lower federal courts.<sup>92</sup> In failing to address the due process question, *Leonard* left out an important link needed to apply its analysis to the *Smith* case.

However, *Woods*<sup>93</sup> and *United States v. Frazier*<sup>94</sup> provide support for maintaining an implied bias rule under the mandate of due process. Although the court in these cases held that government employment is not a sufficient reason to imply juror bias, the court did imply that exceptional circumstances might exist which would warrant a finding of implied bias on the employment affiliation of a juror.<sup>95</sup>

The reasoning of the Court in *Woods* and *Frazier* is consistent with the average man test set forth in *Tumey*.<sup>96</sup> Under this test the average person employed by the government would not be held prejudiced against a defendant absent exceptional circumstances. However, as the district court in the instant case concluded, “prospective employment by a juror is not the type of circumstance addressed in *Frazier* and *Woods*.”<sup>97</sup> In view of this distinguishing factor, the dissent argued persuasively that the *Smith* case represent one of those exceptional circumstances in which a post-trial hearing could not adequately determine if the juror was biased.<sup>98</sup>

Compounding the problem in *Smith* was the failure of the prosecutor to disclose the juror’s misconduct. Isolating this incident from the major inquiry of whether the defendant was denied the right to an impartial jury, the Court applied the principles of *Agurs*.<sup>99</sup> But the principles enunciated in *Agurs* focus primarily upon evidence that might have been submitted to the jury<sup>100</sup> rather than evidence concerning the jury itself.

In applying the principles of *Agurs*, the *Smith* Court significantly failed to explain its relationship to the alleged violation of the right to an impartial jury.<sup>101</sup> However, the Court’s holding does reflect an “overriding concern”

89. *Id.* (Marshall, J., dissenting).

90. Federal courts can require lower federal courts to follow procedures deemed desirable in their sound discretion. See *Cupp v. Naughten*, 414 U.S. 141 (1973).

91. *Tumey*, 102 S. Ct. 940.

92. See *Cupp*, 414 U.S. 141.

93. 299 U.S. 123 (1936).

94. 335 U.S. 497 (1948).

95. See *Woods*, 299 U.S. at 150; *Frazier*, 335 U.S. at 510.

96. 273 U.S. 510 (1927).

97. 485 F. Supp. 1365, 1371 (1980).

98. *Tumey*, 102 S. Ct. 940 (Marshall, J., dissenting).

99. 427 U.S. 97 (1976).

100. See *Id.* at 112.

101. The Court merely concluded that the prosecutor’s failure to disclose the information did not violate the respondent’s due process. 102 S. Ct. at 948.

for the finding of guilt but ignores substantial questions of possible prejudice to the respondent's right to an impartial jury as a result of the prosecutor's misconduct.<sup>102</sup>

The extent to which federal courts can employ an implied bias rule is left unclear by the *Smith* opinion. In a concurring opinion,<sup>103</sup> Justice O'Connor submits that the majority opinion does not foreclose the use of the implied bias rule to protect the right to an impartial jury. But according to the majority, "due process . . . means a trial judge ever watchful to prevent prejudicial occurrences when they happen."<sup>104</sup> Thus the majority found that such determinations can properly be made in post-trial hearings, thereby suggesting that the implied bias rule is no longer a proper safeguard under due process.

The thrust of the Court's opinion in *Smith* appears to lie in its reasoning that few trials would be constitutionally acceptable if a new trial is granted every time a juror is placed in a possible compromising situation.<sup>105</sup> This view tends to focus too much on the stability of trial proceedings rather than the constitutional right of the accused to an impartial jury and a fair trial. Thus, this case should be treated as one that, in the opinion of the Court, does not present the exceptional circumstances needed to constitutionally mandate the granting of a new trial under the due process clause.

## V. CONCLUSION

In *Smith v. Phillips* the question presented was whether a post-trial hearing, as a due process safeguard, adequately protects the right to an impartial jury upon alleged juror and prosecutorial misconduct. The Court held that due process does not require a new trial every time a juror is placed in a possible compromising position in that the trial judge can correct the evil during a post-trial hearing.

The reach of this decision is that it permits the state courts to decide important questions of constitutional dimension with limited federal review. The effect upon society is that it could take away significant procedural safeguards that were developed to protect the right to an impartial jury.

WILLIE DUDLEY

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102. *Tuney*, 102 S. Ct. 940 (Marshall, J., dissenting).

103. *Id.* at 948 (1982) (O'Connor, J., concurring).

104. *Id.* at 946 (1982).

105. *Id.* at 948.