

Constitutional Law - Juror Bias - Posttrial Hearing to Determine Actual Juror Bias Held Sufficient to Satisfy Due Process Rights. (Smith v. Phillips)

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NOTES

CONSTITUTIONAL LAW — Juror Bias — Posttrial Hearing to Determine Actual Juror Bias Held Sufficient to Satisfy Due Process Rights. *Smith v. Phillips*, 102 S. Ct. 940 (1982).

The United States Supreme Court in *Smith v. Phillips*¹ held that a posttrial hearing conducted to determine if a juror was actually biased because he applied for employment in the prosecuting agency's office during trial satisfied the rights of the defendant under the due process clause of the fourteenth amendment.² Since the trial court had determined at a postconviction hearing that the juror was not actually biased, the Court concluded that the defendant's right to a trial by an impartial jury had not been violated.³ In addition, the Court held that the prosecution's failure to disclose the juror's application did not deny the defendant due process of law in view of the trial court's determination that no actual juror bias existed.⁴ The Court concluded that both the district court, which had implied bias to the juror, and the court of appeals, which concluded that the prosecution's misconduct presumptively prejudiced the defendant, had erred.⁵ Since no constitutional violation existed, the Court reversed the lower court's order granting the defendant a new trial because "[f]ederal courts . . . may intervene only to correct wrongs of constitutional dimension."⁶

I. THE DECISION

In this case the defendant, William R. Phillips, was convicted on two counts of murder and one count of attempted murder by a New York state court jury. During the course of the trial, one of the jurors submitted an application for

1. 102 S. Ct. 940 (1982).

2. The due process clause of the fourteenth amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

3. 102 S. Ct. at 946.

4. *Id.* at 948.

5. *Id.*

6. *Id.* (quoting *Chandler v. Florida*, 449 U.S. 560, 582-83 (1981)).

employment as a major felony investigator in the district attorney's office. The prosecuting attorneys, upon learning of the juror's application, decided that there was no need to inform the trial court or defense counsel.

After trial, upon learning of the juror's application, Phillips moved to set aside the verdict on the ground of juror bias. The trial court conducted a posttrial hearing into the matter and concluded that although the juror's conduct was indiscreet, it in no way evidenced a premature conclusion by this particular juror to find the defendant guilty.⁷

After exhausting his state remedies, Phillips commenced an action for a writ of habeas corpus in the United States District Court for the Southern District of New York.⁸ The district court granted the writ even though the court found insufficient evidence to determine that the juror was actually biased.⁹ The court concluded that the juror was impliedly biased because the average person in his position would be biased.¹⁰ The United States Court of Appeals for the Second Circuit affirmed the decision of the district court, but for a different reason.¹¹ The court, without considering the actual or implied bias tests, held that the prosecution's failure to disclose its knowledge of the application denied Phillips due process of law.¹² The Supreme Court granted certiorari to determine if the posttrial hearing on whether the juror was actually biased was sufficient to satisfy the defendant's due process rights.¹³

II. HISTORICAL BACKGROUND

The Supreme Court in *Smith v. Phillips* was primarily concerned with the defendant's right to a trial by an impar-

7. *Smith v. Phillips*, 102 S. Ct. 940, 944 (1982). The Court described the standard of review: "[t]he motion to vacate was denied by him [the trial court judge] in an opinion concluding 'beyond a reasonable doubt' that the events giving rise to the motion did not influence the verdict." *Id.* at 943 (quoting *People v. Phillips*, 87 Misc. 2d 613, —, 384 N.Y.S.2d 906, 918 (1975)).

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

9. *Id.* at 1371.

10. *Id.* at 1371-72.

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

12. *Id.* at 1022.

13. *Smith v. Phillips*, 450 U.S. 909 (1981).

tial jury guaranteed by the sixth amendment¹⁴ and applied to the states through the fourteenth amendment.¹⁵ The district court held the defendant's due process rights had been violated on the ground of juror bias, while the court of appeals concluded the prosecution's misconduct denied the defendant due process of law.¹⁶

A. *Juror Bias*

In reviewing a claim of juror bias, the Court has in the past used two tests, the actual bias test and the implied bias test, to determine whether juror bias was in existence.

1. Actual Bias Test

The actual bias test has its roots in *United States v. Wood*.¹⁷ The Court in *Wood* upheld a District of Columbia statute that allowed government employees to be impaneled as jurors when the government was a party to the action.¹⁸ The Court felt that to impute bias to a government employee without any other evidence of partiality was "without any rational foundation."¹⁹ The Court emphasized that "[i]mpartiality is not a technical conception. It is a state of mind."²⁰ The trial courts were charged by the Court with safeguarding the rights of defendants at trial by determining the existence of actual partiality.²¹

The Court reiterated the holding of *Wood* in *Frazier v. United States*²² and *Dennis v. United States*.²³ Both of these cases also involved government employees as jurors.

14. See 102 S. Ct. 940 (1982). The sixth amendment to the United States Constitution states: "In 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.

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

16. See *supra* notes 8-12 and accompanying text.

17. 299 U.S. 123 (1936).

18. The statute was enacted by Congress to nullify the decision of the United States Supreme Court in *Crawford v. United States*, 212 U.S. 183 (1909). The Court in *Crawford* held that an employee of the government could not be an impartial juror in cases where the government was a party to the action. The Court followed the common-law rule that a master-servant relationship alone was sufficient to imply bias to a juror.

19. 299 U.S. at 149.

20. *Id.* at 145.

21. *Id.* at 150.

22. 335 U.S. 497 (1948).

The defendant in *Frazier* was tried and convicted of violating the Harrison Narcotics Act. One of the grounds for reversal asserted by the defendant was that he was not tried by an impartial jury because one juror and the wife of another were employed by the office of the Secretary of the Treasury, who was charged with administering and enforcing the federal narcotics statutes. However, neither the juror nor the spouse of the other juror was even remotely connected with the Bureau of Narcotics, which handled narcotics within the office of the Secretary of the Treasury. The Court held that since the defendant challenged neither juror for actual bias, although he was afforded the fullest opportunity, his right to a trial by an impartial jury had not been violated.²⁴

In *Dennis*, the defendant was convicted for failing to appear before the Committee on Un-American Activities of the House of Representatives, which was considering two bills outlawing communist activities. Seven of the twelve jurors were government employees who maintained they could render a fair and impartial verdict. The defendant's contention was that the jurors would be afraid to acquit him due to Executive Order 9835, the "loyalty order."²⁵ The Court held that since the defendant was not asserting that the jurors were actually biased, his right to an impartial jury was not violated.²⁶ In addition, the Court said, "[t]he way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact."²⁷

The Court provided defendants a mechanism to prove actual juror bias after trial in *Remmer v. United States*.²⁸ In *Remmer* a juror was approached during the defendant's trial and told he could profit by acquitting the defendant. The

23. 339 U.S. 162 (1950).

24. 335 U.S. at 513.

25. Generally, the "loyalty order" required the investigation of all persons entering civilian employment with the United States. Department and agency heads were charged with the duty of making certain that disloyal employees hired prior to the loyalty order were not retained. See 339 U.S. at 169.

26. *Id.* at 172.

27. *Id.* at 168.

28. 347 U.S. 227 (1954).

juror informed the judge, who then consulted with the prosecuting attorneys. They requested the Federal Bureau of Investigation to look into the matter, and after receiving its report, concluded that the statement to the juror was made in jest. Neither the prosecuting attorneys nor the judge informed the defendant or his counsel during the trial.

The *Remmer* Court held that any private communication or tampering with the jury about issues pending before the jury created a presumption of prejudice.²⁹ The presumption was not conclusive, but the burden of establishing that the jury was not prejudiced rested with the government.³⁰ The Court in *Remmer* established a posttrial hearing procedure for determining actual juror bias. The case was remanded to the district court with directions to hold a posttrial hearing to determine whether the juror was actually biased.³¹

2. Implied Bias Test

The implied bias test has been used by the Supreme Court in various circumstances to disqualify impaneled jurors or prospective jurors and to reverse a defendant's conviction. In *Leonard v. United States*³² the defendant was convicted of two crimes in separate trials with different juries. The jury in the first case announced its guilty verdict in open court in the presence of all prospective jurors who would be used in the second case. The Court implied the existence of bias in this situation and held that the jurors in the second case should automatically be disqualified from service.³³

The Supreme Court in *Turner v. Louisiana*³⁴ reversed a conviction of murder against the defendant on the basis of implied bias. During the course of trial, the jurors were sequestered with two deputy sheriffs who also were the two principal witnesses for the prosecution. The deputy sheriffs

29. *Id.* at 229.

30. *Id.*

31. *Id.* at 230. However, evidence of the jurors' motives and influences which affected their deliberations is inadmissible to impeach the verdict. *See Mattox v. United States*, 146 U.S. 140, 149 (1892).

32. 378 U.S. 544 (1964) (per curiam).

33. *Id.* at 544-45.

34. 379 U.S. 466 (1965).

testified that they had not discussed the case with the jury. The Court held that even if the case were never discussed, "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution."³⁵

The Court has also implied bias to the jury when extensive publicity pervades the judicial proceedings before and during trial.³⁶ The Court has held that identifiable prejudice to the defendant need not be shown when the totality of the circumstances raises the probability of prejudice.³⁷

The implied bias test has also been used by the Court when the jury has not been composed of a representative cross section of the community. A jury that has been selected by systematically excluding women,³⁸ blacks³⁹ or persons morally opposed to the death penalty⁴⁰ has been held by the Court to violate the defendant's right to a trial by an impartial jury. The Court has stated that a jury so selected creates the appearance of bias and increases the risk of actual bias as well.⁴¹

B. Prosecutorial Misconduct Test

In a line of cases commencing with *Brady v. Maryland*,⁴² the conduct of the prosecuting attorneys had been consid-

35. *Id.* at 473. But in Wisconsin see *Cullen v. State*, 26 Wis. 2d 652, 660-62, 133 N.W.2d 284, 288-89 (1965), *cert. denied*, 382 U.S. 863 (1966), where the court held that while it was error for the trial court to permit a witness' wife to serve as jury matron, the error resulted in no prejudice to the defendants. See also *Shelton v. State*, 50 Wis. 2d 43, 51, 183 N.W.2d 87, 92 (1971), where the court adopted a rule which required some showing of probable prejudice.

36. See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961). Compare *Estes v. Texas*, 381 U.S. 532 (1965) with *Chandler v. Florida*, 449 U.S. 560 (1981). In Wisconsin see *McKissick v. State*, 49 Wis. 2d 537, 182 N.W.2d 282 (1971). See also *Briggs v. State*, 76 Wis. 2d 313, 251 N.W.2d 12 (1977).

37. *Sheppard v. Maxwell*, 384 U.S. 333, 352-55 (1966).

38. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

39. *Peters v. Kiff*, 407 U.S. 493 (1972). See also *Ham v. South Carolina*, 409 U.S. 524, 527 (1973), where the Court held that the trial court's refusal to make any inquiry of the jurors as to racial bias denied the defendant a fair trial.

40. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

41. *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

42. 373 U.S. 83 (1963). See also Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112 (1972). See *Nelson v. State*, 59 Wis. 2d 474, 208 N.W.2d 410 (1973), for application of the *Brady* rule in Wisconsin.

ered by the Court in determining if an accused was given a fair trial. In *Brady* the Supreme Court held that the prosecution's suppression of material evidence, favorable to and requested by the defendant, violated the due process rights of the defendant.⁴³ In reaching its decision, the Court focused on the fairness of the trial to the defendant and not on the punishment of society for the misconduct of the prosecution.⁴⁴

In *United States v. Agurs*⁴⁵ the Court discussed the application of the *Brady* holding in three situations in which information known to the prosecution, but not to the defense, is discovered after trial.⁴⁶ The first situation arises when the prosecution knew or should have known that the testimony of a key witness was false.⁴⁷ For example, in *Giglio v. United States*⁴⁸ arrangements were made between a key witness and the prosecution for possible prosecutorial leniency. The actual attorney prosecuting the case, however, was unaware of the arrangements made and, as a result, the jury was told by the witness that none existed. The Court held that a new trial was necessary because the credibility of the witness was an important issue in the case and his false testimony could have affected the judgment of the jury.⁴⁹

Second is the *Brady* situation itself in which the prosecution withholds information specifically requested by defense counsel.⁵⁰ In *Brady* the defendant and a companion were found guilty of murder and sentenced to death. Prior to trial, Brady's counsel requested that the prosecution allow examination of the companion's statements. A statement in which the companion admitted he had done the actual killing was withheld from Brady's counsel. In this situation the Court was concerned with the effect the prosecution's actions had on the fairness of the trial.⁵¹

43. 373 U.S. at 86.

44. *Id.* at 87.

45. 427 U.S. 97 (1976).

46. *Id.* at 103.

47. *Id.*

48. 405 U.S. 150 (1972). *See also* *Napue v. Illinois*, 360 U.S. 264 (1959).

49. 405 U.S. at 154-55.

50. 427 U.S. at 104.

51. 373 U.S. at 87.

In the third type of situation, exemplified in *Agurs*, either defense counsel makes a general request for all exculpatory matter or makes no request of the prosecution at all, and as a result, specific exculpatory facts are not disclosed.⁵² In *Agurs* the prosecution failed to disclose that the victim had a previous criminal record. Since the information was not known to defense counsel, it was not requested. The Court acknowledged that in certain situations, even without a specific request, evidence not disclosed by the prosecution would be of such substantial value in the trial that the trial would be fundamentally unfair without it.⁵³ The test used by the Court was whether the nondisclosure of information created a reasonable doubt of innocence that did not otherwise exist.⁵⁴ The *Agurs* Court concluded that since the criminal record of the victim did not affect the trial court's opinion that the defendant was guilty beyond a reasonable doubt, the prosecution's failure to disclose the information to defense counsel did not have a material impact on the fairness of the trial.⁵⁵

III. THE COURT'S ANALYSIS

Justice Rehnquist,⁵⁶ writing for the majority, employed the actual bias test,⁵⁷ but did not use the implied bias test.⁵⁸ The Court also concluded that the misconduct of the prosecution did not have a material effect on the trial.⁵⁹ In reaching its conclusion, the Court relied on the trial court's finding that no actual bias existed.⁶⁰

The Court stressed that the defendant's opportunity to prove actual bias is part of the guarantee of an impartial

52. 427 U.S. at 106-07.

53. *Id.* at 110.

54. *Id.* at 112-13.

55. *Id.* at 114.

56. Justice Rehnquist was joined in his opinion by Chief Justice Burger and Justices White, Blackmun, Powell and O'Connor.

57. 102 S. Ct. 940, 945-46 (1982).

58. *Id.*

59. *Id.* at 947-48.

60. *Id.* at 948.

jury.⁶¹ In addition, the Court noted that "due process does not require a new trial every time a juror has been placed in a potentially compromising situation."⁶² Instead, the Court reasoned that due process is satisfied by a jury that is capable and willing to decide the case only on the evidence presented, and by a judge who is watchful of prejudicial events occurring and who will determine the effect of such events if they do occur.⁶³

The Court relied heavily on the *Remmer* decision, which sanctioned posttrial hearings to determine actual juror bias when private communications between the jury and others have taken place.⁶⁴ Applying *Remmer* to the instant case, the Court held that since the trial court conducted a posttrial hearing into the matter and concluded that no actual bias existed, the defendant was not deprived of a fair trial guaranteed by the due process clause of the fourteenth amendment.⁶⁵

Justice O'Connor concurred with the majority's opinion, but read the Court's opinion as not foreclosing the use of implied bias to preserve sixth amendment rights.⁶⁶ The concurring opinion pointed out that although in most instances a postconviction hearing is adequate to determine juror bias, there are certain situations where a hearing may be inadequate to uncover juror bias.⁶⁷ For example, a revelation that a juror was actually an employee of the prosecuting agency would be an extreme situation that would justify a finding of implied bias.⁶⁸ Justice O'Connor noted that no previous case decided by the Supreme Court precluded the use of the conclusive presumption of implied bias in appropriate circumstances.⁶⁹

Justice Marshall,⁷⁰ in a dissenting opinion, felt that the decision of the court of appeals should have been affirmed

61. *Id.* at 945.

62. *Id.* at 946.

63. *Id.*

64. *Remmer v. United States*, 347 U.S. 227 (1954).

65. 102 S. Ct. at 946.

66. *Id.* at 949.

67. *Id.* at 948.

68. *Id.*

69. *Id.* at 949.

70. Justice Marshall was joined in his opinion by Justices Brennan and Stevens.

for two reasons. First, the dissent maintained that when the juror actively pursued employment with the district attorney's office during trial, the probability of juror bias was substantial.⁷¹ The dissent believed that the majority ignored basic human psychology by concluding that an evidentiary hearing after trial provided the accused with adequate protection against juror bias.⁷² The dissent noted that it was unlikely that the posttrial hearing revealed juror bias because an admission by the juror that he had plotted against the defendant would have subjected him to criminal sanctions and because the bias on the part of the juror may have been unconscious. Thus, the juror should be deemed biased as a matter of law since no amount of questioning would have led to the juror admitting that he had actually been biased.⁷³

Second, the dissent was convinced that the defendant was prejudiced by the prosecutor's failure to disclose during trial that the juror had applied for a job with the district attorney.⁷⁴ The dissent pointed out that if the prosecution had disclosed the information during trial, the trial court could have exercised its discretion and discharged the juror or held a hearing during trial on the matter.⁷⁵ The dissent contended that a hearing during trial would have been far more likely to have revealed bias because the pressures that affected both the judge and the juror at the posttrial hearing would have been substantially decreased at a hearing during trial.⁷⁶ The dissent believed that since the trial court would have probably replaced the juror and thus eliminated the substantial danger of juror bias, the misconduct of the prosecution was prejudicial to the defendant.⁷⁷

IV. CRITIQUE

The use of only the actual bias test by the majority is yet another restriction of federal constitutional safeguards. The

71. 102 S. Ct. at 952.

72. *Id.*

73. *Id.* at 952-53.

74. *Id.* at 958.

75. *Id.* at 959.

76. *Id.*

77. *Id.*

reasoning of the majority is unpersuasive for a number of reasons.

The majority relied on a line of cases commencing with *United States v. Wood*⁷⁸ which dealt exclusively with government employees sitting as jurors in the District of Columbia. The Court in *Wood* balanced the right of the defendant to a speedy trial with the right to a trial by an impartial jury and concluded that judicial efficiency dictated the need for government employees to be impaneled as jurors.⁷⁹ It is difficult to understand how the facts of those cases relate to the case at hand. In none of the cases cited by the Court were any jurors employed by the actual prosecuting agency. In contrast, the juror in this case applied for a position with the district attorney's office during trial. The application was not made to a remote government agency having no direct relation to the case against the defendant. Instead, the application for a position as a major felony investigator was made to the prosecuting agency directly responsible for prosecuting the case against the defendant.

Moreover, the majority applied the holding of *Remmer v. United States*⁸⁰ too broadly. As noted by Justice O'Connor in the concurring opinion, *Remmer* involved the misconduct of a third party and not the juror.⁸¹ Therefore, a posttrial hearing to determine the effect of the third party's misconduct on the juror is appropriate under *Remmer*. However, extending the *Remmer* holding to allow a posttrial hearing to satisfy the defendant's due process rights in the event of juror misconduct seriously imperiled the defendant's right to a trial by an impartial jury. Although the majority stressed that the defendant had the opportunity to prove actual bias at the hearing after trial,⁸² this was almost impossible to do. In this case, unlike the situation with a third party nonjuror, by the time the posttrial hearing was held the juror had a stake in the outcome of the hearing. If he revealed that he was actually biased during trial, he would have been subject

78. 299 U.S. 123 (1936).

79. *Id.* at 148.

80. 347 U.S. 227 (1954).

81. *Smith v. Phillips*, 102 S. Ct. 940, 949 (1982).

82. *Id.* at 945.

to criminal sanctions.⁸³ On the other hand, even if he felt he was not biased, he may have felt an unconscious alliance with the prosecution since he entertained hopes of being employed in the district attorney's office.⁸⁴ Therefore, in this case the posttrial hearing was clearly inadequate to safeguard the defendant's right to a trial by an impartial jury.

In addition, the Court justified using the actual bias test by saying that if a defendant were allowed a new trial every time a juror was placed in a potentially compromising situation, few trials would ever be constitutional.⁸⁵ However, the Court failed to recognize the realities of why the juror was in a compromising situation in the first place. Justice O'Connor, in the concurring opinion, stated that a person actually employed by the prosecuting agency and impaneled as a juror may represent an extreme situation where bias would be implied.⁸⁶ In times of economic recession when unemployment is high, securing employment is very important to the majority of people in America. Oftentimes, one searching for a job may be willing to do more for a potential employer than one who is already employed, complacent and secure in the position. It is difficult to understand why bias should be implied in one situation and not the other.

Furthermore, the Court failed to discuss why the implied bias test was not employed in this case. It is obvious that there is some confusion regarding this question since both the district court and the dissent believed that the test should be applied. As the dissent stated, there was evidence that the juror in this case had a serious conflict of interest⁸⁷ which created a substantial risk of prejudice. The Court has previously held that a jury whose members created the appearance of bias and increased the risk of actual bias as well, violated the defendant's right to a trial by an impartial jury.⁸⁸ One conclusion that could be drawn from the Court's avoidance of the use of the implied bias test was stated by the dissent: "This holding is utterly inconsistent with the

83. *Id.* at 952-53.

84. *Id.*

85. *Id.* at 946.

86. *Id.* at 948.

87. *Id.* at 951.

88. *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

Court's historical recognition of [the right to an impartial jury]."⁸⁹

It is unclear whether the Court foreclosed the use of the implied bias test altogether or just refused to employ the test in this case. Justice O'Connor's concurring opinion viewed the Court's decision as not foreclosing the use of the implied bias test in future cases.⁹⁰ Moreover, to foreclose the use of the implied bias test the Court would have had to overrule prior case law.⁹¹ The Court did not do so in this case. Therefore, it appears the implied bias test is appropriate in the proper circumstances.

Lastly, the majority oversimplified the question of whether the prosecutorial misconduct had a material effect on the defendant's trial. The majority stated that since the trial court found no actual bias at the posttrial hearing, the prosecution's misconduct did not have a material impact on the trial.⁹² However, in reality, the misconduct of the prosecution affected the timing of the hearing into the matter, and as the dissent noted, "a hearing during trial is far more likely to reveal evidence of bias than a posttrial hearing."⁹³ Therefore, as the dissent concluded, the defendant was actually prejudiced by the prosecution's misconduct.⁹⁴

V. CONCLUSION

The decision of the Court in *Smith v. Phillips* will undoubtedly create confusion as to what test should be applied to determine juror bias in order to safeguard the defendant's right to a trial by an impartial jury. The Court's use of the actual bias test in conjunction with a posttrial hearing, to the exclusion of the implied bias test, ignores the realities of human nature. The lines are thinly drawn between this case and cases where the Court has found implied bias. Alternatively, the Court's conclusion that the prosecution's misconduct did not actually prejudice the defendant is

89. 102 S. Ct. at 952.

90. *See supra* note 66 and accompanying text.

91. *See supra* text accompanying notes 32-41.

92. *Id.* at 948.

93. 102 S. Ct. at 959.

94. *Id.*

unpersuasive.⁹⁵ Undoubtedly the decision will have an adverse effect on public confidence in our system of justice.

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95. 102 S. Ct. at 945.