IN THE

Supreme Court of the United States

October Term, 1959

NO. 7

LEON WOLFE, GEORGE SIMKINS, JR.
JOSEPH STURDIVENT, SAMUEL MURRAY,
and ELIJAH H. HERRING, *Appellants*

v.

STATE OF NORTH CAROLINA

Appeal from the Supreme Court of the State of North Carolina

SUPPLEMENT TO PETITION FOR REHEARING

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Appellants having, on July 20, 1960, filed a Petition for Rehearing in this case, now pray the Court for leave to call the Court's attention to two additional points in the Opinion of this Court in this case. Appellants believe that these points represent vital and substantial additional reasons for urging the Court to grant a rehearing in this case.

I.

Inflexibility of North Carolina Supreme Court in Refusing "Without Exception" To Go Outside Record

This Court said on Pages 13-14 of its Opinion in this case:

> **"It is thus apparent that the present case is not of a pattern with *Williams v. Georgia*, *supra*.**

Even if the North Carolina Supreme Court has power to make independent inquiry as to evidence proffered in the trial court but not included in the case on appeal, its decisions make clear that it has *without exception* refused to do so." (Emphasis added.) 4 L. Ed. 2d 1650, at 1660.

This Case Is Clearly An Exception

Appellants most respectfully submit that, when it suited its purpose so to do, IN THIS VERY CASE No. 7 before this Court, the North Carolina Supreme Court did in fact "*make independent inquiry as to evidence proffered in the trial court*" concerning the Federal Court Records in the *Simkins Case*.

Appellants believe that this appears conclusively by looking first at the Opinion of this Court in this case, and then making comparison with the opinion of the North Carolina Supreme Court in this case.

Page 9, Footnote 8, of this Court's Opinion (4 L. Ed. 2d at 1658)

In that Footnote this Court sets out "All that the record before the North Carolina court contained on this aspect of the case", namely, the introduction in evidence of the Federal Court Records in the *Simkins Case*, and this Court "reproduced here in its entirety" in said Footnote 8 what was before the North Carolina Supreme Court "on this aspect of the case."

It is apparent from reading said Footnote 8 that the North Carolina Supreme Court could not possibly have

known, without making "independent inquiry", whether or not the Federal Court Records in the *Simkins Case* were "*identified*" in the trial of this case, any more than the North Carolina Supreme Court could have known without making "independent inquiry", whether or not said Federal Court Records were "*offered in evidence*".

North Carolina Supreme Court's Opinion (Record 115)

A look at the North Carolina Supreme Court's opinion in this case shows that the following was said of the Federal Court Records in the *Simkins Case:* . . . "defendants had the record in that case *identified*" . . . (Emphasis added. Lines 11 and 12, Record Page 115.)

Now, how could the North Carolina Supreme Court know that the defendants had the Federal Court Records in the *Simkins Case* "*identified*"?

It could not possibly have known, without making "*independent inquiry*" into the trial transcript.

Page 10 of this Court's Opinion (4 L. Ed. 2d at 1658)

In Footnote 9 on Page 10 of its Opinion in this case, this Court quotes from the "trial transcript" what actually happened in connection with both the "identification" and the offering "in evidence" of the Federal Court Records in the *Simkins Case.*

Said Footnote 9 shows the following regarding the "*identification*" of the Federal Court Records in the *Simkins Case,* and that said Records were "*offered in evidence*":

"The Court: Let the record show that is being offered in evidence. I will rule on it later.

"(The documents referred to were marked for identification Defendants' Exhibits 6 and 7.)"

Appellants most respectfully suggest that neither the fact that the Federal Court Records in the *Simkins Case* were "*identified*" nor that they were "*offered in evidence*" could be found anywhere else by the North Carolina Supreme Court, except in the "trial transcript".

The North Carolina Supreme Court thus went to that "trial transcript" to find that the Federal Court Records were "*identified*", but declined to look at the next line above in the same "trial transcript" to see that the Federal Court Records were in fact "*offered in evidence*".

Principle of Williams v. Georgia

In *Williams v. Georgia,* 349 U.S. 375, at Page 383, this Court said:

> **"A state may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner."**

Appellants most respectfully suggest that, if any one issue was ever "kindred" to another issue, it would be here where the issue of the "*identification*" of records in the trial of a case is "kindred" to the issue of offering those records in evidence.

Appellants further most respectfully suggest that, when it suited its purpose so to do in this case, the North Caro-

lina Supreme Court exercised its discretion to make "independent inquiry" into the "trial transcript" to see that appellants "had the record in that case *identified*", but declined to make the same "independent inquiry" to see that appellants had in fact "*offered in evidence*" the Federal Court Records in the *Simkins Case* immediately before their "identification". (Emphasis added.)

II.

A Supervening Fact

In the case of *Patterson v. Alabama,* 294 U.S. 600, 607, this Court said:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act."

In *Williams v. Georgia,* supra, the supervening "fact" was "the State's concession" which was made "on oral argument." 349 U.S. at 381-382.

In Footnote 13 on Page 18 of the Opinion of this Court in this case (4 L. Ed. 2d at 1662) it is stated:

> "It has been suggested that even though the ground relied upon by the Supreme Court of North Carolina is an adequate state ground, this case should not be dismissed, but remanded because of a supervening 'event.' But there has been no significant 'change,

> either in fact or law, which has supervened since the judgment was entered' by the Supreme Court of North Carolina. Patterson v. Alabama, 294 U.S. 600, 607, 79 L ed 1082, 1085, 55 S Ct 575. All that has happened is that the State Attorney General's Office, at this Court's request after argument, made available a transcript of the trial court proceedings which was stated to be accurate. *But it has not been suggested that the State at any time has questioned that the transcript of the trial court's proceedings would reflect that the documents had in fact been offered in evidence in the trial court.* See note 9." (Emphasis added.)

Appellants Do Earnestly Make That Very Suggestion Here.

Appellants most respectfully, but most earnestly and sincerely, suggest that the State has, on more than one occasion before this Court, questioned "that the transcript of the trial court's proceedings would reflect that the documents had in fact been offered in evidence in the trial court."

Appellants Start With What They Believe To Be Three Indisputable Propositions:

1. The State was in possession of "the transcript of the trial court's proceedings."

2. The State had knowledge of the contents of this transcript. This is emphasized by the fact that one of the counsel for the State in this Court is the Solicitor for the Twelfth Solicitorial District, who personally prosecuted this case in the trial court. (See Note 9, Page 10 of this Court's Opinion, 4 L. Ed. 2d at 1658.)

3. Under such circumstances, appellants believe that it becomes in the nature of axiomatic that the State could

not make the flat assertion, as it has done more than once before this Court, that "the documents" were "never at any time offered" in evidence, without thereby questioning "that the transcript of the trial court's proceedings would reflect that the documents had in fact been offered in evidence in the trial court."

On Page 11 of the State's Motion To Dismiss in this Court appears the following:

> **"*The fact remains*, however, that while the Appellants had the Record of the proceedings in the Federal Court in their custody and examined the Deputy Clerk of the Federal Court in regard to the identity of same (see State Record, p. 69) the Appellant (sic) *never at any time offered this Federal Record in evidence.*" (Emphasis added.)**

On Page 13 of the Brief On Behalf Of The State of North Carolina, Appellee, is found the following:

> **"This is especially true since the Federal record *was never introduced in evidence. . . .*" (Emphasis added.)**

Also, on Page 20 of said Brief, the following appears: "*. . . nor were any of the records introduced in evidence.*" (Emphasis added.)

A Fourth Important Consideration.

To the above three propositions, appellants believe that a fourth consideration becomes extremely important.

At every stage of the appeal in this case appellants had insisted "that the documents had in fact been offered in evidence in the trial court."

This was done first in Question No. 9 in the Notice of Appeal to this Court. (Record, Page 137)

It was done next in the Statement As To Jurisdiction, on Page 34.

It was done next in the Brief Opposing the Motion to Dismiss, at Pages 21-22.

It was done next in the Brief On The Merits, at Pages 48-50.

It was done next in the Reply to Brief of Appellee, at Page 17.

Appellants even attached to their Brief On The Merits at Page 98 a photographic reproduction of the page in the "trial transcript" on which appears the quotations which are found in Footnote 9 of this Court's Opinion in this case.

State Had Transcript and Knew Its Contents

Appellants repeat for emphasis that the above flat statements were not made by one who never saw the "trial transcript", but by the State which had possession of that transcript and knew its contents, and whose trial prosecutor is of counsel on the State's Brief in this Court.

Under these circumstances, appellants feel that they are bound to make the most earnest suggestion that the State "has questioned that the transcript of the trial court's proceedings would reflect that the documents had in fact been offered in evidence in the trial court."

Conclusion

In his classic statement in dissent in *Rosenberg v. United States,* 346 U.S. 273, 312, Mr. Justice Douglas said:

> "But the question of an unlawful sentence is never barred. No man or woman should go to death [or presumably, as appellants believe, *to jail*] under an unlawful sentence merely because his lawyer failed to raise the point."

In such a spirit appellants respectfully pray the Court for leave to call this Court's attention to the additional points set out in the above Supplement To Petition For Rehearing, and that this Court grant to appellants a rehearing, in order that this Court may do "what justice does require" in this case.

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Certificate of Counsel

The undersigned, J. Alston Atkins, Counsel of Record for Appellants, hereby certifies that he prepared the above Supplement To Petition For Rehearing, and same was prepared and is presented in good faith and not for delay.

Counsel of Record for Appellants

Proof of Service

The undersigned, J. Alston Atkins, Counsel of Record for Appellants, hereby certifies as follows: That, on_____ day of September, 1960, he deposited in the United States Post Office at Houston, Texas, two copies of the within SUPPLEMENT TO PETITION FOR REHEARING, in the case of *Leon Wolfe et al., Appellants v. State of North Carolina,* No. 7, October Term, 1959, pending in the Supreme Court of the United States, with air mail registered postage prepaid, (Registry No._____), addressed to Honorable Ralph Moody, Assistant Attorney General of the State of North Carolina, who is Counsel of Record for Appellee, North Carolina, at his post office address, Justice Building, Raleigh, North Carolina.

_____

Counsel of Record for Appellants